Report #70 –
Criminal Code Reform Commission (CCRC)
Recommendations for the Council and Mayor
(Voting Draft)

March 10, 2021

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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This Report contains proposed final recommendations of the D.C. Criminal Code Reform Commission (CCRC) to the Mayor and Council for reforms to District of Columbia criminal statutes. The proposed final recommendations are submitted for approval to the voting members[1] of the CCRC's statutorily designated Advisory Group.

The Report consists of two main parts:

(1) Statutory text for an enacted Title 22 (Title 22E) of the D.C. Code and revised statutes in other Titles of the D.C. Code, collectively referred to as the Revised Criminal Code (RCC); and
(2) Commentary on the RCC statutes that explains how and why the recommendations change current District law.

The following background materials are attached as appendices to this report:

(1) Appendix A. Table of Correspondence - RCC to Current D.C. Code Statutes;
(2) Appendix B. Table of Advisory Group Draft Documents;
(3) Appendix C. Advisory Group Comments on Draft Documents;
(4) Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents;
(5) Appendix E. Table of RCC Specific Offense Classifications;
(6) Appendix F. District Charging and Conviction Data 2010-2019, 2015-2019 and 2018-2019;
(7) Appendix G. Comparison of RCC Offense Penalties and District Charging and Conviction Data;
(8) Appendix H. D.C. Voluntary Sentencing Guidelines Rankings;
(9) Appendix I. Public Opinion Data;
(10) Appendix J. Research on Other Jurisdictions' Relevant Criminal Code Provisions; and
(11) Appendix K. Future Issues to be Addressed & Known Conforming Amendments.

[On March 24, 2021 the five voting members of the CCRC's Advisory Group voted _-_ to approve this Report for submission to the Council and Mayor for their due consideration.[2]] The full record of the Advisory Group's written comments on drafts of the statutory text and commentary and the handling of those comments are provided in Appendices C and D. The background materials attached to the report were provided to the Advisory Group but were not the subject of Advisory Group written comments.

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[1] Don Braman, Associate Professor of Law, George Washington University School of Law (Council Appointee); Paul Butler, Professor of Law, Georgetown University Law Center (Council Appointee); Laura Hankins, General Counsel, Public Defender Service for the District of Columbia (Designee of the Director of the Public Defender Service for the District of Columbia); Dave Rosenthal, Senior Assistant Attorney General, Office of the Attorney General (Designee of the Attorney General for the District of Columbia); and Elana Suttenberg, Special Counsel for Legislative Affairs, United States Attorney's Office for the District of Columbia (Designee of the United States Attorney for the District of Columbia).

[2] The question voted upon was: ["Whether to approve the submitted criminal code reform recommendations and background materials for submission to the Council and Mayor for their due consideration, subject to any final typographic changes recommended by agency staff."]

The proposed final recommendations are submitted to fulfill the agency's statutory duties under D.C. Code § 3–152(a)-(c).[3] Previously, in a report transmitted to the Mayor and Council on May 5, 2017, the CCRC provided recommendations to enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.[4]

All materials in this report are available on the CCRC website at www.ccrc.dc.gov.

[3] D.C. Code § 3–152(a)-(c) states: "(a) By March 31, 2021, the Commission shall submit to the Mayor and the Council comprehensive criminal code reform recommendations that revise the language of the District's criminal statutes to:

(1) Use clear and plain language;
(2) Apply consistent, clearly articulated definitions;
(3) Describe all elements, including mental states, that must be proven;
(4) Reduce unnecessary overlap and gaps between criminal offenses;
(5) Eliminate archaic and unused offenses;
(6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties;
(7) Organize existing criminal statutes in a logical order;
(8) Identify any crimes defined in common law that should be codified, and propose recommended language for codification, as appropriate;
(9) Identify criminal statutes that have been held to be unconstitutional and recommend their removal or amendment;
(10) Propose such other amendments as the Commission believes are necessary; and
(11) Enable the adoption of Title 22 as an enacted title of the District of Columbia Official Code.

(b) The comprehensive criminal code reform recommendations required by subsection (a) of this section shall be in the form of a report that:

(1) Includes draft legislation or other specific steps for implementing the recommendations;
(2) Includes charging, sentencing, and other relevant statistics regarding the offenses affected by the recommendations; and
(3) Explains how and why the recommendations change existing District law.

(c) In preparing the comprehensive criminal code reform recommendations required by subsection (a) of this section, the Commission shall:

(1) Consult with the Code Revision Advisory Group established pursuant to § 3-153; and
(2) Review criminal code reforms in other jurisdictions, recommend changes to criminal offenses by the American Law Institute, and survey best practices recommended by criminal law experts.

[4] https://lims.dccouncil.us/Legislation/RC22-0053

CCRC Draft Title 22E
Table of Contents

SUBTITLE I. GENERAL PART.

Chapter 1. Preliminary Provisions.

Chapter 2. Basic Requirements of Offense Liability.

Chapter 3. Inchoate Liability.

Chapter 4. Justification Defenses.

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date. ** Recommended for Repeal in CCRC Report #1

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date. ** Recommended for Repeal in CCRC Report #1

Chapter 12. Robbery, Assault, and Threats.

§ 22E-1201. Robbery. {D.C. Code §§ 22-851; 22-2801; 22-2802; 22-2803; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502; 24-403.01(b-2), (e)}

§ 22E-1202. Assault. {D.C. Code §§ 22-401 – 22-405; 22-406; 22-851; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502; 24-403.01(e), (f)(1)}

[§ 22E-1203. Reserved.]

§ 22E-1204. Criminal Threats. {D.C. Code §§ 22-402; 22-404; 22-407; 22-851; 22-1810; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502}

§ 22E-1205. Offensive Physical Contact. {D.C. Code §§ 22-401 – 22-405; 22-851; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502; 24-403.01(e), (f)(1)}

Chapter 13. Sexual Assault and Related Provisions.

§ 22E-1301. Sexual Assault. {D.C. Code §§ 22-3002; 22-3003; 22-3004; 22-3005; 22-3007; 22-3018; 22-3019; 22-3020; 22-3601; 22-3611; 22-4502; 24-403.01(b-2), (e)}

§ 22E-1302. Sexual Abuse of a Minor. {D.C. Code §§ 22-3008; 22-3009; 22-3009.01; 22-3009.02; 22-3011; 22-3012; 22-3018; 22-3019; 22-3020; 22-3611; 22-4502; 24-403.01(b-2), (e)}

§ 22E-1303. Sexual Abuse by Exploitation. {D.C. Code §§ 22-3009.03; 22-3009.04; 22-3013; 22-3014; 22-3015; 22-3016; 22-3017; 22-3018; 22-3019; 22-3020}

§ 22E-1304. Sexually Suggestive Conduct with a Minor. {D.C. Code §§ 22-3010.01; 22-3011; 22-3018; 22-3019; 22-3020}

§ 22E-1305. Enticing a Minor into Sexual Conduct. {D.C. Code §§ 22-1312; 22-3010; 22-3011; 22-3012; 22-3018; 22-3019; 22-3020}

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

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

§ 22E-1308. Incest. {D.C. Code § 22-1901}

§ 22E-1309. Civil Provisions on the Duty to Report a Sex Crime. {D.C. Code §§ 22-3020.51; 22-3020.52; 22-3020.53; 22-3020.54; 22-3020.55}

§ 22E-1310. Admission of Evidence in Sexual Assault and Related Cases. {D.C. Code §§ 22-3021; 22-3022; 22-3023; 22-3024}

Chapter 14. Kidnapping, Criminal Restraint, and Blackmail.

§ 22E-1401. Kidnapping. {D.C. Code §§ 22-851; 22-2001; 22-2704; 22-2705; 22-2706; 22-2708; 22-2709; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502}

§ 22E-1402. Criminal Restraint. {D.C. Code §§ 22-851; 22-2001; 22-2704; 22-2705; 22-2706; 22-2708; 22-2709; 22-3601; 22-3602; 22-3611; 22-3751; 22-3751.01; 22-3752; 22-4502}
§ 22E-1403. Blackmail. {D.C. Code § 22-3252}

Chapter 15. Abuse and Neglect of Vulnerable Persons.

§ 22E-1501. Criminal Abuse of a Minor. {D.C. Code §§ 22-1101; 22-1102; 22-3611}
§ 22E-1502. Criminal Neglect of a Minor. {D.C. Code §§ 22-1101; 22-1102}
§ 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person. {D.C. Code §§ 22-933; 22-934; 22-935; 22-936}
§ 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person. {D.C. Code §§ 22-933; 22-934; 22-935; 22-936}

Chapter 16. Human Trafficking.

§ 22E-1601. Forced Labor. {D.C. Code §§ 22-1832; 22-1837}
§ 22E-1602. Forced Commercial Sex. {D.C. Code § 22-2705; 22-2706; 22-2708}*
§ 22E-1603. Trafficking in Labor. {D.C. Code §§ 22-1833; 22-1837}
§ 22E-1604. Trafficking in Forced Commercial Sex. {D.C. Code §§ 22-1833; 22-1837}
§ 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting. {D.C. Code §§ 22-1834; 22-1837; 22-2704}
§ 22E-1606. Benefitting from Human Trafficking. {D.C. Code §§ 22-1836, 22-1837}
§ 22E-1607. Misuse of Documents in Furtherance of Human Trafficking. {D.C. Code §§ 22-1835; 22-1837}
§ 22E-1608. Commercial Sex with a Trafficked Person.*
§ 22E-1609. Forfeiture. {D.C. Code § 22-1838}
§ 22E-1610. Reputation or Opinion Evidence. {D.C. Code § 22-1839}
§ 22E-1611. Civil Action. {D.C. Code § 22-1840}
§ 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.*
§ 22E-1613. Civil Forfeiture. {D.C. Code § 22-2723}

Chapter 17. Terrorism.

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

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

§ 22E-1801. Stalking. {D.C. Code §§ 22-3131 – 3135}
§ 22E-1802. Electronic Stalking. {D.C. Code §§ 22-3131 – 3135}
§ 22E-1803. Voyeurism. {D.C. Code § 22-3531}
§ 22E-1804. Unauthorized Disclosure of a Sexual Recording. {D.C. Code §§ 22-3051 – 3057; 22-3531(f)(2)}
§ 22E-1805. Distribution of an Obscene Image. {D.C. Code § 22-2201(a)}
§ 22E-1806. Distribution of an Obscene Image to a Minor. {D.C. Code § 22-2201(b)}

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date. ** Recommended for Repeal in CCRC Report #1

Chapter 19.
[Reserved.]

SUBTITLE III. PROPERTY OFFENSES.

Chapter 20. Property Offense Subtitle Provisions.

Chapter 21. Theft.

Chapter 22. Fraud.

Chapter 23. Extortion.

Chapter 24. Stolen Property.

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

Chapter 25. Property Damage.

§ 22E-2501. Arson. {D.C. Code §§ 22-301; 22-302; 22-3305}
§ 22E-2502. Reckless Burning. {D.C. Code §§ 22-301; 22-302; 22-3305}
§ 22E-2503. Criminal Damage to Property. {D.C. Code §§ 22-303; 22-3305; 22-3307; 22-3309; 22-3310; 22-3312.01; 22-3312.04(a), (c); 22-3312.05; 22-3313; 22-3314}
§ 22E-2504. Criminal Graffiti. {D.C. Code §§ 22-3312.01; 22-3312.04(a), (c), (d), (e); 22-3312.05}

Chapter 26. Trespass.

§ 22E-2601. Trespass. {D.C. Code §§ 22-1341; 22-3301; 22-3302}

Chapter 27. Burglary.

§ 22E-2701. Burglary. {D.C. Code § 22-801}
§ 22E-2702. Possession of Tools to Commit Property Crime. {D.C. Code §§ 22-2501; 24-403.01(f)(3)}

Chapter 28.

[Reserved.]

Chapter 29.

[Reserved.]

SUBTITLE IV. OFFENSES AGAINST GOVERNMENT OPERATION.

Chapter 30. Offenses Against Government Operation Subtitle Provisions.

[Reserved.]

Chapter 31. Bribery, Improper Influence, and Official Misconduct.

[§ 22E-31XX. Corrupt Influence. {D.C. Code § 22-704}]
[§ 22E-31XX. Bribery. {D.C. Code §§ 22-711 – 22-713}]

Chapter 32. Perjury and Other Official Falsification Offenses.

§ 22E-3201. Impersonation of an Official. {D.C. Code §§ 22-1404 – 1406; 22-1409}
§ 22E-3202. Misrepresentation as a District of Columbia Entity. {D.C. Code §§ 22-3401 – 3403}
[§ 22E-32XX. Impersonation of another before court or officer. {D.C. Code § 22-1403}]

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
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[§ 22E-32XX. Perjury. {D.C. Code § 22-2402}]
[§ 22E-32XX. Subornation of Perjury. {D.C. Code § 22-2403}]
[§ 22E-32XX. False Swearing. {D.C. Code § 22-2404}]
[§ 22E-32XX. False Statements. {D.C. Code § 22-2405}]

Chapter 33. Offenses Involving Obstruction of Governmental Operations.

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

Chapter 34. Government Custody.

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

Chapter 35.

[Reserved.]

Chapter 36.

[Reserved.]

Chapter 37.

[Reserved.]

Chapter 38.

[Reserved.]

Chapter 39.

[Reserved.]

SUBTITLE V. PUBLIC ORDER AND SAFETY OFFENSES.

Chapter 40. Public Order and Safety Offenses Subtitle Provisions.

[Reserved.]

Chapter 41. Weapon Offenses and Related Provisions.

§ 22E-4101. Possession of a Prohibited Weapon or Accessory. {D.C. Code §§ 7-2506.01(a)(3); 7-2506.01(b); 22-4514(a); 22-4515a(a) and (c)}
§ 22E-4102. Carrying a Dangerous Weapon. {D.C. Code §§ 22-4502.01; 22-4504(a) – (a-1); 22-4504.01}
§ 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime. {D.C. Code §§ 22-4514(b); 22-4515a(b)}
§ 22E-4104. Possession of a Dangerous Weapon During a Crime. {D.C. Code §§ 22-4502; 22-4504(b)}
§ 22E-4105. Possession of a Firearm by an Unauthorized Person. {D.C. Code §§ 22-4503; 24-403.01(f)(2)}
§ 22E-4106. Negligent Discharge of Firearm. {D.C. Code §§ 22-4503.01; 24 DCMR § 2300.1 – 3}
§ 22E-4107. Alteration of a Firearm Identification Mark. {D.C. Code §§ 7-2505.03(d); 22-4512}
§ 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property. {D.C. Code § 22-4503.02}
§ 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition. {D.C. Code § 22-4504.02}
§ 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol. {D.C. Code § 22-4506}
§ 22E-4111. Unlawful Sale of a Pistol. {D.C. Code § 22-4507}
§ 22E-4112. Unlawful Transfer of a Firearm. {D.C. Code § 22-4508}
§ 22E-4113. Sale of a Firearm Without a License. {D.C. Code § 22-4509}
§ 22E-4114. Civil Provisions for Licenses of Firearms Dealers. {D.C. Code § 22-4510}
§ 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer. {D.C. Code § 22-4510}
§ 22E-4116. Use of False Information for Purchase or Licensure of a Firearm. {D.C. Code § 22-4511}
§ 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles. {D.C. Code § 22-4517}
§ 22E-4118. Exclusions from Liability for Weapon Offenses. {D.C. Code §§ 22-4504.01; 22-4505}
§ 22E-4119. Merger of Related Weapon Offenses.*
§ 22E-4120. Endangerment with a Firearm.*

Chapter 42. Breaches of Peace.

§ 22E-4201. Disorderly Conduct. {D.C. Code §§ 22-1301; 22-1321; 22-1809}
§ 22E-4202. Public Nuisance. {D.C. Code § 22-1321}
§ 22E-4203. Blocking a Public Way. {D.C. Code §§ 22-1307; 22-1318; 22-1323; 22-3319; 22-3321; 22-3322}
§ 22E-4204. Unlawful Demonstration. {D.C. Code §§ 10-503.17; 22-1307}
§ 22E-4205. Breach of Home Privacy. {D.C. Code § 22-1321(f)}
§ 22E-4206. Indecent Exposure. {D.C. Code § 22-1312}
[§ 22E-42XX. Throwing Stones or Other Missiles. {D.C. Code § 22-1309}]
[§ 22E-42XX. Kindling Bonfires. {D.C. Code § 22-1313}]

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date. ** Recommended for Repeal in CCRC Report #1

[§ 22E-42XX. Protest Targeting a Residence. {D.C. Code § 22-2751}]
[§ 22E-42XX. Interference with Access to a Medical Facility. {D.C. Code §§ 22-1314.01; 22-1314.02}]
[§ 22E-42XX. Defacing or Burning Cross or Religious Symbol; Display of Certain Emblems. {D.C. Code §§ 22-3312.02; 22-3312.04}]
[§ 22E-42XX. Wearing hoods or masks. {D.C. Code §§ 22-3312.02; 22-3312.03}]
[§ 22E-42XX. Disorderly Conduct in Public Buildings or Grounds; Injury to or Destruction of United States Property. {D.C. Code § 22-3311}]

Chapter 43. Group Misconduct.

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

Chapter 44. Prostitution and Related Statutes.

§ 22E-4401. Prostitution. {D.C. Code §§ 22-2701; 22-2701.01; 22-2703; 22-2713 – 22-2720; 22-2724; 22-2725}
§ 22E-4402. Patronizing Prostitution. {D.C. Code §§ 22-2701; 22-2701.01; 22-2703; 22-2713 – 22-2720; 22-2724; 22-2725}
§ 22E-4403. Trafficking in Commercial Sex. {D.C. Code §§ 22-2701.01; 22-2705; 22-2707; 22-2710; 22-2711; 22-2712; 22-2713 – 22-2720; 22-2722; 22-2724; 22-2725}
§ 22E-4404. Civil Forfeiture. {D.C. Code § 22-2723; 22-2724; 22-2725}

Chapter 45. Cruelty to Animals.

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

Chapter 46. Offenses Against the Family and Youth.

§ 22E-4601. Contributing to the Delinquency of a Minor. {D.C. Code § 22-811}
[§ 22E-46XX. Bigamy. {D.C. Code § 22-501}]

Chapter 47. Gambling.

§ 22E-47XX. Promotion, sale, or possession of lottery tickets. {D.C. Code § 22-1701}]
§ 22E-47XX. Possession of lottery or policy tickets. {D.C. Code § 22-1702}]
§ 22E-47XX. Permitting sale of lottery tickets on premises. {D.C. Code § 22-1703}]
§ 22E-47XX. Gaming; setting up gaming table; inducing play. {D.C. Code § 22-1704}]
§ 22E-47XX. Gambling premises; definition; prohibition against maintaining; forfeiture; liens; deposit of moneys in Treasury; penalty; subsequent offenses. {D.C. Code § 22-1705}]
§ 22E-47XX. Three-card monte and confidence games. {D.C. Code § 22-1706}]
§ 22E-47XX. "Gaming table" defined. {D.C. Code § 22-1707}]
[§ 22E-47XX. Gambling pools and bookmaking; athletic contest defined. {D.C. Code § 22-1708}]

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date. ** Recommended for Repeal in CCRC Report #1

[§ 22E-47XX. Corrupt influence in connection with athletic contests. {D.C. Code § 22-1713}]
[§ 22E-47XX. Immunity of witnesses; record. {D.C. Code § 22-1714}]
[§ 22E-47XX. Statement of purpose. {D.C. Code § 22-1716}]
[§ 22E-47XX. Permissible gambling activities. {D.C. Code § 22-1717}]
[§ 22E-47XX. Advertising and promotion; sale and possession of lottery and numbers tickets and slips. {D.C. Code § 22-1718}]

Chapter 48. Environmental Offenses.

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

SUBTITLE VI. OTHER OFFENSES.

Chapter 50.

[Reserved.]

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

§ 7-2502.01A. Possession of an Unregistered Firearm, Destructive Device, or Ammunition. {D.C. Code §§ 7-2502.01(a); 7-2506.01(a); 7-2507.06(a)(2) – (4) and (b); 24 DCMR § 2343.2}
§ 7-2502.15. Possession of a Stun Gun. {D.C. Code § 7-2502.15; 7-2507.06(b)(1)(E)}
§ 7-2502.17. Carrying an Air or Spring Gun. {24 DCMR § 2301}
§ 7-2507.02A. Unlawful Storage of a Firearm. {D.C. Code § 7-2507.02; 24 DCMR § 2348}
§ 7-2509.06A. Carrying a Pistol in an Unlawful Manner. {24 DCMR §§ 2343.1; 2344}
§ 16-705. Jury trial; trial by court. {D.C. Code § 16-705}
§ 16-1005A. Criminal Contempt for Violation of a Civil Protection Order. {D.C. Code §§ 16-1005(f) – (i)}
§ 16-1021. Parental Kidnapping Definitions. {D.C. Code § 16-1021}
§ 16-1022. Parental Kidnapping. {D.C. Code §§ 16-1022-1025}
§ 16-1023. Protective Custody and Return of Child. {D.C. Code § 16-1023}
§ 16-1024. Expungement of Parental Kidnapping Conviction. {D.C. Code § 16-1026}
§ 23-586. Failure to Appear after Release on Citation or Bench Warrant Bond. {D.C. Code § 23-585(b)}
§ 23-1327. Failure to Appear in Violation of a Court Order. {D.C. Code § 23-1327}
§ 23-1329A. Criminal Contempt for Violation of a Release Condition. {D.C. Code § 23-1329(a-1) and (c)}
§ 24-241.05A. Violation of Work Release. {D.C. Code § 24-241.05(b)}
§ 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000. {D.C. Code § 24-403.01}
§ 24-403.03. Modification of an imposed term of imprisonment. {D.C. Code § 24-403.03}
§ 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle. {D.C. Code § 25-1001}
§ 48-904.01a. Possession of a Controlled Substance. {D.C. Code §§ 48-904.01(d)(1); 48-904.08; 48-904.09}
§ 48-904.01b. Trafficking of a Controlled Substance. {D.C. Code §§ 48-904.01(a)(1); 48-904.06; 48-904.07; 48-904.07a; 48-904.08; 48-904.09}
§ 48-904.01c. Trafficking of a Counterfeit Substance. {D.C. Code §§ 48-904.01(b)(1); 48-904.08; 48-904.09}
§ 48-904.10. Possession of Drug Manufacturing Paraphernalia. {D.C. Code §§ 48-904.10; 48-1102; 48-1101(3); 48-1103(a)(1)}
§ 48-904.11. Trafficking of Drug Paraphernalia. {D.C. Code §§ 48-1102; 48-1103(b)(1)}
§ 48-904.12. Maintaining Methamphetamine Production. {D.C. Code § 48-904.03a}
[§ 48-904.02. [Controlled Substances] Prohibited Acts B.]
[§ 48-904.03. [Controlled Substances] Prohibited Acts C.]

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date. ** Recommended for Repeal in CCRC Report #1

D.C. Code Statutes Recommended for Repeal

§ 3-206. Unlawful acts.**
§ 4-125. Assisting child to leave institution without authority; concealing such child; duty of police.**
§ 5-115.03. Neglect to Make Arrest for Offense Committed in Presence.
§§ 7-2502.12 – 7-2502.13. Possession of self-defense sprays.
§ 8-305. Penalty.**
§ 9-433.01. Permit required; exceptions.**
§ 9-433.02. Penalty; prosecution.**
§ 22-1003. Rest, water and feeding for animals transported by railroad company.**
§ 22-1012(a). Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.**
§ 22-1308. Playing games in streets.**
§ 22-1311. Allowing dogs to go at large.
§ 22-1317. Flying fire balloons or parachutes.**
§ 22-1402. Recordation of deed, contract, or conveyance with intent to extort money.**
§§ 22-1511 – 22-1513. Fraudulent Advertising.
§ 22-1807. Punishment for offenses not covered by provisions of Code. **
§§ 22-2301 – 22-2306. Panhandling.
§ 22-3224. Fraudulent registration.
§ 22-3303. Grave robbery; burying or selling dead bodies.**
§ 22-3320. Obstructing public road; removing milestones.**
§ 34-701. False statements in securing approval for stock issue.**
§ 34-707. Destruction of apparatus or appliance of Commission.**
§ 36-153. Unauthorized use, defacing, or sale of registered vessel.**
§ 37-131.08(b). Penalties for Illegal vending.
§ 47-102. Total indebtedness not to be increased.**
§ 48-904.07. Enlistment of minors to distribute.

* No corresponding statute in current D.C. Code. {…} Corresponding statute(s) in D.C. Code
[…] Possible or planned RCC statute, no draft to date. ** Recommended for Repeal in CCRC Report #1

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

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

SUBTITLE I. GENERAL PART.

Chapter 1. Preliminary Provisions.

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

(a) *Short title.* This title may be cited as the "Revised Criminal Code."
(b) *Effective date.* This title takes effect at 12:01 am on [A DATE AT LEAST 1 YEAR FROM ENACTMENT].
(c) *Prior offenses.* Offenses committed prior to the effective date of the Revised Criminal Code are subject to laws in effect at that time. In this subsection, an offense is "committed prior to the effective date" if any one of the elements of the offense is satisfied prior to the effective date.

RCC § 22E-102. Rules of Interpretation.

(a) *Interpretation Generally*. To interpret a statutory provision of this title, the plain meaning of that provision shall be examined first. If necessary to determine the legislature's meaning, the structure, goal, and history of the provision also may be examined.
(b) *Rule of lenity*. If the meaning of a statutory provision remains in doubt after examination of that provision's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the actor applies.
(c) *Effect of headings and captions*. Headings and captions that appear at the beginning of subtitles, chapters, subchapters, sections, and subsections of this title may aid the interpretation of otherwise ambiguous statutory language.
(d) *Effect of definition cross-references.* Cross-references to definitions located elsewhere in this title, or omissions of such cross-references, may aid the interpretation of otherwise ambiguous statutory language.
(e) *Definitions.* The term "actor" has the meaning specified in RCC § 22E-701.

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

(a) *General interaction of Title 22E with provisions in other laws*. Unless otherwise expressly specified by statute, a provision in this title applies to this title only.
(b) *Interaction of Title 22E with civil provisions in other laws*. Unless expressly specified by this title or otherwise provided by law, the provisions of this title do not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action.

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

Unless otherwise expressly specified by statute, the provisions in Subtitle I of this title apply to all other provisions of this title.

Chapter 2. Basic Requirements of Offense Liability.

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

(a) *Proof of offense elements beyond a reasonable doubt.* No person may be convicted of an offense unless the government proves each offense element beyond a reasonable doubt.
(b) *Burden of proof for exclusions from liability, defenses, and affirmative defenses.*
    (1) If there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of at least one element of the exclusion from liability beyond a reasonable doubt.
    (2) If there is any evidence of a statutory defense at trial, the government must prove the absence of at least one element of the defense beyond a reasonable doubt.
    (3) An actor has the burden of proving an affirmative defense by a preponderance of the evidence.
(c) *"Offense element" defined.* "Offense element" includes the necessary objective elements and culpability required for an offense.
(d) *"Objective element" defined.* "Objective element" means any conduct element, result element, or circumstance element. In this title:
    (1) "Conduct element" means any act or omission that is required to establish liability for an offense;
    (2) "Result element" means any consequence caused by a person's act or omission that is required to establish liability for an offense; and
    (3) "Circumstance element" means any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense.
(e) *"Culpability required" defined.* "Culpability required" includes:
    (1) The voluntariness requirement under RCC § 22E-203;
    (2) The culpable mental state requirement under RCC § 22E-205; and
    (3) Any other aspect of culpability specifically required for an offense.
(f) *Definitions.* The terms "act" and "omission" have the meanings specified in RCC § 22E-202; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-202. Conduct Requirement.

(a) *Conduct requirement.* No person may be convicted of an offense unless the person's liability is based on an act or omission.
(b) *"Act" defined.* "Act" means a bodily movement.
(c) *"Omission" defined.* "Omission" means a failure to act when:
    (1) A person is under a legal duty to act; and
    (2) The person is either:
        (A) Aware that the legal duty to act exists; or
        (B) Culpably unaware that the legal duty to act exists.

(d) *Existence of legal duty*. In this title, a legal duty to act exists when:
(1) The failure to act is expressly made sufficient by the law defining the offense; or
(2) A duty to perform the omitted act is otherwise imposed by law.

RCC § 22E-203. Voluntariness Requirement.

(a) *Voluntariness requirement.* No person may be convicted of an offense unless the person voluntarily commits the conduct element required for the offense.
(b) *Scope of voluntariness requirement.*
(1) *Voluntariness of act.* When a person's act provides the basis for liability, a person voluntarily commits the conduct element of an offense when the act is:
(A) The product of conscious effort or determination; or
(B) Otherwise subject to the person's control.
(2) *Voluntariness of omission.* When a person's omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when:
(A) The person has the physical capacity to perform the required legal duty; or
(B) The failure to act is otherwise subject to the person's control.
(c) *Definitions.* The term "conduct element" has the meaning specified in RCC § 22E-201; and the terms "act" and "omission" have the meanings specified in RCC § 22E-202.

RCC § 22E-204. Causation Requirement.

(a) *Causation requirement.* No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result.
(b) *"Factual cause" defined.* A person's conduct is the factual cause of a result if:
(1) The result would not have occurred but for the person's conduct; or
(2) When the conduct of 2 or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.
(c) *"Legal cause" defined.* A person's conduct is the legal cause of a result if:
(1) The result is reasonably foreseeable in its manner of occurrence; and
(2) When the result depends on another person's volitional conduct, there is a close connection between the actor's conduct and the result.
(d) *Definitions*. The term "result element" has the meaning specified in RCC § 22E-201; and the term "actor" has the meaning specified in RCC § 22E-701.

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

(a) *Culpable mental state requirement.* No person may be convicted of an offense unless the person acts with a culpable mental state as to every result element and circumstance element required for the offense, other than an element for which the person is strictly liable under RCC § 22E-207(b).
(b) *Culpable mental state defined.* "Culpable mental state" means:
    (1) Purpose, knowledge, intent, recklessness, or negligence; and
    (2) The object of the phrases "with intent" and "with the purpose".
(c) *"Strictly liability" defined.* "Strictly liable" and "strict liability" mean liability as to a result element or circumstance element in the absence of a culpable mental state.
(d) *Definitions.* The terms "circumstance element" and "result element" have the meanings specified in RCC § 22E-201; and the terms "intent," "knowledge," "negligence," "purpose," and "recklessness" have the meanings specified in RCC § 22E-206.

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

(a) *"Purposely" defined.* A person acts purposely:
    (1) As to a result element when the person consciously desires to cause the result; and
    (2) As to a circumstance element when the person consciously desires that the circumstance exists.
(b) *"Knowingly" and "intentionally" defined.* A person acts knowingly or intentionally:
    (1) As to a result element, when the person is aware or believes that the conduct is practically certain to cause the result; and
    (2) As to a circumstance element when the person is practically certain that the circumstance exists.
(c) *"Recklessly" defined.* A person acts recklessly:
    (1) As to a result element, when:
        (A) The person consciously disregards a substantial risk that the conduct will cause the result; and
        (B) The risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the standard of conduct that a reasonable individual would follow in the person's situation; and
    (2) As to a circumstance element, when:
        (A) The person consciously disregards a substantial risk that the circumstance exists; and
        (B) The risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the standard of

conduct that a reasonable individual would follow in the person's situation.

(d) *"Negligently" defined.* A person acts negligently:
  (1) As to a result element, when:
    (A) The person should be aware of a substantial risk that the conduct will cause the result; and
    (B) The risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's failure to perceive that risk is a gross deviation from the standard of care that a reasonable individual would follow in the person's situation; and
  (2) As to a circumstance element, when:
    (A) The person should be aware of a substantial risk that the circumstance exists; and
    (B) The risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's failure to perceive that risk is a gross deviation from the standard of care that a reasonable individual would follow in the person's situation.

(e) *Hierarchical relationship of culpable mental states.*
  (1) *Proof of Negligence*. When the law requires negligence as to a result element or circumstance element, the requirement is also satisfied by proof of recklessness, intent, knowledge, or purpose.
  (2) *Proof of Recklessness*. When the law requires recklessness as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose.
  (3) *Proof of Knowledge or Intent.* When the law requires knowledge or intent as to a result element or circumstance element, the requirement is also satisfied by proof of purpose.

(f) *Same definitions for other parts of speech.* The words defined in this section have the same meaning when used as other parts of speech.

(g) *Definitions.* The terms "circumstance element" and "result element" have the meanings specified in RCC § 22E-201.

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

(a) *Distribution of specified culpable mental states.* Any culpable mental state or strict liability specified in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state or strict liability is specified.

(b) *Identification of elements subject to strict liability.* A person is strictly liable for any result element or circumstance element in an offense:
  (1) That is modified by the phrase "in fact"; or

(2) When another statutory provision explicitly indicates strict liability applies to that result element or circumstance element.

(c) *Recklessness otherwise implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a) or strict liability under RCC § 22E-207(b).

(d) *Definitions.* The terms "circumstance element" and "result element" have the meanings specified in RCC § 22E-201; the terms "culpable mental state," "strict liability," and "strictly liable" have the meaning specified in RCC § 22E-205; the term "recklessly" has the meaning specified in RCC § 22E-206; and the term "in fact" has the meaning specified in RCC § 22E-207.

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

(a) *Effect of accident, mistake, and ignorance on liability.* A person is not liable for an offense when the person's accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state required for a result element or circumstance element in the offense.

(b) *Relationship between mistake and culpable mental state requirements.* A mistake as to a matter of fact or law negates the existence of a culpable mental state applicable to a circumstance element as follows:

(1) *Purpose.* Any mistake as to a circumstance element negates purpose as to that element.

(2) *Knowledge or intent.* Any mistake as to a circumstance element negates knowledge or intent as to that element.

(3) *Recklessness.* A reasonable mistake as to a circumstance element negates recklessness as to that element. An unreasonable mistake as to a circumstance element negates recklessness as to that element unless the person made the mistake recklessly.

(4) *Negligence.* A reasonable mistake as to a circumstance element negates negligence as to that element. An unreasonable mistake as to a circumstance element negates negligence as to that element unless the person made the mistake negligently.

(c) *Mistake or ignorance as to criminality.* A person remains liable for an offense when they are mistaken or ignorant as to the illegality of their conduct unless the person's mistake or ignorance:

(1) Negates a culpable mental state that is expressly specified by statute as to:

(A) Whether conduct constitutes that offense; or

(B) The existence, meaning, or application of the law defining an offense; or

(2) Satisfies the requirements of a general defense under Chapters 4 and 5 of this Subtitle.

(d) *Imputation of knowledge for deliberate ignorance.* Knowledge of a circumstance element is established if the person:

(1) Is reckless as to whether the circumstance element exists; and
(2) With the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance element exists.

(e) *Definitions.* The terms "circumstance element" and "result element" have the meanings specified in RCC § 22E-201; the term "culpable mental state" has the meaning specified in RCC § 22E-205; and the terms "intent," "knowledge," "negligence," "negligently," "purpose," "reckless," "recklessly," and "recklessness" have the meanings specified in RCC § 22E-206.

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

(a) *Relevance of intoxication to liability.* A person is not liable for an offense when the person's intoxication negates the existence of a culpable mental state required for a result element or circumstance element in the offense.
(b) *Relationship between intoxication and culpable mental state requirements.* Intoxication negates the existence of a culpable mental state applicable to a result element or circumstance element as follows:
(1) *Purpose.* Intoxication negates purpose as to a result element or circumstance element when, due to the person's intoxicated state, the person does not consciously desire to cause the result or that the circumstance exists.
(2) *Knowledge or intent.* Intoxication negates knowledge or intent as to a result element or circumstance element when, due to the person's intoxicated state, the person is not practically certain that the result will occur or that the circumstance exists.
(3) *Recklessness.* Except as specified in subsection (c) of this section, intoxication negates recklessness as to a result element or circumstance element when, due to the person's intoxicated state:
(A) The person is unaware of a substantial risk that the result will occur or that the circumstance exists; or
(B) The person's disregard of the risk is not a gross deviation from the standard of conduct that a reasonable individual would follow in the person's situation under RCC § 22E-206(c)(1)(B) or RCC § 22E-206(c)(2)(B).
(4) *Negligence.* Intoxication negates negligence as to a result element or circumstance element when, due to the person's intoxicated state, the person's failure to perceive a substantial risk that the result will occur or that the circumstance exists is not a gross deviation from the standard of care that a reasonable individual would follow in the person's situation under RCC § 22E-206(d)(1)(B) or § 22E-206(d)(2)(B).
(c) *Imputation of recklessness for self-induced intoxication.* Recklessness as to a result element or circumstance element is established if:

(1) Because of an intoxicated state, the person is unaware of a substantial risk of the result occurring or circumstance existing, that the person would have been aware of had the person been sober;
(2) The person's intoxicated state is self-induced; and
(3) The person acts at least negligently as to that result or circumstance.

(d) *"Intoxication" and "self-induced intoxication" defined.*
(1) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.
(2) "Self-induced intoxication" means intoxication that, in fact, is caused by a substance that an actor knowingly introduces into their body, negligent as to the tendency of the substance to cause intoxication and, in fact, the substance was not introduced pursuant to medical advice by a licensed health professional or under circumstances that would afford a general defense under Chapters 4 or 5 of this Subtitle.

(e) *Definitions.* The terms "circumstance element" and "result element" have the meanings specified in RCC § 22E-201; the term "culpable mental state" has the meaning specified in RCC § 22E-205; the terms "intent," "knowingly," "knowledge," "negligence," "negligent," "negligently," "purpose," and "recklessness" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor" and "health professional" have the meanings specified in RCC § 22E-701.

RCC § 22E-210. Accomplice Liability.

(a) *Accomplice liability.* An actor is an accomplice to the commission of an offense by another person when the actor:
(1) Purposely assists another person with the planning or commission of conduct constituting an offense and, in fact, acts with the culpability required for the offense; or
(2) Purposely encourages another person to engage in specific conduct constituting an offense and, in fact, acts with the culpability required for the offense.

(b) *Culpable mental state elevation applicable to circumstances of target offense.* Notwithstanding subsection (a) of this section, to be an accomplice to the commission of an offense, an actor must intend for all circumstance elements required by the offense to exist.

(c) *Grading distinctions based on culpability as to result elements.* An accomplice to the commission of an offense that is graded by distinctions in culpability as to result elements is liable for any grade for which they have the culpability required.

(d) *Charging and penalties.* An actor who is an accomplice to the commission of an offense by another person shall be charged and subject to punishment as a principal.

(e) *Actual disposition of principal not relevant.* An actor is liable as an accomplice under this section even though the principal has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted for an offense.

(f) *Definitions.* The terms "circumstance elements," "culpability required," and "result elements" have the meanings specified in RCC § 22E-201; the terms "intend" and "purposely" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-211. Criminal Liability for Conduct by an Innocent or Irresponsible Person.

(a) *Criminal liability for conduct by an innocent or irresponsible person.* An actor is criminally liable for the conduct of an innocent or irresponsible person when the actor:
  (1) In fact, causes an innocent or irresponsible person to engage in conduct constituting an offense; and
  (2) Acts with the culpability required for the offense.

(b) *"Innocent or irresponsible person" defined.* The term "innocent or irresponsible person" includes a person who engages in conduct constituting an offense but either:
  (1) Lacks the culpability required for the offense; or
  (2) Acts under conditions that establish a general defense under Chapters 4 or 5 of this Subtitle.

(c) *Charging and penalties.* An actor who is criminally liable for the conduct of an innocent or irresponsible person shall be charged and subject to punishment as if the actor had directly engaged in the conduct constituting the offense.

(d) *Actual disposition of innocent or irresponsible person not relevant.* An actor is liable for the conduct of an innocent or irresponsible person even though the innocent or irresponsible person has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted for an offense.

(e) *Definitions.* The term "culpability required" has the meaning specified in RCC § 22E-201; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.

(a) *Exclusions from liability.* Unless otherwise expressly specified by statute, a person is not liable for the conduct of another person under RCC § 22E-210 or RCC § 22E-211 when, in fact, the person is a victim of the offense, or the person's conduct is inevitably incident to commission of the offense.

(b) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207.

RCC § 22E-213. Withdrawal Defense to Legal Accountability.

(a) *Affirmative defense.* It is an affirmative defense to liability under RCC § 22E-210 or RCC § 22E-211 that the actor, in fact, terminates their efforts to promote or facilitate commission of an offense before it is committed, and:

(1) Ensures their prior efforts are wholly ineffective;
(2) Gives timely warning to the appropriate law enforcement authorities; or
(3) Makes reasonable efforts to prevent the commission of the offense.

(b) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

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

(a) *Merger of multiple related offenses.* Multiple convictions for 2 or more offenses arising from the same act or course of conduct merge when:
(1) One offense is necessarily established by proof of the elements of the other offense as a matter of law;
(2) The offenses differ only in that:
(A) One prohibits a less serious harm or wrong to the same person, property, or public interest;
(B) One may be satisfied by a lower culpable mental state under RCC § 22E-206 or § 22E-207; or
(C) One is defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of that kind of conduct;
(3) One offense requires a finding of fact inconsistent with the requirements for commission of the other offense, as a matter of law;
(4) One offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each;
(5) One offense consists only of a criminal attempt or criminal solicitation of:
(A) The other offense; or
(B) An offense that is related to that offense in the manner described in paragraphs (a)(1) – (a)(4) of this subsection; or
(6) Each offense is a general inchoate offense designed to culminate in the commission of:
(A) The same offense; or
(B) Different offenses that are related to one another in the manner described in paragraphs (a)(1) – (a)(4) of this subsection.

(b) *Merger procedure.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall either:
(1) Vacate all but one of the offenses prior to sentencing according to the rule of priority in subsection (c) of this section; or
(2) Enter judgment and sentence the actor for offenses that merge, provided that:
(A) Sentences for the offenses run concurrent to one another; and
(B) The convictions for all but, at most, one of the offenses shall be vacated after:
(i) The time for appeal has expired; or
(ii) The judgment that was appealed has been decided.

(c) *Rule of priority.* When convictions are vacated under subsection (b) of this section, the conviction that remains shall be the conviction for:
  (1) The offense with the highest authorized maximum period of incarceration; or
  (2) If two or more offenses have the same, highest authorized maximum period of incarceration, any offense that the sentencing court deems appropriate.

(d) *Definitions.* The term "act" has the meaning specified in RCC § 22E-202; the term "culpable mental state" has the meaning specified in RCC § 22E-205; and the terms "actor" and "property" have the meanings specified in RCC § 22E-701.

RCC § 22E-215. Judicial Dismissal for Minimal or Unforeseen Harms.

(a) *Court authority to dismiss*. The court may dismiss a prosecution if, in fact, considering the nature of the conduct alleged, the actor's culpable mental state, and the nature of the attendant circumstances, it finds that the actor's conduct constituting the offense:
  (1) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the goal of the law defining the offense;
  (2) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
  (3) Presents such other extenuations that it cannot reasonably be regarded as envisioned by the legislature in forbidding the offense.

(b) *Specific findings*. A court shall state its specific findings of facts, as determined by a preponderance of the evidence, or findings of law under this section in open court or in a written decision or opinion.

(c) *Definitions*. The term "culpable mental state" has the meaning specified in RCC § 22E-205; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-216. Minimum Age for Offense Liability.

(a) *Exception to liability for actors under 12*. An actor does not commit an offense when the actor, in fact, is under 12 years of age.

(b) *Others' liability for actors under 12.* When otherwise liable for an offense based on the conduct of another, an actor remains liable for the offense notwithstanding the fact that the conduct is committed by a person under 12 years of age.

(c) *Definitions*. The term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

Chapter 3. Inchoate Liability.

RCC § 22E-301. Criminal Attempt.

(a) *Definition of criminal attempt.* An actor commits criminal attempt to commit an offense when the actor:
  (1) In fact, plans to engage in conduct constituting an offense;
  (2) Engages in conduct that is reasonably adapted to completion of the offense;
  (3) Acts with the culpability required for the offense; and
  (4) Either:
    (A) Comes dangerously close to completing the offense; or
    (B) Would have come dangerously close to completing the offense if the situation was as the actor perceived it to be.

(b) *Culpable mental state elevation applicable to results of target offense.* Notwithstanding subsection (a) of this section, to commit a criminal attempt to commit an offense, the actor must intend to cause all result elements required for the offense.

(c) *Proof of completed offense sufficient basis for criminal attempt conviction.* An actor may be convicted of criminal attempt to commit an offense based upon proof that the actor actually committed the target offense, provided that no actor may be convicted of both the target offense and an attempt to commit the target offense arising from the same act or course of conduct.

(d) *Penalties.* A criminal attempt to commit an offense is subject to not more than one-half the maximum term of imprisonment and fine applicable to the offense, after the application of any penalty enhancements.

(e) *Definitions*. The terms "culpability required" and "result element" have the meanings specified in RCC § 22E-201; the term "intend" has the meaning specified in RCC § 22E-206; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-302. Criminal Solicitation.

(a) *Definition of criminal solicitation.* An actor commits criminal solicitation when the actor:
  (1) Purposely commands, requests, or tries to persuade another person to engage in or aid the planning or commission of specific conduct, which, if carried out, in fact, will constitute an offense or an attempt to commit an offense; and
  (2) Acts with the culpability required for the offense.

(b) *Scope of criminal solicitation liability.* Notwithstanding subsection (a) of this section, an actor commits criminal solicitation to commit an offense only when the offense is, in fact:
  (1) An offense against persons as defined in Subtitle II of this title; or
  (2) A felony property offense as defined in Subtitle III of this title.

(c) *Culpable mental state elevation applicable to results and circumstances of target offense.* Notwithstanding subsection (a) of this section, to commit criminal solicitation to commit an offense, an actor must:
  (1) Intend to cause all result elements required for the offense; and
  (2) Intend for all circumstance elements required for the offense to exist.

(d) *Uncommunicated criminal solicitation.* It is immaterial under subsection (a) of this section that the planned recipient of the actor's command, request, or efforts at persuasion fails to receive the message, if the actor does everything they plan to do to transmit the message to the planned recipient.

(e) *Penalties.* A criminal solicitation to commit an offense is subject to not more than one-half the maximum term of imprisonment and fine applicable to the offense, after the application of any penalty enhancements.

(f) *Definitions.* The terms "circumstance element," "culpability required," and "result element" have the meanings specified in RCC § 22E-201; the terms "intend" and "purposely" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor" and "felony" have the meanings specified in RCC § 22E-701.

RCC § 22E-303. Criminal Conspiracy.

(a) *Definition of criminal conspiracy*. An actor commits criminal conspiracy to commit an offense when the actor and at least one other person:
  (1) Purposely agree to engage in or aid the planning or commission of conduct which, if carried out, in fact, will constitute an offense or a criminal attempt to commit an offense;
  (2) The parties to the agreement act with the culpability required for the offense; and
  (3) Any one of the parties to the agreement engages in an overt act in furtherance of the agreement.

(b) *Culpable mental state elevation applicable to results and circumstances of target offense.* Notwithstanding subsection (a) of this section, to commit criminal conspiracy to commit an offense, the actor and at least one other person must:
  (1) Intend to cause all result elements required for the offense; and
  (2) Intend for all circumstance elements required for the offense to exist.

(c) *Penalties.* A criminal conspiracy to commit an offense is subject to not more than one-half the maximum term of imprisonment and fine applicable to the offense, after the application of any penalty enhancements.

(d) *Jurisdiction when object of criminal conspiracy is to engage in conduct outside the District.* When the object of a conspiracy formed inside the District is to engage in conduct outside the District, the conspiracy is a violation of this section only if:
  (1) The conduct would constitute a criminal offense under the statutory laws of the District if performed in the District; and
  (2) The conduct would constitute a criminal offense under:

(A) The statutory laws of the other jurisdiction if performed in that jurisdiction; or
(B) The statutory laws of the District even if performed outside the District.

(e) *Jurisdiction when criminal conspiracy is formed outside the District.* A conspiracy formed outside the District to engage in conduct inside the District is a violation of this section if:
(1) The conduct would constitute a criminal offense under the statutory laws of the District if performed within the District; and
(2) An overt act in furtherance of the conspiracy is committed within the District.

(f) *Legality of conduct in other jurisdiction no defense.* When paragraphs (e)(1) and (e)(2) of this section are proven, it is not a defense to a prosecution for conspiracy that the conduct that is the object of the conspiracy would not constitute a criminal offense under the laws of the jurisdiction in which the conspiracy was formed.

(g) *Definitions*. The terms "circumstance element," "culpability required," and "result element" have the meanings specified in RCC § 22E-201; the term "act" has the meaning specified in RCC § 22E-202; the terms "intend" and "purposely" have the meanings specified in RCC § 22E-206; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-304. Limitation on Vicarious Liability for Conspirators.

(a) *Offense.* An actor who is a party to a criminal conspiracy as defined under RCC § 22E-303 shall not be liable for an offense committed by another party to the conspiracy, unless, in fact:
(1) The actor satisfies the requirements for criminal liability specified in RCC § 22E-210, RCC § 22E-211, or RCC § 22E-302; or
(2) It is expressly specified by statute that a party to a conspiracy may be held criminally liable for an offense committed by another party to the conspiracy.

(b) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-305. Exceptions to General Inchoate Liability.

(a) *Exceptions to general inchoate liability.* A person does not commit criminal solicitation under RCC § 22E-302 or criminal conspiracy under RCC § 22E-303 when, in fact:
(1) The person is a victim of the target offense; or
(2) The person's criminal objective is inevitably incident to commission of the target offense as defined by statute.

(b) *Exceptions inapplicable where liability expressly provided by statute.* The exceptions established in subsection (a) of this section do not limit the criminal liability expressly specified by statute.

RCC § 22E-306. Renunciation Defense to Attempt, Conspiracy, and Solicitation.

(a) *Renunciation defense.* It is an affirmative defense to liability for a criminal attempt under RCC § 22E-301, criminal solicitation under RCC § 22E-302, or criminal conspiracy under RCC § 22E-303 that, in fact:
  (1) The actor made reasonable efforts to prevent commission of the target offense;
  (2) Under circumstances manifesting a voluntary and complete renunciation of the actor's criminal intent; and
  (3) The target offense was not committed.

(b) *Scope of voluntary and complete.* A renunciation is not "voluntary and complete" under subsection (a) of this section when it is motivated in whole or in part by:
  (1) A belief that circumstances exist which:
    (A) Increase the probability of detection or apprehension of the actor or another participant in the criminal enterprise; or
    (B) Render accomplishment of the criminal plans more difficult; or
  (2) A decision to:
    (A) Postpone the criminal conduct until another time; or
    (B) Transfer the criminal effort to another victim or similar objective.

(c) *Definitions.* The term "intent" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

Chapter 4. Justification Defenses.

RCC § 22E-401. Lesser Harm.

(a) *Defense.* It is a defense that, in fact, the actor:
  (1) Reasonably believes the actor or another person is in imminent danger of a specific, identifiable harm;
  (2) Reasonably believes the conduct constituting the offense:
    (A) Will protect against the harm; and
    (B) Is necessary in degree; and
  (3) The conduct constituting the offense brings about a significantly lesser harm than that the actor seeks to avoid.

(b) *Exceptions.* This defense is not available when:
  (1) Recklessness is the culpable mental state for an objective element of the offense and the actor recklessly brings about the situation requiring a choice of harms;
  (2) Negligence is the culpable mental state for an objective element of the offense and the actor negligently brings about the situation requiring a choice of harms; or

(3) The conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability.

(c) *Definitions*. The term "objective element" has the meaning specified in RCC § 22E-201; the term "culpable mental state" has the meaning specified in RCC § 22E-205; the terms "negligence," "negligently," "recklessly," and "recklessness" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "actor" has the meaning specified in RCC § 22E-701.

RCC § 22E-402. Execution of Public Duty.

(a) *Defense.* It is a defense that, in fact:
  (1) The conduct constituting the offense is required or authorized by law, including:
    (A) A court order;
    (B) A law governing the armed services or the lawful conduct of war;
    (C) A law defining the duties or functions of a public official;
    (D) A law defining the assistance to be rendered to a public official in the performance of their official duties;
    (E) A law governing the execution of legal process; or
    (F) Any other provision of law imposing a public duty;
  (2) The actor reasonably believes the conduct constituting the offense is required or authorized by a court order or warrant; or
  (3) The actor reasonably believes the conduct constituting the offense is required or authorized by law to assist a public official in the performance of their official duties.

(b) *Exceptions.*
  (1) This defense is not available in a situation that is expressly addressed by another available defense, affirmative defense, or exclusion from liability.
  (2) This defense is not available when the conduct constituting the offense is the use of deadly force, unless that use of deadly force:
    (A) Is expressly authorized by law; or
    (B) Occurs in the lawful conduct of war.

(c) *Definitions*. The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "deadly force," and "public official" have the meanings specified in RCC § 22E-701.

RCC § 22E-403. Defense of Self or Another Person.

(a) *Defense*. It is a defense that, in fact, the actor reasonably believes:
  (1) The actor or another person is in imminent danger of a physical contact, bodily injury, sexual act, sexual contact, confinement, or death; and
  (2) The conduct constituting the offense:

(A) Will protect against the harm; and
(B) Is necessary in degree.

(b) *Exceptions*. This defense is not available when:
(1) In fact, the actor uses or attempts to use deadly force, unless the actor reasonably believes:
(A) The actor or another person is in imminent danger:
(i) Of a serious bodily injury, a sexual act, confinement, or death; or
(ii) While in their individual dwelling unit, of a bodily injury or a sexual contact; and
(B) The conduct constituting the offense:
(i) Will protect against the harm; and
(ii) Is necessary in degree;
(2) The actor purposely, through conduct other than speech or presence alone, provokes or brings about the situation requiring the defense and, in fact, does not withdraw or make reasonable efforts to withdraw; or
(3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.

(c) *Use of deadly force by a law enforcement officer.* When, in fact, the actor is a law enforcement officer who uses or attempts to use deadly force, a factfinder shall consider all of the following when determining whether the actor satisfies the requirements of the defense:
(1) The law enforcement officer's training and experience;
(2) Whether the complainant:
(A) Appeared to possess, either on their person or in a location where it is readily available, a dangerous weapon; and
(B) Was afforded an opportunity to comply with an order to surrender any suspected dangerous weapons;
(3) Whether the law enforcement officer engaged in de-escalation measures, including taking cover, waiting for back-up, trying to calm the complainant, or using non-deadly force;
(4) Whether any conduct by the law enforcement officer increased the risk of a confrontation resulting in deadly force being used; and
(5) Whether the law enforcement officer made all reasonable efforts to prevent a loss of a life, including abandoning efforts to apprehend the complainant.

(d) *Definitions*. The terms "purposely" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "dangerous weapon," "deadly force," "law enforcement officer," "possess," "serious bodily injury," "sexual act," "sexual contact," and "speech" have the meanings specified in RCC § 22E-701.

RCC § 22E-404. Defense of Property.

(a) *Defense*. It is a defense that, in fact, the actor reasonably believes:

(1) Real or tangible personal property is in imminent danger of damage, taking, trespass, or misuse; and
(2) The conduct constituting the offense:
(A) Will protect against the harm; and
(B) Is necessary in degree.

(b) *Exceptions*. This defense is not available when:
(1) In fact, the actor uses or attempts to use deadly force;
(2) The property is land that is property of another, unless the actor has or reasonably believes they have the effective consent of a property owner to protect the land; or
(3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.

(c) *Definitions*. The term "reckless" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "deadly force," "effective consent," "owner," "property," and "property of another" have the meanings specified in RCC § 22E-701.

RCC § 22E-408. Special Responsibility for Care, Discipline, or Safety Defenses.

(a) *Parental defense.* It is a defense to offenses under Subtitle II and Subtitle III of this title that:
(1) In fact, the actor reasonably believes that:
(A) The complainant is under 18 years of age; and
(B) The actor is either:
(i) A parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant; or
(ii) Acting with the effective consent of such a parent or such a person;
(2) The actor engages in the conduct constituting the offense with intent to safeguard or promote the welfare of the complainant, including the prevention or punishment of the complainant's misconduct; and
(3) In fact, such conduct:
(A) Is reasonable, under all the circumstances; and
(B) Either:
(i) Does not create a substantial risk of, or cause, death or serious bodily injury; or
(ii) Is the performance or authorization of a lawful cosmetic or medical procedure.

(b) *Guardian defense.* It is a defense to offenses under Subtitle II and Subtitle III of this title that:
(1) In fact, the actor reasonably believes that:
(A) The complainant is an incapacitated individual; and
(B) The actor is either:
(i) A court-appointed guardian to the complainant; or
(ii) Acting with the effective consent of such a guardian;

(2) The actor engages in the conduct constituting the offense with intent to safeguard or promote the welfare of the complainant, including the prevention of the complainant's misconduct; and
(3) In fact, such conduct:
(A) Is reasonable under all the circumstances;
(B) Is permitted under civil law controlling the guardianship; and
(C) Either:
(i) Does not create a substantial risk of, or cause, death or serious bodily injury; or
(ii) Is the performance or authorization of a lawful cosmetic or medical procedure.

(c) *Emergency health professional defense.* It is a defense to offenses under Subtitle II and Subtitle III of this title that:
(1) In fact, the actor reasonably believes that:
(A) The complainant is presently unable to give effective consent;
(B) The actor is either:
(i) A licensed health professional; or
(ii) A person acting at a licensed health professional's direction;
(C) The conduct charged to constitute the offense is the performance or authorization of a lawful medical procedure;
(D) The medical procedure is administered or authorized in an emergency;
(E) No person who is legally permitted to consent to the medical procedure on behalf of the complainant can be timely consulted;
(F) There is no legally valid standing instruction by the complainant declining the medical procedure;
(2) The actor engages in or authorizes the medical procedure with intent to safeguard or promote the physical or mental health of the complainant; and
(3) In fact, a reasonable person wishing to safeguard the welfare of the complainant would consent to the medical procedure.

(d) *Limited duty of care defense.* It is a defense to offenses under Subtitle II and Subtitle III of this title that:
(1) In fact, the actor reasonably believes that the actor has a responsibility, under civil law, for the health, welfare, or supervision of the complainant;
(2) The actor engages in the conduct constituting the offense with intent that the conduct:
(A) Is necessary to fulfill the actor's responsibility to the complainant; and
(B) Is consistent with the welfare of the complainant; and
(3) In fact, such conduct:
(A) Is reasonable, under all the circumstances;

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

(4) The defenses in subsections (a) - (c) of this section do not apply to the actor's conduct.

(e) *Exceptions.* The defenses in this section do not apply to:

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

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

(f) *Definitions.* The term "intent," has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "consent," "effective consent," "health professional," "incapacitated individual," "person acting in the place of a parent under civil law," and "serious bodily injury" have the meanings specified in RCC § 22E-701.

Chapter 5. Excuse Defenses.

RCC § 22E-501. Duress.

(a) *Affirmative defense*. It is an affirmative defense that, in fact:

(1) The actor reasonably believes:

(A) A person communicated to the actor that the person will cause the actor or a third person a criminal bodily injury, sexual act, sexual contact, confinement, or death; and

(B) The actor or third person is in imminent danger of the communicated harm; and

(2) The communication would cause a reasonable person of the same background and in the same circumstances as the actor to engage in the conduct constituting the offense.

(b) *Exceptions.* This defense is not available when, in fact:

(1) The actor recklessly brings about the situation requiring a choice of harms;

(2) Negligence is the culpable mental state for an objective element of the offense and the actor is negligent in bringing about the situation requiring a choice of harms; or

(3) The conduct constituting the offense is an escape from a correctional facility or officer under RCC § 22E-3401 and the actor does not make reasonable efforts to safely return to official custody.

(c) *Definitions*. The term "objective element" has the meaning specified in RCC § 22E-201; the term "culpable mental state" has the meaning specified in RCC § 22E-205; the terms "negligence," "negligent," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "official custody," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-502. Temporary Possession.

(a) *Affirmative defense.* It is an affirmative defense that:
  (1) In fact, the offense is a predicate possessory or distribution offense;
  (2) The actor possesses or distributes the item with intent, exclusively and in good faith, to do one or more of the following:
    (A) Permanently relinquish control over the item to a law enforcement officer or prosecutor for appropriate and lawful action;
    (B) Permanently relinquish control over the item to the actor's supervisor or a person in charge of the location where the item was found, for appropriate and lawful action;
    (C) Seek legal services from an attorney or provide legal services as an attorney;
    (D) Seek medical services from a licensed health professional or provide medical services as a licensed health professional;
    (E) Investigate the circumstances surrounding the item's possession, acquisition, or use by a specific person when the actor has a responsibility, under civil law, for the health, welfare, or supervision of the person; or
    (F) Permanently dispose of the item; and
  (3) In fact, the actor does not possess the item longer than is reasonably necessary to engage in the conduct specified in paragraph (a)(2) of this subsection.

(b) *Definitions*.
  (1) The term "intent" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "health professional," "law enforcement officer," "possess," "possesses," and "possession" have the meanings specified in RCC § 22E-701; and
  (2) In this section, the term "predicate possessory or distribution offense" means:
    (A) Possession of a Prohibited Weapon or Accessory under RCC § 22E-4101;
    (B) Carrying a Dangerous Weapon under RCC § 22E-4102;
    (C) Possession of a Firearm by an Unauthorized Person under RCC § 22E-4105;
    (D) Possession of an Unregistered Firearm, Destructive Device, or Ammunition under RCC § 7-2502.01;
    (E) Possession of a Stun Gun under RCC § 7-2502.15;
    (F) Carrying an Air or Spring Gun under RCC § 7-2502.17;
    (G) Carrying a Pistol in an Unlawful Manner under RCC § 7-2509.06.
    (H) Possession of a Controlled Substance under RCC § 48-904.01a;

(I) Trafficking of a Controlled Substance under RCC § 48-904.01b; and
(J) Trafficking of a Counterfeit Substance under RCC § 48-904.01c.

RCC § 22E-503. Entrapment.

(a) *Affirmative defense.* It is an affirmative defense that, in fact, a law enforcement officer acting under color or pretense of official right, or a person cooperating with a law enforcement officer acting under color or pretense of official right:
  (1) Purposely commanded, requested, tried to persuade, or otherwise induced the actor to engage in the conduct constituting the offense; or
  (2) Purposely commanded, requested, tried to persuade, or otherwise induced a third party to engage in conduct constituting a criminal offense:
    (A) Reckless as to the fact that the third party would command, request, try to persuade, or otherwise induce one or more additional persons to engage in or assist the conduct; and
    (B) In fact, the command, request, effort to persuade or otherwise induce an additional person in paragraph (a)(2)(A) induces the actor to engage in the conduct constituting the offense.
(b) *Exception.* This defense is not available when, in fact, the actor is predisposed to engage in the specific conduct constituting the offense and the actor is merely afforded the opportunity or means to engage in such conduct.
(c) *Definitions*. The terms "purposely" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor" and "law enforcement officer" have the meanings specified in RCC § 22E-701.

RCC § 22E-504. Mental Disability Defense.

(a) *Affirmative defense*. It is an affirmative defense in a criminal proceeding that, in fact, as a result of a mental disability, the actor:
  (1) Lacked substantial capacity to conform their conduct to the requirements of the law; or
  (2) Lacked substantial capacity to recognize the wrongfulness of their conduct.
(b) *Effect of defense*. An actor who is acquitted solely on the ground of mental disability shall be committed under D.C. Code § 24-501.
(c) *Definitions*.
  (1) The term "in fact" has the meaning specified in RCC § 22E-207; the term "actor" has the meaning specified in RCC § 22E-701; and
  (2) In this section, the term "mental disability" means an abnormal condition of the mind, regardless of its medical label, that affects mental or emotional processes and either substantially impairs a

person's ability to regulate and control their conduct or substantially impairs a person's ability to recognize the wrongfulness of their conduct.

(d) *Interpretation of statute.* This section shall not be construed to create or limit a court's authority, on its own initiative, to order a psychiatric examination or to raise a mental disability defense.

Chapter 6. Offense Classes, Penalties, & Enhancements.

RCC § 22E-601. Offense Classifications.

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

(b) *Definitions*. The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

RCC § 22E-602. Authorized Dispositions.

(a) Unless otherwise expressly specified by statute, a court may sentence a person upon conviction to sanctions that include:
  (1) A term of imprisonment under RCC § 22E-603;
  (2) A fine under RCC § 22E-604;
  (3) Probation under D.C. Code § 16-710;
  (4) Restitution or reparation under D.C. Code § 16-711;
  (5) Community service under D.C. Code § 16-712;
  (6) Post-release supervision under D.C. Code § 24-903; and
  (7) Work release under D.C. Code § 24-241.01.

(b) A court may sentence a person upon conviction to either imprisonment under RCC § 22E-603 or a fine under RCC § 22E-604, but not both, for the following statutes prosecuted by the Attorney General for the District of Columbia: [RESERVED.]

(c) *Judicial deferral and dismissal of proceedings.*

(1) When a person is found guilty of a violation of any Class A, B, C, D, or E offense, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings on that offense and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against the person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation the person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against the person. Discharge and dismissal under this subsection shall be without court adjudication of guilt. Such discharge or dismissal shall not be deemed a conviction with respect to disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions).

(2) Upon the dismissal of the proceedings and discharge of the person under paragraph (c)(1) of this subsection, the person may apply to the court for an order to seal the publicly available records of the arrest and related court proceedings. If the court determines, after hearing, that the proceedings were dismissed and the person discharged, it shall grant the motion to seal under the procedures in D.C. Code § 16–803(l).

(3) A person to whom relief is granted under paragraph (c)(2) of this subsection shall have the legal protections and obligations specified under D.C. Code § 16–803(l) and (m).

(d) *Definitions*. The term "consent" has the meaning specified in RCC § 22E-701.

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

(a) *Authorized terms of imprisonment.* Unless otherwise expressly specified by statute, the maximum term of imprisonment authorized for an offense is:

(1) For a Class 1 felony, 45 years;
(2) For a Class 2 felony, 40 years;
(3) For a Class 3 felony, 30 years;
(4) For a Class 4 felony, 24 years;
(5) For a Class 5 felony, 18 years;
(6) For a Class 6 felony, 12 years;
(7) For a Class 7 felony, 8 years;
(8) For a Class 8 felony, 4 years;

(9) For a Class 9 felony, 2 years;
(10) For a Class A misdemeanor, 1 year;
(11) For a Class B misdemeanor, 180 days;
(12) For a Class C misdemeanor, 60 days;
(13) For a Class D misdemeanor, 10 days; and
(14) For a Class E misdemeanor, no imprisonment.

(b) *Definitions*. The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

RCC § 22E-604. Authorized Fines.

(a) *Authorized fines*. Unless otherwise expressly specified by statute, the maximum fine for an offense is:
(1) For a Class 1 felony, $1,000,000;
(2) For a Class 2 felony, $750,000;
(3) For a Class 3 felony, $500,000;
(4) For a Class 4 felony, $250,000;
(5) For a Class 5 felony, $100,000;
(6) For a Class 6 felony, $75,000;
(7) For a Class 7 felony, $50,000;
(8) For a Class 8 felony, $25,000;
(9) For a Class 9 felony, $10,000;
(10) For a Class A misdemeanor, $5,000;
(11) For a Class B misdemeanor, $2,500;
(12) For a Class C misdemeanor, $1,000;
(13) For a Class D misdemeanor, $500; and
(14) For a Class E misdemeanor, $250.

(b) *Alternative fines for pecuniary loss or gain, or organizational actors*. A court may fine an actor who has been found guilty:
(1) Up to twice the pecuniary loss or pecuniary gain when:
(A) The offense, in fact, results in either pecuniary loss to a person other than the actor, or pecuniary gain to any person; and
(B) The information or indictment alleges the amount of the pecuniary loss or pecuniary gain and that the actor is subject to a fine double the amount of the pecuniary loss or pecuniary gain; or
(2) Up to three times the amount otherwise provided by statute for the offense when the actor, in fact, is an organizational actor and the information or indictment alleges the actor is an organizational actor and is subject to a fine treble the maximum amount otherwise authorized.

(c) *Limits on fines.* Notwithstanding any other provision of law, a court shall not impose a fine that would impair the ability of an actor who has been found guilty to make restitution or leave the actor without sufficient means for reasonable living expenses and family obligations, and a person who is

eligible for appointed counsel under D.C. Code § 11-2601 shall not be subject to a fine under subsection (a) of this section.

(d) *Definitions*.

(1) The term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "felony," "misdemeanor," "pecuniary gain," and "pecuniary loss" have the meanings specified in RCC § 22E-701; and

(2) In this section, "organizational actor" means any actor other than a natural person, including a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity.

RCC § 22E-605. Charging and Proof of Penalty Enhancements.

(a) *Charging of penalty enhancements.* An offense is not subject to a general penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless notice of the penalty enhancement is specified in the information or indictment for the offense.

(b) *Standard of proof for penalty enhancements*. Except for the establishment of prior convictions under D.C. Code § 23-111, an offense is not subject to a general penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless each objective element and culpable mental state of the penalty enhancement is proven beyond a reasonable doubt.

(c) *Definitions.* The term "objective element" has the meaning specified in RCC § 22E- 201; the term "culpable mental state" has the meaning specified in RCC § 22E-205; and the term "prior conviction" has the meaning specified in RCC 22E-701.

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

(a) *Felony repeat offender penalty enhancement.* A felony repeat offender penalty enhancement applies to an offense when:

(1) In fact, the actor presently commits a felony offense under Subtitle II of this title, or an enhanced burglary offense; and

(2) At the time of the offense, has at least one prior conviction for a felony offense under Subtitle II of this title, an enhanced burglary offense, or a comparable offense, that was:

(A) Committed within 10 years of the current offense being enhanced; and

(B) Not committed on the same occasion as the current offense being enhanced.

(b) *Misdemeanor repeat offender penalty enhancement.* A misdemeanor repeat offender penalty enhancement applies to an offense when:

(1) In fact, the actor presently commits a misdemeanor offense under Subtitle II of this title; and

(2) At the time of the offense, has at least two prior convictions for misdemeanor offenses under Subtitle II of this title, or comparable offenses, or at least one prior conviction for a felony offense under Subtitle II of this title, an enhanced burglary offense, or a comparable offense, that were:
(A) Committed within 10 years of the current offense being enhanced; and
(B) Not committed on the same occasion as one another or the current offense being enhanced.

(c) *Proceedings to establish previous convictions.* No person shall be subject to additional punishment for a felony or misdemeanor repeat offender penalty enhancement in this section unless the requirements under D.C. Code § 23-111 are satisfied.

(d) *Penalties.* Subject to the limitation under RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine:
(1) A felony repeat offender penalty enhancement under subsection (a) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:
(A) For a Class 1 or Class 2 felony, 6 years and $50,000;
(B) For a Class 3 or Class 4 felony, 4 years and $40,000;
(C) For a Class 5 or Class 6 felony, 2 years and $30,000;
(D) For a Class 7 or Class 8 felony, 1 years and $20,000; and
(E) For a Class 9 felony, 180 days and $10,000; and
(2) A misdemeanor repeat offender penalty enhancement under subsection (b) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:
(A) For a Class A or Class B misdemeanor, 60 days and $500; and
(B) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.

(e) *Multiple penalty enhancements.* A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in this chapter or this title, provided that the determination of the offense class under subsection (d) of this section shall be based on the offense penalty before application of any additional penalty enhancements.

(f) *Definitions.*
(1) The term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "comparable offense," "felony," "misdemeanor," and "prior conviction" have the meanings specified in RCC § 22E-701; and
(2) In this section the term "enhanced burglary offense" means enhanced first and enhanced second degree burglary under RCC § 22E-2701(a)-(b), (d)(4).

RCC § 22E-607. Pretrial Release Penalty Enhancement.

(a) *Pretrial release penalty enhancement.* A pretrial release penalty enhancement applies to an offense when, in fact, at the time the actor commits the offense the actor is on pretrial release under D.C. Code § 23-1321.

(b) *Exceptions.* Notwithstanding any other provision of law, a penalty enhancement in this section does not apply to an offense of Contempt under D.C. Code § 11-741, Third Degree Escape from a Correctional Facility or Officer under RCC § 22E-3401(c), Tampering With a Detection Device under RCC § 22E-3402(a)(1)(B), or violation of a condition of release under D.C. Code § 23-1329 for the same conduct.

(c) *Penalties.* Subject to the limitation in RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine, a pretrial release penalty enhancement increases the authorized term of imprisonment and fine for an offense above the otherwise authorized penalty classification:

(1) For a Class 1 or Class 2 felony, 6 years and $50,000;
(2) For a Class 3 or Class 4 felony, 4 years and $40,000;
(3) For a Class 5 or Class 6 felony, 2 years and $30,000;
(4) For a Class 7 or Class 8 felony, 1 years and $20,000;
(5) For a Class 9 felony, 180 days and $10,000;
(6) For a Class A or B misdemeanor, 60 days and $500; and
(7) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.

(d) *Multiple penalty enhancements.* A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in this chapter or in this title, provided that the determination of the offense class under subsection (c) of this section shall be based on the offense penalty before application of any additional penalty enhancements.

(e) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," and "misdemeanor" have the meanings specified in RCC § 22E-701.

RCC § 22E-608. Hate Crime Penalty Enhancement.

(a) *Hate crime penalty enhancement.* A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group because of prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression of any person or group.

(b) *Penalties.* A hate crime penalty enhancement increases the penalty classification for an offense by one class except, for a Class 1 felony, the authorized term of imprisonment and fine for the offense increases by 6 years and $50,000.

(c) *Multiple penalty enhancements.* A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in this chapter or in this title.

(d) *Definitions.*

(1) The term "purpose" has the meaning specified in RCC § 22E-206; the terms "actor," "felony," "homelessness," "pecuniary loss," and "property" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "gender identity or expression" has the meaning specified in D.C. Code § 2-1401.02.

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

(a) *Civil provisions on data collection and publication.*

(1) The Metropolitan Police Department shall afford each crime victim the opportunity to submit with their complaint a written statement that contains information to support a claim that the conduct that occurred is a crime subject to a hate crime penalty enhancement under RCC § 22E-608.

(2) The Mayor shall collect and compile data on the incidence of crime subject to a hate crime penalty enhancement under this section, provided that such data shall be used for research or statistical purposes and shall not contain information that may reveal the identity of an individual crime victim.

(3) The Mayor shall publish an annual summary of the data collected under paragraph (b)(2) of this section and transmit the summary and recommendations based on the summary to the Council.

(b) *Civil action.*

(1) Irrespective of any criminal prosecution or the result of a criminal prosecution, a civil cause of action in a court of competent jurisdiction for appropriate relief shall be available for any person who alleges that they have been subjected to conduct that constitutes a criminal offense committed with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group because of prejudice against the person's or group's perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression as, in fact, defined in D.C. Code § 2-1401.02(12A).

(2) In a civil action under paragraph (b)(1) of this section, the relief available shall include:

(A) An injunction;

(B) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;

(C) Punitive damages in an amount to be determined by a jury or a court sitting without a jury; or

(D) Reasonable attorneys' fees and costs.

(3) An actor's parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the actor shall be liable for any damages that an actor under 18 years of age is required to pay in a civil action brought under paragraph (b)(1) of this section, if any act or omission of the parent or person acting in the place of a parent under civil law contributed to the conduct of the actor.

(c) *Definitions.* The terms "act" and "omission" have the meanings specified in RCC § 22E-202; the term "purpose" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "homelessness," "pecuniary loss," "person acting in the place of a parent under civil law," and "property" have the meanings specified in RCC § 22E-701.

RCC § 22E-610. Abuse of Government Power Penalty Enhancement.

(a) *Penalty enhancement.* An abuse of government power penalty enhancement applies to an offense when the actor:
(1) In fact, commits an offense under Subtitle II or Subtitle III of this title;
(2) Knowing that they are a public official; and
(3) Recklessly engages in the conduct constituting the offense under color or pretense of official right.

(b) *Penalties.* An abuse of government power penalty enhancement increases the penalty classification for an offense by one class except, for a Class 1 felony, the authorized term of imprisonment and fine for the offense increases by 6 years and $50,000.

(c) *Multiple penalty enhancements.* A penalty enhancement under this section is in addition to, and does not limit application of, additional penalty enhancements specified elsewhere in this chapter or in this title.

(d) *Definitions.* The terms "knowing" and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," and "public official" have the meanings specified in RCC § 22E-701.

Chapter 7. Definitions.

RCC § 22E-701. Generally Applicable Definitions.

Unless otherwise defined in a particular section, in this title, the term:

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

"Actor" means person accused of a criminal offense.

"Ammunition" has the meaning specified in D.C. Code § 7-2501.01.

"Amount of damage" means:

(A) When property is completely destroyed, the property's fair market value at the time it was destroyed; or

(B) When the property is partially damaged, either:

(i) The reasonable cost of necessary repairs if there are repairs; or

(ii) If there are no repairs, the change in the fair market value of the property due to the damage.

(C) Notwithstanding subparagraph (B) of this paragraph, if the reasonable cost of necessary repairs is greater than the fair market value of the property at the time it was partially damaged, that fair market value is the amount of damage.

"Assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

"Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now existing or later developed, together with any accompanying sounds.

"Block" and other parts of speech, including "blocks" and "blocking," mean to render safe passage through a space difficult or impossible.

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

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

"Bump stock" means any object that, when installed in or attached to a firearm, increases the rate of fire by using energy from the recoil of the firearm to generate a reciprocating action that facilitates repeated activation of the trigger.

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

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

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

"Class A contraband" means:

(A) A dangerous weapon or an imitation dangerous weapon;

(B) Ammunition or an ammunition clip;

(C) A flammable liquid or explosive powder;

(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;

(E) A shank or a homemade knife;

(F) Tear gas, pepper spray, or any other substance that is designed or specifically adapted for causing temporary blindness or incapacitation;
(G) A tool that is designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
(H) Handcuffs, security restraints, handcuff keys, or any other object that is designed or specifically adapted for locking, unlocking, or releasing handcuffs or security restraints;
(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool that is designed or specifically adapted for cutting through metal, concrete, or plastic;
(J) Rope; or
(K) A law enforcement officer's uniform, medical staff clothing, or any other uniform.

"Class B contraband" means:
(A) Any controlled substance or marijuana;
(B) Any alcoholic liquor or beverage;
(C) A hypodermic needle or syringe or other item that is designed or specifically adapted for administering an unlawful controlled substance; or
(D) A portable electronic communication device or an accessory to a portable electronic communication device.

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

"Coercive threat" means a communication that, unless the complainant complies, any person will do any of the following:
(A) Engage in conduct that, in fact, constitutes:
(i) An offense against persons under Subtitle II of this title; or
(ii) A property offense under Subtitle III of this title;
(B) Take or withhold action as a public official, or cause a public official to take or withhold action;
(C) Accuse a person of a crime;
(D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:
(i) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
(ii) Significant injury to credit or business reputation;
(E) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(F) Restrict a person's access to either a controlled substance that the person owns or a prescription medication that the person owns; or
(G) Cause any harm that is sufficiently serious, under all the circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply.

"Commercial sex act" means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.

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

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

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

"Consent" means a word or act that:

(A) Indicates, explicitly or implicitly, agreement to particular conduct or a particular result; and

(B) Is not given by a person who:

(i) Is legally unable to authorize the conduct charged to constitute the offense or to the result thereof; or

(ii) Because of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof; and

(C) Has not been withdrawn, explicitly or implicitly, by a subsequent word or act.

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

"Correctional facility" means any building or building grounds located in the District of Columbia, operated by the Department of Corrections, for the secure confinement of persons charged with or convicted of a criminal offense.

"Counterfeit mark" means any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia, that is used without the permission of the owner of the trademark, service mark, trade name, label, term, picture, seal, word, or advertisement.

"Crime of violence" means:

(A) Murder under RCC § 22E-1101;

(B) Manslaughter under RCC § 22E-1102;

(C) Robbery under RCC § 22E-1201;

(D) First degree, second degree, and third degree assault under RCC § 22E-1202(a)-(c);

(E) Enhanced first degree criminal threats under RCC § 22E-1204(a), (d)(4)(B);

(F) First degree, second degree, and third degree sexual assault under RCC § 22E-1301(a)-(c);
(G) First, second, fourth, and fifth degree sexual abuse of a minor under RCC § 22E-1302(a)-(b), (d)-(e);
(H) Kidnapping under RCC § 22E-1401;
(I) Enhanced criminal restraint under RCC § 22E-1402(a), (d)(2);
(J) First and second degree criminal abuse of a minor under RCC § 22E-1501(a)-(b);
(K) First and second degree criminal abuse of a vulnerable adult or elderly person under RCC § 22E-1503(a)-(b);
(L) Forced labor under RCC § 22E-1601;
(M) Forced commercial sex under RCC § 22E-1602;
(N) Trafficking in labor under RCC § 22E-1603;
(O) Trafficking in forced commercial sex under RCC § 22E-1604;
(P) Sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605;
(Q) [Reserved. Acts of terrorism under RCC § 22E-1701;]
(R) [Reserved. Manufacture or possession of a weapon of mass destruction under RCC § 22E-1702;]
(S) [Reserved. Use, dissemination, or detonation of a weapon of mass destruction under RCC § 22E-1703;]
(T) Enhanced first degree and enhanced second degree burglary under RCC § 22E-2701(a)-(b), (d)(4); or
(U) For any of the offenses described in subparagraphs (A)-(T) of this paragraph, a criminal attempt under RCC § 22E-301, a criminal solicitation under RCC § 22E-302, or a criminal conspiracy under RCC § 22E-303.

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

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

"Dangerous weapon" means:
(A) A firearm;
(B) A restricted explosive;
(C) A knife with a blade longer than 3 inches, sword, razor, stiletto, dagger, or dirk; or
(D) A blackjack, billy club, slungshot, sand club, sandbag, or false knuckles;
(E) A stun gun; or
(F) Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person.

"Deadly force" means any physical force that is likely to cause serious bodily injury or death.

"Debt bondage" means the status or condition of a person who provides services or commercial sex acts, for a real or alleged debt, where:

(A) The value of the services or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;

(B) The length and nature of the services or commercial sex acts are not respectively limited and defined; or

(C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.

"Deceive" and other parts of speech, including "deception," mean:

(A) To create or reinforce a false impression as to a material fact, including a false impression as to an intention to perform future actions;

(B) Preventing another person from acquiring material information;

(C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which influences another to whom they stand in a fiduciary or confidential relationship; or

(D) For offenses under Subtitle III of this title, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property which they transfer or encumber in consideration for property, whether or not it is a matter of official record; provided that under subparagraphs (A)-(D) of this paragraph:

(i) The term does not include puffing statements that are unlikely to deceive ordinary persons; and

(ii) Deception as to a person's intention to perform a future act shall not be inferred from the fact alone that they did not subsequently perform the act.

"Demonstration" means an act of marching, congregating, standing, sitting, lying down, parading, or patrolling by one or more persons, with or without signs, with the desire to persuade one or more individuals, or the public, or to protest some action, attitude, or belief.

"Deprive" means:

(A) Withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to the owner; or

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

"Detection device" means any wearable equipment with location tracking capability, including global positioning system and radio frequency identification technologies.

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

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

"Domestic partnership" has the meaning specified in D.C. Code § 32-701(4).

"Dwelling" means a structure that at the time of the offense is either designed or actually used for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public.

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

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

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

"Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied.

"False knuckles" means an object, whether made of metal, wood, plastic, or other similarly durable material that is constructed of one piece, the outside part of which is designed to fit over and cover the fingers on a hand and the inside part of which is designed to be gripped by the fist.

"Felony" means:

(A) An offense punishable by a term of imprisonment that is more than one year;
(B) In other jurisdictions, an offense punishable by death; or
(C) First or Second Degree Parental Kidnapping under RCC § 16-1022.

"Financial injury" means the reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act, including:

(A) The costs of clearing a name, debt, credit rating, credit history, criminal record, or any other official record;
(B) The costs of repairing or replacing any property that was taken or damaged;
(C) Medical bills;
(D) Relocation costs;
(E) Lost wages or compensation; and
(F) Attorneys' fees.

"Firearm" has the meaning specified in D.C. Code § 7-2501.01, except that in Chapter 41 of this title the term "firearm":

(A) Shall not include a firearm frame or receiver;
(B) Shall not include a firearm muffler or silencer; and
(C) Shall include operable antique pistols.

"Firearms instructor" has the meaning specified in D.C. Code § 7-2501.01.

"Ghost gun" has the meaning specified in D.C. Code § 7-2501.01.

"Halfway house" means any building or building grounds located in the District of Columbia that are used for the confinement of persons participating in a work release program under D.C. Code § 24-241.01.

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

"Healthcare provider" has the meaning specified in D.C. Code § 16-2801.

"Homelessness" means the status or circumstance of an individual who:

(A) Lacks a fixed, regular, and adequate nighttime residence; or

(B) Has a primary nighttime residence that is:

(i) A supervised, publicly or privately operated shelter designed to provide temporary living accommodations, including motels, hotels, congregate shelters, and transitional housing for persons with a mental illness;

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

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

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

"Imitation dangerous weapon" means an object used or fashioned in a manner that would cause a reasonable person to believe that the object is a dangerous weapon.

"Imitation firearm" means any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real.

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

"Incapacitated individual" has the meaning specified in D.C. Code § 21-2011.

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

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

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

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

"Labor" means work that has economic or financial value.

"Large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition. The term "large capacity ammunition feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

"Law enforcement officer" means:

(A) An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;
(B) An investigative officer or agent of the United States;
(C) An on-duty, civilian employee of the Metropolitan Police Department;
(D) An on-duty, licensed special police officer;
(E) An on-duty, licensed campus police officer;
(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or
(G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.

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

"Live broadcast" means a streaming video, or any other electronically transmitted image, for simultaneous viewing by an audience, including an audience of one person.

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

"Machine gun" has the meaning specified in D.C. Code § 7-2501.01.

"Misdemeanor" means an offense punishable by a term of imprisonment that is one year or less.

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

"Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, truck, truck tractor with or without a semitrailer or trailer, bus, or other vehicle designed to be propelled only by an internal-combustion engine or electricity.

"Movie theater" means a theater, auditorium, or other venue that is being utilized primarily for the exhibition of a motion picture to the public.

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

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

"Obscene" means:

(A) Appealing to a prurient interest in sex, under contemporary community standards and considered as a whole;
(B) Patently offensive; and
(C) Lacking serious literary, artistic, political, or scientific value, considered as a whole.

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

"Official custody" means full submission after an arrest or substantial physical restraint after an arrest.

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

"Open to the general public" means a location:

(A) To which the public is invited; and
(B) For which no payment, membership, affiliation, appointment, or special permission is required for an adult to enter, other than proof of age or a security screening.

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

"Payment card" means an instrument of any kind, whether tangible or digital, including an instrument that is a credit card or debit card, that is issued for use by the cardholder to obtain or pay for property, or the number inscribed on such a card.

"Pecuniary gain" means before-tax profit that is monetary or readily measurable in money, including additional revenue or cost savings.

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

"Person," in Subtitle III of this Title, means an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity, notwithstanding the definition in D.C. Code § 45-604.

"Person acting in the place of a parent under civil law" means:

(A) A person who has put themselves in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption; or
(B) A person acting by, through, or under the direction of a court with jurisdiction over the child.

"Person with legal authority over the complainant" means:
(A) When the complainant is a person under 18 years of age:
(i) A parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant; or
(ii) Someone who is acting with the effective consent of such a parent or such a person; or
(B) When the complainant is an incapacitated individual:
(i) A court-appointed guardian to the complainant; or
(ii) Someone who is acting with the effective consent of such a guardian.

"Personal identifying information" means:
(A) Name, address, telephone number, date of birth, or mother's maiden name;
(B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;
(C) Savings, checking, or other financial account number;
(D) Social security number or tax identification number;
(E) Passport or passport number;
(F) Citizenship status, visa, or alien registration card or number;
(G) Birth certificate or a facsimile of a birth certificate;
(H) Credit or debit card, or credit or debit card number;
(I) Credit history or credit rating;
(J) Signature;
(K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;
(L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
(M) Place of employment, employment history, or employee identification number; and
(N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, serve as identification, or obtain property.

"Physically following" means maintaining close proximity to a person, near enough to see or hear the person's activities as they move from one location to another.

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

"Pistol" has the meaning specified in D.C. Code § 7-2501.01.

"Position of trust with or authority over" means a relationship to a complainant that is:

(A) A parent, grandparent, great-grandparent, sibling, or a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship, whether related by:
  (i) Blood or adoption; or
  (ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends;

(B) A half-sibling related by blood;

(C) A person acting in the place of a parent under civil law, the current spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship;

(D) Any person, at least 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant;

(E) A religious leader described in D.C. Code § 14-309;

(F) A coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer, provided that such an actor is an employee, contractor, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming;

(G) Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, that exercises supervisory or disciplinary authority over the complainant; or

(H) A person responsible under civil law for the health, welfare, or supervision of the complainant.

"Possess," and other parts of speech, including "possesses," "possessing," and "possession," mean:

(A) To hold or carry on one's person; or

(B) To have the ability and desire to exercise control over.

"Prior conviction" means a final order by any court of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, that enters judgment of guilt for a criminal offense. The term "prior conviction" does not include:

(A) An adjudication of juvenile delinquency;

(B) Probation under D.C. Code § 48-904.01(e);

(C) A conviction that has been reversed, vacated, sealed, or expunged; or

(D) A conviction for which a person has been granted a pardon.

"Property" means anything of value and includes:

(A) Real property, including things growing on, affixed to, or found on land;

(B) Tangible or intangible personal property, including an animal;

(C) Services;
(D) Credit;
(E) Money, or any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed; and
(F) A government-issued license, permit, or benefit.

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

"Protected person" means:
(A) A person who is under 18 years of age and at least 4 years younger than an actor who is 18 years of age or older;
(B) A person who is 65 years of age or older and at least 10 years older than an actor who is under 65 years of age;
(C) A vulnerable adult;
(D) A law enforcement officer, while in the course of their official duties;
(E) A public safety employee, while in the course of their official duties;
(F) A transportation worker, while in the course of their official duties; or
(G) A District official, while in the course of their official duties.

"Public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including any airplane, train, bus, or boat.

"Public official" means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47).

"Public safety employee" means:
(A) An on-duty District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician;
(B) Any other on-duty firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician operating in the District of Columbia; or
(C) An on-duty District of Columbia investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector.

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

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

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

"Recording device" means a photographic or video camera, audio recorder, or any other device that is later developed that may be used for recording sounds or images or both.

"Restricted explosive" means any device that is designed to explode or produce uncontained combustion upon impact, including a breakable container containing flammable liquid and having a wick or a similar device capable of being ignited, but excluding any device that is lawfully and commercially manufactured primarily for the purpose of illumination, construction work, or other lawful purpose.

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

"Retail value" means the actor's regular selling price for the item or service bearing or identified by the counterfeit mark. In the case of items bearing a counterfeit mark which are components of a finished product, the retail value shall be the actor's regular selling price of the finished product on or in which the component would be utilized.

"Revoked or canceled" means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer.

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

"Sawed-off shotgun" has the meaning specified in D.C. Code § 7-2501.01.

"Secure juvenile detention facility" means any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

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

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

(A) A substantial risk of death;
(B) Protracted and obvious disfigurement;
(C) Protracted loss or impairment of the function of a bodily member or organ; or
(D) Protracted loss of consciousness.

"Serious mental injury" means substantial, prolonged harm to a person's psychological or intellectual functioning, that may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and that may be demonstrated by a change in behavior, emotional response, or cognition.

"Services" includes:

(A) Labor, whether professional or nonprofessional;

(B) The use of vehicles or equipment;
(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;
(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;
(E) Admission to public exhibitions or places of entertainment; and
(F) Educational and hospital services, accommodations, and other related services.

"Sexual act" means:
(A) Penetration, however slight, of the anus or vulva of any person by a penis;
(B) Contact between the mouth of any person and another person's penis, vulva, or anus;
(C) Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire; or
(D) Conduct described in subparagraphs (A)-(C) of this paragraph between a person and an animal.

"Sexual contact" means:
(A) Sexual act; or
(B) Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person:
(i) With any clothed or unclothed body part or any object, either directly or through the clothing; and
(ii) With the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire.

"Significant bodily injury" means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer, and, in addition, the following injuries constitute at least a significant bodily injury: a fracture of a bone; a laceration that is at least one inch in length and at least one quarter of an inch in depth; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.

"Significant emotional distress" means substantial, ongoing mental suffering that may require medical or other professional treatment or counseling, and must rise significantly above the level of uneasiness, nervousness, unhappiness, or similar feeling, that is commonly experienced in day to day living.

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

"Sound recording" means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now existing or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

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

"Strangulation or suffocation" means a restriction of normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth.

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

"Stun gun" has the meaning specified in D.C. Code § 7-2501.01.

"Transportation worker" means:

(A) A person who is licensed to operate, and is operating, a publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia;

(B) Any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station within the District of Columbia; and

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

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

"Undue influence" means mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes the person to act in a manner that is inconsistent with the person's financial, emotional, mental, or physical well-being.

"Value" means:

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

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

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

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

(iii) For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the

greatest amount of economic loss that the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.

(C) Notwithstanding subparagraphs (A) and (B) of this paragraph, the value of a payment card alone is $10.00 and the value of an unendorsed check alone is $10.00.

"Vehicle identification number" means a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for identification.

"Vulnerable adult" means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impairs the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.

"Written instrument" includes any:

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

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

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

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

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

(F) Other instrument commonly called a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

Subtitle II. Offenses Against Persons.

Chapter 11. Homicide.

RCC § 22E-1101. Murder.

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

(b) *Second degree*. An actor commits second degree murder when the actor:

(1) Knowingly causes the death of another person;

(2) Recklessly, with extreme indifference to human life, causes the death of another person; or

(3) Negligently causes the death of another person, other than an accomplice, by committing the lethal act in the course of and in furtherance of committing or attempting to commit an offense that is, in fact:
(A) First or second degree arson under RCC § 22E-2501;
(B) First degree sexual assault under RCC § 22E-1301;
(C) First or second degree sexual abuse of a minor under RCC § 22E-1302;
(D) First degree assault under RCC § 22E-1202;
(E) Enhanced first degree burglary under RCC § 22E-2701
(F) First or second degree robbery under RCC § 22E-1201;
(G) First or second degree kidnapping under RCC § 22E-1401; or
(H) First degree criminal abuse of a minor when the actor knowingly causes serious bodily injury.

(c) *Self-induced intoxication*. An actor shall be deemed to have consciously disregarded the risk required to prove that the actor acted with extreme indifference to human life in paragraph (b)(2) if due to self-induced intoxication, in fact, the actor was unaware of the risk, but would have been aware had the actor been sober.

(d) *Penalties.*
(1) First degree murder is a Class 2 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree murder is a Class 4 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) *Penalty enhancements*. The penalty classification of any gradation of this offense is increased by one class when the actor commits the offense and the person:
(A) Is reckless as to the fact that the decedent is a protected person;
(B) Commits the murder with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official;
(C) Commits the murder with intent to avoid or prevent a lawful arrest or effecting an escape from official custody;
(D) Knowingly commits the murder for hire;
(E) Knowingly inflicts extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death;
(F) Knowingly mutilates or desecrates the decedent's body;
(G) In fact, commits the murder after substantial planning;
(H) By knowingly shooting from a vehicle that is being driven at the time of the shooting; or
(I) Commits the murder with the purpose of harming the decedent because was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding.

(e) *Evidence of extreme pain, mental suffering, mutilation, or desecration.* Notwithstanding any other provision of law, an actor charged with penalty enhancements under subparagraph (d)(3)(E) or (d)(3)(F) shall be subject to a bifurcated criminal proceeding with the same jury or fact finder serving in both stages of the proceeding. In the first stage of the proceeding, the factfinder must determine if the actor committed either first degree murder as defined under subsection (a) or second degree murder as defined under subsection (b). In the first stage of the proceeding, evidence of penalty enhancements under subparagraph (d)(3)(E) or (d)(3)(F) is inadmissible except if such evidence is relevant to determining whether the actor committed first degree murder or second degree murder. In the second stage of the proceeding, after the actor has been found guilty of either first degree murder or second degree murder, the factfinder may consider any evidence relevant to penalty enhancements under subparagraphs (d)(3)(E) or (d)(3)(F).

(f) *Defenses.*

(1) In addition to any defenses otherwise applicable to the actor's conduct under District law, the presence of mitigating circumstances is a defense to prosecution under subsection (a) and paragraphs (b)(1) and (b)(2) of this section. Mitigating circumstances means:

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

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

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

(2) *Effect of mitigation defense.* If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the actor is not guilty of murder, but is guilty of voluntary manslaughter.

(g) *No accomplice liability for felony murder*. Notwithstanding RCC § 22E-210, no person shall be liable as an accomplice to second degree murder under paragraph (b)(3) of this section.

(h) *Felony murder merger.* Multiple convictions for second degree murder under paragraph (b)(3) and another offense listed in subparagraphs (b)(3)(A) – (b)(3)(H) of this section merge when arising from the same act or course of conduct and the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(i) *Definitions.* The term "act" has the meaning specified in RCC § 22E-202; the terms "intent," "intentionally," "knowingly," "negligently," "purpose," "purposely," "reckless," and "recklessly" have the meanings specified in RCC

§ 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the term "self-induced intoxication" has the meaning specified in RCC § 22E-209; and the terms "actor," "deadly force," "District official," "law enforcement officer," "official custody," "protected person," "public safety employee," and "serious bodily injury" have the meanings specified in RCC § 22E-701.

RCC § 22E-1102. Manslaughter.

(a) *Voluntary manslaughter*. An actor commits voluntary manslaughter when the actor:
  (1) Knowingly causes the death of another person;
  (2) Recklessly, with extreme indifference for human life, causes death of another person; or
  (3) Negligently causes the death of another person, other than an accomplice, by committing the lethal act in the course of and in furtherance of committing or attempting to commit an offense that is, in fact:
    (A) First or second degree arson under RCC § 22E-2501;
    (B) First degree sexual assault under RCC § 22E-1301;
    (C) First or second degree sexual abuse of a minor under RCC § 22E-1302;
    (D) First degree assault under RCC § 22E-1202;
    (E) Enhanced first degree burglary under RCC § 22E-2701
    (F) First or second degree robbery under RCC § 22E-1201;
    (G) First or second degree kidnapping under RCC § 22E-1401; or
    (H) First degree criminal abuse of a minor when the actor knowingly causes serious bodily injury.

(b) *Involuntary manslaughter*. An actor commits involuntary manslaughter when the actor recklessly causes the death of another person.

(c) *Self-induced intoxication*. An actor shall be deemed to have consciously disregarded the risk required to prove that the person acted with extreme indifference to human life in paragraph (a)(2) if due to self-induced intoxication, in fact, the actor was unaware of the risk, but would have been aware had the actor been sober.

(d) *Penalties*.
  (1) Voluntary manslaughter is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Involuntary manslaughter is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Penalty enhancements*. The penalty classification for voluntary manslaughter and involuntary manslaughter is increased by one class when the actor commits the offense:
    (A) Reckless as to the fact that the decedent is a protected person; or

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

(e) *No accomplice liability for felony murder*. Notwithstanding RCC § 22E-210, no person shall be liable as an accomplice to voluntary manslaughter under paragraph (a)(3) of this section.

(f) *Felony murder merger.* Multiple convictions for voluntary manslaughter under paragraph (a)(3) and another offense listed in subparagraphs (a)(3)(A) – (a)(3)(H) of this section merge when arising from the same act or course of conduct and the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(g) *Definitions*. The term "act" has the meaning specified in RCC § 22E-202; the terms "intends," "intentionally," "knowingly," "negligently," "purpose," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the term "self-induced intoxication" has the meaning specified in RCC § 22E-209; and the terms "actor," "District official," "law enforcement officer," "protected person," "public safety employee," and "serious bodily injury" have the meanings specified in RCC § 22E-701.

RCC § 22E-1103. Negligent Homicide.

(a) *Offense.* An actor commits negligent homicide when the actor negligently causes the death of another person.

(b) *Penalties*. Negligent homicide is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The term "negligently" has the meaning specified in RCC § 22E-206; and the term "actor" has the meaning specified in RCC § 22E-701.

Chapter 12. Robbery, Assault, and Threats.

RCC § 22E-1201. Robbery.

(a) *First degree*. An actor commits first degree robbery when the actor:

(1) Knowingly takes or exercises control over the property of another that the complainant possesses within the complainant's immediate physical control by:

(A) Causing bodily injury to the complainant or another person physically present;

(B) Communicating, explicitly or implicitly, that the actor immediately will cause the complainant or another person physically present to suffer bodily injury, a sexual act, a sexual contact, confinement, or death;

(C) Applying physical force that moves or immobilizes another person present; or

(D) Removing property from the hand or arms of the complainant;

(2) With intent to deprive the complainant of the property; and
(3) In the course of the robbery, recklessly causes serious bodily injury another person, other than an accomplice.

(b) *Second degree*. An actor commits second degree robbery when the actor:
(1) Knowingly takes or exercises control over the property of another that the complainant possesses within the complainant's immediate physical control by:
(A) Causing bodily injury to another person physically present;
(B) Communicating, explicitly or implicitly, that the actor immediately will cause the complainant or another person present to suffer bodily injury, a sexual act, a sexual contact, confinement, or death;
(C) Applying physical force that moves or immobilizes another person present; or
(D) Removing property from the hand or arms of the complainant
(2) With intent to deprive the complainant of the property; and
(3) Either:
(A) In the course of the robbery, recklessly causes significant bodily injury to another person, other than an accomplice; or
(B) In fact:
(i) The property is a motor vehicle; or
(ii) The property has a value of $5,000 or more.

(c) *Third degree.* An actor commits third degree robbery when the actor:
(1) Knowingly takes or exercises control over the property of another that the complainant possesses within the complainant's immediate physical control by:
(A) Causing bodily injury to the complainant or another person present;
(B) Communicating to the complainant, explicitly or implicitly, that the actor immediately will cause the complainant or another person present to suffer bodily injury, a sexual act, a sexual contact, confinement, or death;
(C) Applying physical force that moves or immobilizes another person present; or
(D) Removing property from the hand or arms of the complainant;
(2) With intent to deprive the complainant of the property.

(d) *Affirmative defense.* It is an affirmative defense to criminal liability under this section that, in fact, the actor reasonably believes that an owner of the property gives effective consent to the actor to take or exercise control over the property.

(e) *Penalties.*
(1) First degree robbery is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree robbery is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree robbery is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) *Penalty enhancements.* The penalty classification for first degree robbery is increased in severity by one class when the actor commits the offense:

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

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

(5) *Penalty enhancements*. The penalty classification of second and third degree robbery is increased by:

(A) One class when the actor commits the offense:

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

(ii) Under sub-paragraphs (b)(3)(B), (c)(1)(B), (c)(1)(C), or (c)(1)(D) by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon; or

(B) Two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon and the display or use of the dangerous weapon directly or indirectly causes the injury to the complainant.

(f) *Definitions.* The terms "intent," "knowingly," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "bodily injury," "complainant," "dangerous weapon," "effective consent," "deprive," "imitation dangerous weapon," "motor vehicle," "owner," "possesses," "property," "property of another," "protected person," "serious bodily injury," "sexual act," "sexual contact," "significant bodily injury," and "value" have the meanings specified in RCC § 22E-701.

RCC § 22E-1202. Assault.

(a) *First degree.* An actor commits first degree assault when the actor purposely:

(1) Causes serious and permanent disfigurement to the complainant; or

(2) Destroys, amputates, or permanently disables a member or organ of the complainant's body.

(b) *Second degree*. An actor commits second degree assault when the actor recklessly, with extreme indifference to human life, causes serious bodily injury to the complainant.

(c) *Third degree.* An actor commits third degree assault when the actor recklessly causes significant bodily injury to the complainant.

(d) *Fourth degree.* An actor commits fourth degree assault when the actor recklessly causes bodily injury to the complainant.

(e) *Exclusion from liability.* An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation.

(f) *Defenses.*

(1) It is a defense to liability under subsections (a) and (b) of this section that, in fact:

(A) The injury is caused by a lawful cosmetic or medical procedure;

(B) The actor is not a person with legal authority over the complainant; and

(C) The actor reasonably believes that:

(i) The complainant is 18 years of age or older, and the complainant, or a person with legal authority over the complainant acting consistent with that authority, gives effective consent to the actor to cause the injury;

(ii) The complainant is under 18 years of age and:

(I) The actor is 18 years of age or older; and

(II) A person with legal authority over the complainant acting consistent with that authority gives effective consent to the actor to cause the injury; or

(iii) The complainant is under 18 years of age and:

(I) The actor is under 18 years of age; and

(II) The complainant gives effective consent to the actor to cause the injury.

(2) It is a defense to liability under subsections (c) and (d) of this section that, in fact:

(A) The actor is not a person with legal authority over the complainant; and

(B) The actor reasonably believes that:

(i) The complainant is 18 years of age or older, and the complainant, or a person with legal authority over the complainant acting consistent with that authority, gives effective consent to the actor either to cause the injury or to engage in a lawful sport, occupation, or other concerted activity, and the actor's infliction of the injury is a reasonably foreseeable hazard of that activity;

(ii) The complainant is under 18 years of age and:

(I) The actor is 18 years of age or older and is more than four years older than the complainant; and

(II) A person with legal authority over the complainant acting consistent with that authority gives effective consent to the actor either to cause the injury or to engage in a lawful sport, occupation, or other concerted

activity, and the actor's infliction of the injury is a reasonably foreseeable hazard of that activity; or

(iii) The complainant is under 18 years of age and:

(I) The actor is either under 18 years of age or is 18 years of age or older and not more four years older than the complainant; and

(II) The complainant gives effective consent to the actor to either to cause the injury or to engage in a lawful sport, occupation, or other concerted activity, and the actor's infliction of the injury is a reasonably foreseeable hazard of that activity.

(g) *Self-induced intoxication.* An actor shall be deemed to have consciously disregarded the risk required to prove the actor acted with extreme indifference to human life in subsection (b) of this section if due to self-induced intoxication, in fact, the actor was unaware of the risk, but would have been aware had the actor been sober.

(h) *Penalties.*

(1) First degree assault is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree assault is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree assault is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

(5) *Penalty enhancements.* The penalty classification of second degree assault is increased by one class when the actor commits the offense:

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

(B) By displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon; or

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

(6) *Penalty enhancements*. The penalty classification of third degree assault is increased by:

(A) One class when the actor commits the offense:

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

(ii) By displaying or using what, in fact, is an imitation dangerous weapon; or

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

(B) Two classes when the actor commits the offense by recklessly displaying or using what, in fact, is a dangerous weapon.

(7) *Penalty enhancements*. The penalty classification of fourth degree assault is increased by:

(A) One class when the actor commits the offense:

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

(ii) By recklessly displaying or using what, in fact, is an imitation dangerous weapon; or

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

(B) Three classes when the actor commits the offense by recklessly displaying or using what, in fact, is a dangerous weapon.

(i) *Definitions.* The terms "purpose," "purposely," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the term "self-induced intoxication" has the meaning specified in RCC § 22E-209; and the terms "actor," "bodily injury," "complainant," "dangerous weapon," "District official," "effective consent," "imitation dangerous weapon," "law enforcement officer," "person with legal authority over the complainant," "protected person," "public safety employee," "serious bodily injury," and "significant bodily injury" have the meanings specified in RCC § 22E-701.

RCC § 22E-1204. Criminal Threats.

(a) *First degree*. An actor commits first degree criminal threats when the actor:

(1) Knowingly communicates to a person other than a co-conspirator or accomplice, explicitly or implicitly, that the actor immediately will cause the complainant or another person to suffer a criminal death, serious bodily injury, sexual act, or confinement;

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

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

(b) *Second degree.* An actor commits second degree criminal threats when the actor:

(1) Knowingly communicates to a person other than a co-conspirator or accomplice, explicitly or implicitly, that the actor will cause the complainant or another person to suffer a criminal bodily injury or sexual contact;

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

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

(c) *Third degree.* An actor commits third degree criminal threats when the actor:

(1) Knowingly communicates to a person other than a co-conspirator or accomplice, explicitly or implicitly, that the actor will cause the complainant or another person to suffer a criminal loss or damage to property;
(2) With intent that the communication be perceived as a serious expression that the actor would cause the harm; and
(3) In fact, the communication would cause a reasonable person in the complainant's circumstances to believe that the harm would occur.

(d) *Penalties.*
(1) First degree criminal threats is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree criminal threats is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree criminal threats is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) *Penalty enhancements.* The penalty classification of any gradation of this offense is increased by one class when the actor commits the offense:
(A) Reckless as to the fact that the complainant is a protected person;
(B) By displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon; or
(C) With the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official.

(e) *Definitions.* The terms "intent," "knowingly," "purpose," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "dangerous weapon," "District official," "imitation dangerous weapon," "law enforcement officer," "property," "protected person," "public safety employee," "serious bodily injury," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-1205. Offensive Physical Contact.

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

(b) *Second degree*. An actor commits second degree offensive physical contact when the actor:

(1) Knowingly causes the complainant to come into physical contact with any person or any object or substance;
(2) With intent that the physical contact be offensive to the complainant; and
(3) In fact, a reasonable person in the situation of the complainant would regard it as offensive.

(c) *Exclusion from liability.* An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation.

(d) *Defense.* It is a defense to liability that, in fact:
(1) The actor is not a person with legal authority over the complainant; and
(2) The actor reasonably believes that:
(A) The complainant is 18 years of age or older, and the complainant, or a person with legal authority over the complainant acting consistent with that authority, gives effective consent to the actor to:
(i) Cause the physical contact; or
(ii) Engage in a lawful sport, occupation, or other concerted activity, and the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity;
(B) The complainant is under 18 years of age and:
(i) The actor is 18 years of age or older and is more than four years older than the complainant; and
(ii) A person with legal authority over the complainant acting consistent with that authority gives effective consent to the actor to:
(I) Cause the physical contact; or
(II) Engage in a lawful sport, occupation, or other concerted activity, and the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity; or
(C) The complainant is under 18 years of age and:
(i) The actor is either under 18 years of age or is 18 years of age or older and not more four years older than the complainant; and
(ii) The complainant gives effective consent to the actor to:
(I) Cause the physical contact; or
(II) Engage in a lawful sport, occupation, or other concerted activity, and the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity.

(e) *Penalties.*

(1) First degree offensive physical contact is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree offensive physical contact is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) *Penalty enhancements.* The penalty classification of any gradation of this offense is increased by one class when the actor commits the offense:
(A) Reckless as to the fact that the complainant is a protected person; or
(B) With the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official.

(f) *Definition*s. The terms "intent," "knowingly," "purpose," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "District official," "effective consent," "law enforcement officer," "person with legal authority over the complainant," "protected person," and "public safety employee" have the meanings specified in RCC § 22E-701.

Chapter 13. Sexual Assault and Related Provisions.

RCC § 22E-1301. Sexual Assault.

(a) *First degree*. An actor commits first degree sexual assault when the actor:
(1) Knowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act;
(2) In one or more of the following ways:
(A) By causing bodily injury to the complainant, or by using physical force that moves or immobilizes the complainant;
(B) By communicating to the complainant, explicitly or implicitly, that the actor will cause:
(i) The complainant to suffer a bodily injury, confinement or death; or
(ii) A third party to suffer a bodily injury, sexual act, sexual contact, confinement, or death; or
(C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:
(i) With intent to impair the complainant's ability to express willingness or unwillingness to engage in the sexual act; and
(ii) In fact, the drug, intoxicant, or other substance renders the complainant:

(I) Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness;
(II) Substantially incapable of appraising the nature of the sexual act; or
(III) Substantially incapable of communicating willingness or unwillingness to engage in the sexual act.

(b) *Second degree*. An actor commits second degree sexual assault when the actor:
(1) Knowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act;
(2) In one or more of the following ways:
(A) By making a coercive threat, explicit or implicit; or
(B) When the complainant is:
(i) Asleep, unconscious, or passing in and out of consciousness;
(ii) Incapable of appraising the nature of the sexual act or of understanding the right to give or withhold consent to the sexual act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness;
(iii) Incapable of communicating willingness or unwillingness to engage in the sexual act; or
(iv) Substantially paralyzed.

(c) *Third degree*. An actor commits third degree sexual assault when the actor:
(1) Knowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact;
(2) In one or more of the following ways:
(A) By causing bodily injury to the complainant, or by using physical force that moves or immobilizes the complainant;
(B) By communicating to the complainant, explicitly or implicitly, that the actor will cause:
(i) The complainant to suffer a bodily injury, confinement or death; or
(ii) A third party to suffer a bodily injury, sexual act, sexual contact, confinement, or death; or
(C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:
(i) With intent to impair the complainant's ability to express unwillingness to engage in the sexual contact; and
(ii) In fact, the drug, intoxicant, or other substance renders the complainant:

(I) Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness;
(II) Substantially incapable of appraising the nature of the sexual contact; or
(III) Substantially incapable of communicating willingness or unwillingness to engage in the sexual contact.

(d) *Fourth degree*. An actor commits fourth degree sexual assault when the actor:
(1) Knowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact;
(2) In one or more of the following ways:
(A) By making a coercive threat, explicit or implicit; or
(B) When the complainant is:
(i) Asleep, unconscious, or passing in and out of consciousness;
(ii) Incapable of appraising the nature of the sexual contact or of understanding the right to give or withhold consent to the sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness;
(iii) Incapable of communicating willingness or unwillingness to engage in the sexual contact; or
(iv) Substantially paralyzed.

(e) *Defense*. It is a defense to liability under subparagraphs (a)(2)(A), (a)(2)(B), (b)(2)(A), (b)(2)(B), (c)(2)(A), (c)(2)(B), (d)(2)(A), and (d)(2)(B) of this section that, in fact, the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense.

(f) *Penalties*.
(1) First degree sexual assault is a Class 4 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree sexual assault is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree sexual assault is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree sexual assault is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) *Penalty enhancements*. The penalty classification of any gradation of this offense is increased by one class when the actor:
(A) Recklessly causes the sexual act or sexual contact by displaying or using what is, in fact, a dangerous weapon or imitation dangerous weapon;
(B) Knowingly acts with one or more accomplices that are physically present at the time of the sexual act or sexual contact; or

(C) Recklessly causes serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact; or

(D) At the time of the sexual act or sexual contact:

(i) In fact, the complainant is under 12 years of age, and the actor is at least 4 years older than the complainant;

(ii) The actor is reckless as to the fact that the complainant is under 16 years of age and, in fact, the actor is at least 4 years older than the complainant;

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

(iv) The actor is reckless as to the fact that the complainant is 65 years of age or older and, in fact, the actor is under 65 years of age and at least 10 years younger than the complainant; or

(v) The actor is reckless as to the fact that the complainant is a vulnerable adult.

(g) *Definitions*. The terms "intent," "knowingly," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "coercive threat," "complainant," "consent," "dangerous weapon," "effective consent," "imitation dangerous weapon," "position of trust with or authority over," "serious bodily injury," "sexual act," "sexual contact," and "vulnerable adult" have the meanings specified in RCC § 22E-701.

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

(a) *First degree*. An actor commits first degree sexual abuse of a minor when the actor:

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

(2) In fact:

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

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

(b) *Second degree*. An actor commits second degree sexual abuse of a minor when the actor:

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

(2) In fact:

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

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

(c) *Third degree*. An actor commits third degree sexual abuse of a minor when the actor:

(1) Knowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act;
(2) While in a position of trust with or authority over the complainant; and
(3) In fact:
(A) The complainant is under 18 years of age; and
(B) The actor is 18 years of age or older and at least 4 years older than the complainant.

(d) *Fourth degree*. An actor commits fourth degree sexual abuse of a minor when the actor:
(1) Knowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact; and
(2) In fact:
(A) The complainant is under 12 years of age; and
(B) The actor is at least 4 years older than the complainant.

(e) *Fifth degree*. An actor commits fifth degree sexual abuse of a minor when the actor:
(1) Knowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact; and
(2) In fact:
(A) The complainant is under 16 years of age; and
(B) The actor is at least 4 years older than the complainant.

(f) *Sixth degree*. An actor commits sixth degree sexual abuse of a minor when the actor:
(1) Knowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact;
(2) While in a position of trust with or authority over the complainant; and
(3) In fact:
(A) The complainant is under 18 years of age; and
(B) The actor is, in fact, 18 years of age or older and at least 4 years older than the complainant.

(g) *Affirmative defenses*.
(1) It is an affirmative defense to liability under this section for conduct involving only the actor and the complainant that, in fact, the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact.
(2) It is an affirmative defense to liability under subsection (b) and subsection (e) of this section that, in fact:
(A) The actor reasonably believes that the complainant is 16 years of age or older at the time of the sexual act or sexual contact;
(B) Such reasonable belief is based on an oral or written statement that the complainant made to the actor about the complainant's age; and
(C) The complainant is 14 years of age or older at the time of the sexual act or sexual contact.
(3) It is an affirmative defense to liability under subsection (c) and subsection (f) of this section that, in fact:

(A) The actor reasonably believes that the complainant is 18 years of age of older at the time of the sexual act or sexual contact;
(B) Such reasonable belief is based on an oral or written statement that the complainant made to the actor about the complainant's age; and
(C) The complainant is 16 years of age or older at the time of the sexual act or sexual contact.

(h) *Penalties*.

(1) First degree sexual abuse of a minor is a Class 4 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree sexual abuse of a minor is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree sexual abuse of a minor is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree sexual abuse of a minor is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree sexual abuse of a minor is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(6) Sixth degree sexual abuse of a minor is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(7) *Penalty enhancements*. The penalty classification of first, second, fourth, and fifth degree sexual abuse of a minor is increased by one class when the actor:
    (A) Recklessly causes the sexual act or sexual contact by displaying or using what is, in fact, a dangerous weapon or imitation dangerous weapon;
    (B) Knowingly acts with one or more accomplices that are physically present at the time of the sexual act or sexual contact;
    (C) Recklessly causes serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact; or
    (D) Knows at the time of the sexual act or sexual contact that the actor is in a position of trust with or authority over the complainant.
(8) *Penalty enhancements.* The penalty classification of third and sixth degree sexual abuse of a minor is increased by one class when the actor:

(A) Recklessly causes the sexual act or sexual contact by displaying or what is, in fact, a dangerous weapon or imitation dangerous weapon;
(B) Knowingly acts with one or more accomplices that are physically present at the time of the sexual act or sexual contact; or
(C) Recklessly causes serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact.

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

RCC § 22E-1303. Sexual Abuse by Exploitation.

(a) *First degree*. An actor commits first degree sexual abuse by exploitation when the actor:
(1) Knowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act;
(2) In one or more of the following situations:
(A) The actor is a coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contractor, or volunteer, and is reckless as to the fact that:
(i) The complainant:
(I) Is an enrolled student in the same secondary school; or
(II) Receives educational services or attends educational programming at the same secondary school; and
(ii) The complainant is under 20 years of age;
(B) The actor knowingly and falsely represents that the actor is someone else with whom the complainant is in a romantic, dating, or sexual relationship;
(C) The actor is, or purports to be, a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309, and:
(i) Falsely represents that the sexual act is for a bona fide medical, therapeutic, or professional purpose;
(ii) Commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services; or

(iii) Commits the sexual act while the complainant is a patient or client of the actor, and is reckless as to the fact that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual act;

(D) The actor:

(i) Knowingly works as an employee, contractor, or volunteer at or for a hospital, treatment facility, detention or correctional facility, group home, or institution housing persons who are not free to leave at will; and

(ii) Is reckless as to the fact that the complainant is:

(I) A ward, patient, client, or prisoner at that institution;

(II) Awaiting admission to that institution; or

(III) In transport to or from that institution; or

(E) The actor knowingly works as a law enforcement officer, and is reckless as to the fact that the complainant is:

(i) In official custody or detained for a legitimate police purpose;

(ii) Detained pending or following:

(I) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;

(II) Commitment as a material witness; or

(III) Civil commitment proceedings, extradition, deportation, or exclusion; or

(iii) On probation or parole.

(b) *Second degree*. An actor commits second degree sexual abuse by exploitation when the actor:

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

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

(A) The actor is a coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contractor, or volunteer, and is reckless as to the fact that:

(i) The complainant:

(I) Is an enrolled student in the same secondary school; or

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

(ii) The complainant is under 20 years of age;

(B) The actor knowingly and falsely represents that the actor is someone else with whom the complainant is in a romantic, dating, or sexual relationship;

(C) The actor is, or purports to be, a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309, and:

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

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

(iii) Commits the sexual contact while the complainant is a patient or client of the actor, and is reckless as to the fact that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual contact;

(D) The actor:

(i) Knowingly works as an employee, contractor, or volunteer at or for a hospital, treatment facility, detention or correctional facility, group home, or institution housing persons who are not free to leave at will; and

(ii) Is reckless as to the fact that the complainant is:

(I) A ward, patient, client, or prisoner at that institution;

(II) Awaiting admission to that institution; or

(III) In transport to or from that institution; or

(E) The actor knowingly works as a law enforcement officer, and is reckless as to the fact that the complainant is:

(i) In official custody or detained for a legitimate police purpose;

(ii) Detained pending or following:

(I) A charge or conviction of an offense, or an allegation or finding of juvenile delinquency;

(II) Commitment as a material witness; or

(III) Civil commitment proceedings, extradition, deportation, or exclusion; or

(iii) On probation or parole.

(c) *Affirmative defense*. It is an affirmative defense to liability under this section that, in fact, the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact.

(d) *Penalties*.

(1) First degree sexual abuse by exploitation of an adult is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree sexual abuse by exploitation of an adult is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *No abuse of government power penalty enhancement.* A person shall not be subject to prosecution for violation of this section and an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct.

(e) *Definitions*. The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "correctional facility," "domestic partnership," "health professional," "healthcare provider," "law enforcement officer," "official custody," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

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

(a) *Offense*. An actor commits sexually suggestive conduct with a minor when the actor:

(1) In fact, is 18 years of age or older and at least 4 years older than the complainant; and:

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

(B) The actor:

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

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

(2) The actor:

(A) Purposely engages in:

(i) A sexual act that is visible to the complainant;

(ii) A sexual contact that is visible to the complainant; or

(iii) A sexual or sexualized display of the genitals, pubic area, or anus that is visible to the complainant;

(B) Knowingly:

(i) Engages in one of the following with the complainant or causes the complainant to engage in or submit to one of the following:

(I) Touching or kissing any person, either directly or through the clothing; or

(II) Removing clothing from any person;

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

(C) Knowingly engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact.

(b) *Affirmative defense*. It is an affirmative defense to liability under this section for conduct involving only the actor and the complainant that, in fact, the actor and the complainant are in a marriage or domestic partnership at the time of the prohibited conduct.
(c) *Penalties*. Sexually suggestive contact with a minor is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The terms "intent," "knowingly," "knows," "purposely," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "domestic partnership," "position of trust with or authority over," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

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

(a) *Offense*. An actor commits enticing a minor into sexual conduct when the actor:
    (1) Knowingly commands, requests, or tries to persuade the complainant to engage in or submit to a sexual act or sexual contact;
    (2) In fact, is 18 years of age or older and at least four years older than the complainant, and:
        (A) The actor is reckless as to the fact that the complainant is under 16 years of age; or
        (B) The actor:
            (i) Is reckless as to the fact that the complainant is under 18 years of age; and
            (ii) Knows that the actor is in a position of trust with or authority over the complainant; or
    (3) In fact, is 18 years of age or older and at least four years older than the purported age of the complainant, and:
        (A) The complainant is a law enforcement officer who purports to be a person under 16 years of age; and
        (B) The actor is reckless as to the fact that the purported age of the complainant is under 16 years of age.
(b) *Affirmative defense.* It is an affirmative defense to liability under this section for conduct involving only the actor and the complainant that, in fact, the actor and the complainant are in a marriage or domestic partnership at the time of the prohibited conduct.
(c) *Penalties.* Enticing a minor into sexual conduct is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The terms "knowingly," "knows," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "domestic partnership," "law enforcement officer," "position of trust with or authority

over," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

(a) *Offense*. An actor commits arranging for sexual conduct with a minor or person incapable of consenting when the actor:
  (1) Knowingly:
    (A) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant;
    (B) Gives effective consent to a third party to:
      (i) Engage in or submit to a sexual act or sexual contact with or for the complainant; or
      (ii) Cause the complainant to engage in or submit to a sexual act or sexual contact with or for the third party or any other person;
  (2) In one of the following situations:
    (A) The actor is reckless as to:
      (i) The fact that the complainant is under 16 years of age; and
      (ii) The fact that the third party or other person is at least 4 years older than the complainant;
    (B) The actor:
      (i) Is reckless as to:
        (I) The fact that the complainant is under 18 years of age; and
        (II) The fact that the third party or other person is 18 years of age or older and at least 4 years older than the complainant; and
      (ii) Knows that the third party or other person is in a position of trust with or authority over the complainant; or
    (C) The actor is reckless as to:
      (i) The fact that the complainant is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or
      (ii) The fact that the complainant is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact.

(b) *Penalties*. Arranging for sexual conduct with a minor or person incapable of consenting is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly," "knows," and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "complainant," "consent," "effective consent," "position of trust with or authority over," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

(a) *First degree*. An actor commits first degree nonconsensual sexual conduct when the actor:
  (1) Knowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act;
  (2) Reckless as to the fact that the actor lacks the complainant's effective consent.

(b) *Second degree*. An actor commits second degree nonconsensual sexual contact when the actor:
  (1) Knowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact;
  (2) Reckless as to the fact that the actor lacks the complainant's effective consent.

(c) *Exclusion from liability*. An actor does not commit an offense under this section when, in fact, the actor uses deception, unless it is deception as to the nature of the sexual act or sexual contact.

(d) *Penalties*.
  (1) First degree nonconsensual sexual conduct of an adult is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree nonconsensual sexual conduct of an adult is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "deception," "effective consent," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-1308. Incest.[5]

(a) *First degree*. An actor commits first degree incest when the actor:
  (1) In fact, is 16 years of age or older;
  (2) Knowingly engages in a sexual act with another person who is a:

[5] Incest was previously numbered as RCC § 22E-1312.

(A) Parent, grandparent, great-grandparent, child, grandchild, great-grandchild, sibling, parent's sibling, a sibling's child, or a child of a parent's sibling, whether related by:
(i) Blood or adoption; or
(ii) Marriage or domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends; or
(B) A half-sibling related by blood; and
(3) Obtains the consent of the other person by undue influence.

(b) *Second degree*. An actor commits second degree incest when the actor:
(1) In fact, is 16 years of age or older;
(2) Knowingly engages in a sexual contact with another person who is a:
(A) Parent, grandparent, great-grandparent, child, grandchild, great-grandchild, sibling, parent's sibling, or a sibling's child, or a child of a parent's sibling, whether related by:
(i) Blood or adoption; or
(ii) Marriage or domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends; or
(B) A half-sibling related by blood; and
(3) Obtains the consent of the other person by undue influence.

(c) *Penalties*.
(1) First degree incest is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree incest is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "consent," "domestic partnership," "sexual act," "sexual contact," and "undue influence" have the meanings specified in RCC § 22E-701.

RCC § 22E-1309. Civil Provisions on the Duty to Report a Sex Crime.

(a) *Duty to report a sex crime.* A person who is, in fact, 18 years of age or older, and is aware of a substantial risk that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime, shall immediately report such information or belief in a call to 911, a report to the Child and Family Services Agency, or a report to the Metropolitan Police Department.

(b) *Exclusions from duty to report.*
(1) A person does not have a duty to report a predicate crime under subsection (a) of this section when the person is, in fact:
(A) Subjected to a predicate crime by the same person alleged to have committed a predicate crime against the person under 16 years of age;

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

(C) A religious leader described in D.C. Code § 14-309, when the information or basis for the belief is the result of a confession or penitential communication made by a penitent directly to the minister if:

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

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

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

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

(D) A sexual assault counselor, when the information or basis for the belief is disclosed in a confidential communication, unless the sexual assault counselor is aware of a substantial risk that:

(i) A sexual assault victim is under 13 years of age;

(ii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is in a position of trust with or authority over the sexual assault victim; or

(iii) A perpetrator or alleged perpetrator of the predicate crime in subsection (a) is more than 4 years older than the sexual assault victim.

(2) No legal privilege, except the privileges set forth in subsection (b) of this section, shall apply to the duty to report in subsection (a) of this section.

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

(d) *Civil violation.* A person commits failure to report a sex crime involving a person under 16 years of age when the person:

(1) Is, in fact, 18 years of age or older;

(2) Knows that they have a duty to report a predicate crime involving a person under 16 years of age under subsection (a) of this section; and

(3) Fails to carry out this duty.

(e) *Defense.* It is a defense to liability under subsection (d) of this section that the person fails to report a predicate crime under subsection (a) of this section because the person, in fact, reasonably believes that they are a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9).

(f) *Penalty.*

(1) Failure to report a sex crime involving a person under 16 years of age is a civil violation subject to a civil fine of $300.

(2) A violation of subsection (d) of this section shall not constitute a criminal offense or a delinquent act as defined in D.C. Official Code § 16-2301(7).

(g) *Judicial venue.* Adjudication of a civil violation under this section shall occur in the Office of Administrative Hearings pursuant to D.C. Code § 2-1831.03(b-6).

(h) *Immunity for good faith report of a sex crime.*

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

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

(i) *Definitions.*

(1) The term "knows" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the term "position of trust with or authority over" has the meaning specified in RCC § 22E-701; and

(2) In this section, the term:

(A) "Confidential communication" has the meaning specified in D.C. Code § 14-312(a)(1), and is subject to the protections in D.C. Code § 14-312(b)(3);

(B) "Predicate crime" means any conduct that violates:

(i) Chapter 13 of this title; or

(ii) Forced Commercial Sex under RCC § 22E-1602, Trafficking in Forced Commercial Sex under RCC § 22E-1604, Sex Trafficking of a Minor or Adult Incapable of Consenting under RCC § 22E-1605, or Commercial Sex with a Trafficked Person under RCC § 22E-1608; or

(iii) Creating or Trafficking an Obscene Image of a Minor under RCC § 22E-1807, Possession of an Obscene Image of a Minor under RCC § 22E-1808, Arranging a

Live Sexual Performance of a Minor under RCC § 22E-1809, or Attending or Viewing a Live Sexual Performance of a Minor under RCC § 22E-1810; or

(iv) Trafficking in Commercial Sex under RCC § 22E-4403;

(C) "Sexual assault counselor" has the meaning specified in D.C. Code § 23-1907(10); and

(D) "Sexual assault victim" has the meaning specified in D.C. Code § 23-1907(11).

RCC § 22E-1310. Admission of Evidence in Sexual Assault and Related Cases.[6]

(a) *Reputation or opinion evidence of complainant's past sexual behavior inadmissible.* Notwithstanding any other provision of law, in a criminal case under Chapter 13 of this title, reputation or opinion evidence of the past sexual behavior of the complainant is not admissible.

(b) *Admissibility of other evidence of complainant's past sexual behavior.*

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

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

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

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

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

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

[6] Admission of Evidence in Sexual Assault and Related Cases was previously numbered as RCC § 22E-1311.

arisen in the case. Any motion made under this paragraph, and the accompanying offer of proof, shall be filed under seal and served on all other parties and on the complainant.

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

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

(c) *Prompt reporting.* Evidence of delay in reporting an offense under Chapter 13 of this title to a public authority shall not raise any presumption concerning the credibility or veracity of a charge under Chapter 13 of this title.

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

(e) *Definitions.*

(1) The terms "actor," "bodily injury," "complainant," "consent," "domestic partner," and "effective consent" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under Chapter 13 of this title is alleged.

Chapter 14. Kidnapping, Criminal Restraint, and Blackmail.

RCC § 22E-1401. Kidnapping.

(a) *First degree kidnapping.* An actor commits first degree kidnapping when the actor:

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

(2) By means of:

(A) Causing bodily injury to the complainant or by using physical force;
(B) Making an explicit or implicit coercive threat;
(C) Deception; or
(D) With acquiescence of the complainant, when the actor is:
(i) Reckless as to the facts that:
(I) The complainant is an incapacitated individual; and
(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; or
(ii) In fact, 18 years of age or older and reckless as to the facts that:
(I) The complainant is under 16 years of age and four years younger than the actor; and
(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; and

(3) With intent to:
(A) Hold the complainant for ransom or reward;
(B) Use the complainant as a shield or hostage;
(C) Facilitate the commission of any felony or flight thereafter;
(D) Inflict death or serious bodily injury upon the complainant;
(E) Commit a sexual offense defined in Chapter 13 of this Title against the complainant;
(F) Cause any person to believe that the complainant will not be released without suffering death, serious bodily injury, or a sex offense defined in Chapter 13 of this Title;
(G) Permanently leave a person with legal authority over the complainant without custody of the complainant; or
(H) Confine or move the complainant for 72 hours or more.

(b) *Second degree kidnapping.* An actor commits second degree kidnapping when the actor:
(1) Knowingly and substantially confines or moves the complainant;
(2) By means of:
(A) Causing bodily injury to the complainant or by using physical force;
(B) Making an explicit or implicit coercive threat;
(C) Deception; or
(D) With acquiescence of the complainant, when the actor is:
(i) Reckless as to the facts that:
(I) The complainant is an incapacitated individual; and

(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; or

(ii) In fact, 18 years of age or older and reckless as to the facts that:

(I) The complainant is under 16 years of age and four years younger than the actor; and

(II) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; and

(3) With intent to:

(A) Inflict bodily injury upon the complainant;

(B) Cause any person to believe that the complainant will not be released without suffering bodily injury.

(c) *Defense.* It is a defense to prosecution under subparagraphs (a)(3)(G) and (a)(3)(H) when the complainant is, in fact, under 18 years of age and the actor is either:

(1) A close relative or a former legal guardian who had authority to control the complainant's freedom of movement who:

(A) Acts with intent to assume full responsibility for the care and supervision of the complainant; and

(B) Does not cause bodily injury or use an explicit or implicit coercive threat to cause the confinement or movement; or

(2) A person who reasonably believes they are acting at the direction of a close relative who:

(A) Acts with intent that the close relative will assume full responsibility for the care and supervision of the complainant; and

(B) Does not cause bodily injury or use an explicit or implicit coercive threat to cause the confinement or movement.

(d) *Penalties*.

(1) First degree kidnapping is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree kidnapping is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Penalty enhancements.* The penalty classification of any gradation of this offense is increased by one class when the actor commits the offense:

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

(B) By recklessly causing the confinement or movement by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon; or

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

(e) *Multiple convictions for related offenses*. Multiple convictions for first degree kidnapping or second degree kidnapping and another offense merge when arising from the same act or course of conduct and when the confinement or movement was incidental to commission of the other offense, and the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(f) *Definitions*. The terms "intent," "knowingly," "purpose," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "close relative," "coercive threat," "complainant," "dangerous weapon," "deception," "District official," "effective consent," "felony," "imitation dangerous weapon," "incapacitated individual," "law enforcement officer," "person with legal authority over the complainant," "protected person," "public safety employee," and "serious bodily injury" have the meanings specified in RCC § 22E-701.

RCC § 22E-1402. Criminal Restraint.

(a) *Offense.* An actor commits criminal restraint when the actor knowingly and substantially confines or moves the complainant:

(1) By means of:

(A) Causing bodily injury to the complainant or by using physical force;

(B) Making an explicit or implicit coercive threat;

(C) Deception; or

(2) By any means, including with acquiescence of the complainant, when the actor is:

(A) Reckless as to the facts that:

(i) The complainant is an incapacitated individual; and

(ii) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement; or

(B) In fact, 18 years of age or older and reckless as to the facts that:

(i) The complainant is under 16 years of age and four years younger than the actor; and

(ii) A person with legal authority over the complainant who is acting consistent with that authority has not given effective consent to the confinement or movement.

(b) *Defenses*.

(1) It is a defense that the complainant is, in fact, under 18 years of age, and the actor is:

(A) A close relative or a former legal guardian who had authority to control the complainant's freedom of movement who:

(i) Acts with intent to assume full responsibility for the care and supervision of the complainant; and

(ii) Does not cause bodily injury or use an explicit or implicit coercive threat to cause the confinement or movement; or

(B) A person who reasonably believes they are acting at the direction of a close relative who:

(i) Acts with intent that the close relative will assume full responsibility for the care and supervision of the complainant; and

(ii) Does not cause bodily injury or use an explicit or implicit coercive threat to cause the confinement or movement.

(2) It is a defense to prosecution under paragraph (a)(2) of this section that, in fact, the actor:

(A) Is a transportation worker who moves the complainant while in the course of the worker's official duties; or

(B) Is a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity.

(c) *Affirmative defenses.*

(1) It is an affirmative defense to prosecution under subparagraph (a)(1)(C) of this section that the actor, in fact:

(A) Lacks the complainant's effective consent solely because of deception by the actor; and

(B) Does not confine or move the complainant with intent to use bodily injury or an explicit or implicit coercive threat if the deception should fail.

(2) It is an affirmative defense to prosecution under paragraph (a)(2) that the actor, in fact, reasonably believes that a person with legal authority over the complainant would have given effective consent to the conduct constituting the offense.

(d) *Penalties*.

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

(2) *Penalty enhancements.* The penalty classification of this offense is increased by one class when the actor commits the offense:

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

(B) By recklessly causes the confinement or movement by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon; or

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

(e) *Multiple convictions for related offenses*. Multiple convictions for criminal restraint and another offense merge when arising from the same act or course of conduct and when the confinement or movement was incidental to commission of the other offense, and the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(f) *Definitions*. The terms "intent," "knowingly," "purpose," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "close relative," "coercive threat," "complainant," "dangerous weapon," "deception," "District official," "effective consent," "imitation dangerous weapon," "incapacitated individual," "law enforcement officer," "open to the general public," "person with legal authority over the complainant," "protected person," "public safety employee," and "transportation worker" have the meanings specified in RCC § 22E-701.

RCC § 22E-1403. Blackmail.

(a) *Offense.* An actor commits blackmail when the actor:

(1) Purposely causes another person to commit or refrain from any act,

(2) By communicating, explicitly or implicitly, that if the person does not commit or refrain from the act, any person will:

(A) Take or withhold action as a public official, or cause a public official to take or withhold action;

(B) Accuse another person of a crime;

(C) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:

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

(ii) Significant injury to credit or business reputation;

(D) Significantly impair the reputation of a deceased person;

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

(F) Restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns;

(G) Engage in conduct that, in fact, constitutes:

(i) An offense under Subtitle II of this title; or

(ii) A property offense as defined in subtitle III of this title.

(b) *Exclusions to liability.*

(1) An actor does not commit an offense under subparagraph (a)(2)(C) for communicating that, in fact, any person will engage in legal employment or business actions.

(2) An actor does not commit an offense under this section for causing a person to do any of the following:

(A) Transfer, use, give control over, or consent to damage property;

(B) Remain in or move to a location; or

(C) Give consent for a person to enter or remain in a location.

(c) *Affirmative defenses*.

(1) It is an affirmative defense to liability under this section committed by means of the conduct specified in subparagraphs (a)(1)(A)-(F) that:

(A) The actor, in fact, reasonably believes the threatened official action to be justified, or the accusation, secret, or assertion to be true, or that the photograph, video, or audio recording is authentic, and

(B) Engages in the conduct with the purpose of compelling the other person to:

(i) Desist or refrain from criminal or tortious activity or behavior harmful to any person's physical or mental health,

(ii) Act or refrain from acting in a manner reasonably related to the wrong that is the subject of the accusation, assertion, invocation of official action, or photograph, video or audio recording; or

(iii) Refrain from taking any action or responsibility for which the actor believes the other unqualified.

(2) It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense.

(d) *Penalties*.

(1) Blackmail is a Class 8 offense, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *No abuse of government power penalty enhancement.* A person convicted under subparagraph (a)(2)(A) of this section shall not be subject to an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct.

(e) *Definitions*. The term "act" has the meaning specified in RCC § 22E-202; the terms "purpose" and "purposely" have the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "consent," "controlled substance," "effective consent," "property," and "public official" have the meaning specified in RCC § 22E-701.

Chapter 15. Abuse and Neglect of Vulnerable Persons.

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

(a) *First degree*. An actor commits first degree criminal abuse of a minor when the actor:
  (1) Is reckless as to the fact that:
    (A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
    (B) The complainant is under 18 years of age; and
  (2) Either:
    (A) Purposely causes serious mental injury to the complainant; or
    (B) Recklessly causes serious bodily injury to the complainant.

(b) *Second degree*. An actor commits second degree criminal abuse of a minor when the actor:
  (1) Is reckless as to the fact that:
    (A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
    (B) The complainant is under 18 years of age; and
  (2) Causes significant bodily injury to the complainant.

(c) *Third degree*. An actor commits third degree criminal abuse of a minor when the actor:
  (1) Is reckless as to the fact that:
    (A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
    (B) The complainant is under 18 years of age; and
  (2) Either:
    (A) Causes serious mental injury to the complainant; or
    (B) In fact, commits a predicate offense against persons against the complainant.

(d) *Exclusion from liability.* An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation.

(e) Affirmative defense. It is an affirmative defense to liability under this subsection (b) and subsection (c) of this section that the actor, in fact:
  (1) Is not a person with legal authority over the complainant; and
  (2) Reasonably believes that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the injury or the conduct constituting the offense.

(f) *Penalties*.
  (1) First degree criminal abuse of a minor is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree criminal abuse of a minor is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Third degree criminal abuse of a minor is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions*.

(1) The terms "purposely," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "complainant," "effective consent," "person with legal authority over the complainant," "serious bodily injury," "serious mental injury," and "significant bodily injury" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "predicate offense against persons" means:

(A) Fourth Degree Assault under RCC § 22E-1202(d);
(B) Criminal Threats under RCC § 22E-1204;
(C) Offensive Physical Contact under RCC § 22E-1205;
(D) Criminal Restraint under RCC § 22E-1404;
(E) Stalking under RCC § 22E-1801; or
(F) Electronic Stalking under RCC § 22E-1802.

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

(a) *First degree*. An actor commits first degree criminal neglect of a minor when the actor:

(1) Is reckless as to the fact that:

(A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
(B) The complainant is under 18 years of age; and

(2) Created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death.

(b) *Second degree*. An actor commits second degree criminal neglect of a minor when the actor:

(1) Is reckless as to the fact that:

(A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
(B) The complainant is under 18 years of age; and

(2) Created, or failed to mitigate or remedy, a substantial risk that the complainant would experience:

(A) Significant bodily injury; or
(B) Serious mental injury.

(c) *Third degree*. An actor commits third degree criminal neglect of a minor when the actor:

(1) Is reckless as to the fact that:

(A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
(B) The complainant is under 18 years of age; and

(2) Engages in one of the following:

(A) Knowingly leaves the complainant in any place with intent to abandon the complainant; or
(B) Recklessly:

(i) Fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of the complainant; or

(ii) Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.

(d) *Exclusions from liability*.

(1) An actor does not commit an offense under this section for conduct that, in fact, constitutes surrendering a newborn child in accordance with D.C. Code § 4-1451.01 et seq.

(2) An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation.

(e) *Affirmative defense.* It is an affirmative defense to liability under subsection (b) and subparagraph (c)(2)(B) of this section that the actor, in fact:

(1) Is not a person with legal authority over the complainant; and

(2) Reasonably believes that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense.

(f) *Penalties*.

(1) First degree criminal neglect of a minor is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

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

(g) *Definitions.* The terms "intent," "knowingly," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "controlled substance," "effective consent," "person with legal authority over the complainant," "serious bodily injury," "serious mental injury," and "significant bodily injury" have the meanings specified in RCC § 22E-701.

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

(a) *First degree*. An actor commits first degree criminal abuse of a vulnerable adult or elderly person when the actor:

(1) Is reckless as to the fact that:

(A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
(B) The complainant is a vulnerable adult or elderly person; and

(2) Either:
(A) Purposely causes serious mental injury to the complainant; or
(B) Recklessly causes serious bodily injury to the complainant.

(b) *Second degree*. An actor commits second degree criminal abuse of a vulnerable adult or elderly person when the actor:
(1) Is reckless as to the fact that:
(A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
(B) The complainant is a vulnerable adult or elderly person; and
(2) Causes significant bodily injury to the complainant.

(c) *Third degree.* An actor commits third degree criminal abuse of a vulnerable adult or elderly person when the actor:
(1) Is reckless as to the fact that:
(A) The actor has a responsibility under civil law for the health, welfare, or supervision of the complainant; and
(B) The complainant is a vulnerable adult or elderly person; and
(2) Either:
(A) Causes serious mental injury to the complainant; or
(B) In fact, commits a predicate offense against persons against the complainant.

(d) *Exclusion from liability.* An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation.

(e) *Defenses.*
(1) It is a defense to liability under subparagraph (a)(2)(B) of this section that, in fact:
(A) The injury is caused by:
(i) A lawful cosmetic or medical procedure; or
(ii) An omission;
(B) The actor is not a person with legal authority over the complainant; and
(C) The actor reasonably believes that the complainant, or a person with legal authority over the complainant acting consistent with that authority, gives effective consent to the actor to cause the injury or engage in the omission that causes the injury.
(2) It is a defense to liability under subsection (b) and subsection (c) of this section that, in fact:
(A) The actor is not a person with legal authority over the complainant; and
(B) The actor reasonably believes that the complainant, or a person with legal authority over the complainant acting consistent with that authority, gives effective consent to the actor to:
(i) Cause the injury;

(ii) Engage in the omission that causes the injury; or

(iii) Engage in a lawful sport, occupation, or other concerted activity, and the actor's infliction of the injury is a reasonably foreseeable hazard of that activity.

(f) *Penalties*.

(1) First degree criminal abuse of a vulnerable adult or elderly person is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree criminal abuse of a vulnerable adult or elderly person is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree criminal abuse of a vulnerable adult or elderly person is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.*

(1) The term "omission" has the meaning specified in RCC § 22E-202; the terms "purposely," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "complainant," "effective consent," "elderly person," "person with legal authority over the complainant," "serious bodily injury," "serious mental injury," "significant bodily injury," and "vulnerable adult" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "predicate offense against persons" means:

(A) Fourth Degree Assault under RCC § 22E-1202(d);

(B) Criminal Threats under RCC § 22E-1204;

(C) Offensive Physical Contact under RCC § 22E-1205;

(D) Criminal Restraint under RCC § 22E-1404;

(E) Stalking under RCC § 22E-1801; or

(F) Electronic Stalking under RCC § 22E-1802.

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

(a) *First degree*. An actor commits first degree criminal neglect of a vulnerable adult or elderly person when the actor:

(1) Is reckless as to the fact that:

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

(B) The complainant is a vulnerable adult or elderly person; and

(2) Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death.

(b) *Second degree*. An actor commits second degree criminal neglect of a vulnerable adult or elderly person when the actor:

(1) Is reckless as to the fact that:

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

(B) The complainant is a vulnerable adult or elderly person; and

(2) Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience:

(A) Significant bodily injury; or

(B) Serious mental injury.

(c) *Third degree*. An actor commits third degree criminal neglect of a vulnerable adult or elderly person when the actor:

(1) Is reckless as to the fact that:

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

(B) The complainant is a vulnerable adult or elderly person; and

(2) Either:

(A) Fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of the complainant; or

(B) Creates, or fails to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.

(d) *Exclusion from liability.* An actor does not commit an offense under this section when, in fact, the actor's conduct is specifically permitted by a District statute or regulation.

(e) *Defenses.*

(1) It is a defense to liability under subsection (a) of this section that, in fact:

(A) The risk is caused by:

(i) A lawful cosmetic or medical procedure; or

(ii) An omission;

(B) The actor is not a person with legal authority over the complainant; and

(C) The actor reasonably believes that the complainant, or a person with legal authority over the complainant acting consistent with that authority, gives effective consent to the actor to engage in the conduct that constitutes the offense.

(2) It is a defense to liability under subsection (b) and subsection (c) of this section that, in fact:

(A) The actor is not a person with legal authority over the complainant; and

(B) The actor reasonably believes that the complainant, or a person with legal authority over the complainant acting consistent with that authority, gives effective consent to the actor to:

(i) Engage in the conduct that constitutes the offense; or

(ii) Engage in a lawful sport, occupation, or other concerted activity, and the actor's creation, or failure to mitigate

or remedy, the risk is a reasonably foreseeable hazard of that activity.

(f) *Penalties*.
  (1) First degree criminal neglect of a vulnerable adult or elderly person is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree criminal neglect of a vulnerable adult or elderly person is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Third degree criminal neglect of a vulnerable adult or elderly person is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* The term "omission" has the meaning specified in RCC § 22E-202; the term "reckless" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "controlled substance," "effective consent," "elderly person," "person with legal authority over the complainant," "serious bodily injury," "serious mental injury," "significant bodily injury," and "vulnerable adult" have the meanings specified in RCC § 22E-701.

Chapter 16. Human Trafficking.

RCC § 22E-1601. Forced Labor.

(a) *Offense.* An actor commits forced labor when the actor:
  (1) Knowingly causes a person to provide services;
  (2) By means of debt bondage or making an explicit or implicit coercive threat.

(b) *Exclusions from liability.* An actor does not commit an offense under this section for, in fact, communicating that any person will engage in legal employment actions, such as threats of termination, demotion, reduced pay or benefits, or scheduling changes, in order to compel an employee to provide labor or services.

(c) *Penalties.*
  (1) Forced labor is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty enhancements*. The penalty classification of this offense is increased by one class when the actor commits the offense:
    (A) Reckless as to the fact that the complainant is under 18 years of age; or
    (B) By holding the complainant, or causing the complainant to provide services, for more than 180 days.

(d) *Definitions*. The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "coercive threat,"

"complainant," "debt bondage," "labor," and "services" have the meanings specified in RCC § 22E-701.

RCC § 22E-1602. Forced Commercial Sex.

(a) *Offense.* An actor commits forced commercial sex when the actor:
  (1) Knowingly causes the complainant to engage in or submit to a commercial sex act with or for another person;
  (2) In one or more of the following ways:
    (A) By using physical force that causes bodily injury to, overcomes, or restrains any person;
    (B) By making a coercive threat, explicit or implicit;
    (C) By debt bondage; or
    (D) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:
      (i) With intent to impair the complainant's ability to express unwillingness to engage in the commercial sex act; and
      (ii) In fact, the drug, intoxicant, or other substance renders the complainant:
        (I) Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness;
        (II) Substantially incapable of appraising the nature of the commercial sex act; or
        (III) Substantially incapable of communicating unwillingness to engage in the commercial sex act.

(b) *Penalties.*
  (1) Forced commercial sex is a Class 4 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty enhancements.* The penalty classification of this offense is increased by one class when the actor commits the offense:
    (A) Reckless as to the fact that the complainant is under 18 years of age, or, in fact, the complainant is under 12 years of age; or
    (B) By recklessly holding the complainant, or causing the complainant to provide commercial sex acts, for a total of more than 180 days.

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

RCC § 22E-1603. Trafficking in Labor.

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

(b) *Penalties.*
  (1) Trafficking in labor is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty enhancements.* The penalty classification of this offense is increased by one class when the actor commits the offense:
    (A) Reckless as to the fact that the complainant is under 18 years of age; or
    (B) By holding the complainant, or causing the complainant to provide services, for a total of more than 180 days.

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

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

(a) *Offense*. An actor commits trafficking in forced commercial sex when the actor:
  (1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant;
  (2) With intent that, as a result, the complainant will be caused to engage in or submit to a commercial sex act with or for another person in one or more of the following ways:
    (A) By physical force that causes bodily injury to, overcomes, or restrains any person;
    (B) By an explicit or implicit coercive threat;
    (C) By debt bondage; or
    (D) By a drug, intoxicant, or other substance, administered to the complainant without the complainant's effective consent.

(b) *Penalties.*
  (1) Trafficking in forced commercial sex is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty enhancements.* The penalty classification of this offense is increased by one class when the actor commits the offense:
    (A) Reckless as to the fact that the complainant is under 18 years of age, or, in fact, the complainant is under 12 years of age; or
    (B) By recklessly holding the complainant, or causing the complainant to provide commercial sex acts, for a total of more than 180 days.

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

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.

(a) *Offense*. An actor commits sex trafficking of a minor or adult incapable of consenting when the actor:
  (1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means the complainant;
  (2) With intent that the complainant, as a result, will be caused to engage in or submit to a commercial sex act with or for another person; and
  (3) Reckless as to the fact that the complainant is:
    (A) Under 18 years of age;
    (B) Incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or
    (C) Incapable of communicating willingness or unwillingness to engage in the commercial sex act.

(b) *Penalties*.
  (1) Sex trafficking of a minor or adult incapable of consenting is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty enhancements.* The penalty classification of this offense is increased by one class when the actor commits the offense and recklessly holds the complainant, or causes the complainant to provide commercial sex acts, for a total of more than 180 days.

(c) *Definitions.* The terms "intent," "knowingly," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; and the terms "actor," "commercial sex act," "complainant," and "consent" have the meanings specified in RCC § 22E-701.

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

(a) *First degree.* An actor commits first degree benefiting from human trafficking when the actor:
  (1) Knowingly obtains any financial benefit or property;
  (2) By participating in a group of 2 or more persons;
  (3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes forced commercial sex under RCC § 22E-1602, trafficking in forced commercial sex under RCC § 22E-1604, or sex

trafficking of a minor or adult incapable of consenting under RCC § 22E-1605; and

(4) The actor's participation in the group furthers, in any manner, the conduct that constitutes a human trafficking offense.

(b) *Second degree.* An actor commits second degree benefiting from human trafficking when the actor:

(1) Knowingly obtains any financial benefit or property;

(2) By participation in a group of 2 or more persons;

(3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes forced labor under RCC § 22E-1601 or trafficking in labor under RCC § 22E-1603; and

(4) In fact, the actor's participation in the group furthers, in any manner, the conduct that constitutes a human trafficking offense.

(c) *Penalties.*

(1) First degree benefitting from human trafficking is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree benefitting from human trafficking is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "labor," and "property" have the meanings specified in RCC § 22E-701.

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

(a) *First degree.* An actor commits first degree misuse of documents in furtherance of human trafficking when the actor:

(1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of any person;

(2) With intent to restrict the person's liberty to move or travel in order to maintain performance of a commercial sex act by the person.

(b) *Second degree.* An actor commits second degree misuse of documents in furtherance of human trafficking when the actor:

(1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of any person;

(2) With intent to restrict the person's liberty to move or travel in order to maintain the services of the person.

(c) *Penalties.*

(1) First degree misuse of documents in furtherance of human trafficking is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree misuse of documents in furtherance of human trafficking is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

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

(a) *First degree.* An actor commits first degree commercial sex with a trafficked person when the actor:
  (1) Knowingly engages in a commercial sex act;
  (2) When a coercive threat, explicit or implicit, or debt bondage by another person causes the complainant to submit to or engage in the commercial sex act;
  (3) Reckless as to the fact that the complainant is under 18 years of age, or, in fact, the complainant is under 12 years of age.

(b) *Second degree.* An actor commits second degree commercial sex with a trafficked person when the actor:
  (1) Knowingly engages in a commercial sex act;
  (2) When either:
    (A) An explicit or implicit coercive threat, or debt bondage by another person causes the complainant to submit to or engage in the commercial sex act; or
    (B) The complainant is recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act; and:
      (i) The actor is reckless that the complainant is under 18 years of age;
      (ii) Incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or
      (iii) Incapable of communicating willingness or unwillingness to engage in the commercial sex act; or
      (iv) The complainant is, in fact, under 12 years of age.

(c) *Penalties.*
  (1) First degree commercial sex with a trafficked person is a Class 3 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree commercial sex with a trafficked person is a Class 4 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

RCC § 22E-1609. Forfeiture.

(a) *Forfeiture penalty.* In imposing sentence on any person convicted of a violation of this chapter, the court may order, in addition to any sentence imposed, that the person shall forfeit to the District of Columbia:
(1) Any interest in any property, real or personal, that was used or planned to be used to commit or to facilitate the commission of the violation; and
(2) Any property, real or personal, constituting or derived from any proceeds that the person obtained, directly or indirectly, as a result of the violation.

(b) *Property subject to forfeiture.* The following shall be subject to forfeiture to the District of Columbia and no property right shall exist in them:
(1) Any property, real or personal, that was used or planned to be used to commit or to facilitate the commission of any violation of this chapter; and
(2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

(c) *Definitions.* The term "property" has the meaning specified in RCC § 22E-701.

RCC § 22E-1610. Reputation or Opinion Evidence.

In a criminal case in which a person is accused of forced commercial sex under RCC § 22E-1602; trafficking in forced commercial sex under RCC § 22E-1604; sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605; or benefitting from human trafficking under RCC § 22E-1606; reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. Evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence also is not admissible, unless such evidence other than reputation or opinion evidence is admitted in accordance with RCC § 22E-1311 (b) and is constitutionally required to be admitted.

RCC § 22E-1611. Civil Action.

(a) An individual who is a victim of an offense prohibited by RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, or 22E-1608 may bring a civil action in the Superior Court of the District of

Columbia. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages shall be awarded on proof of actual damages where a defendant's acts were willful and malicious.

(b) Any action for recovery of damages arising out of an offense in this chapter may not be brought after 5 years from when the victim knew, or reasonably should have been aware, of any act constituting an offense in this chapter, or if the offense occurred while the victim was less than 35 years of age, the date that the victim turns 40 years of age, whichever is later.

(c) If a person entitled to sue is imprisoned, insane, or similarly incapacitated at the time the cause of action accrues, so that it is impossible or impracticable for the person to bring an action, then the time of the incapacity is not part of the time limited for the commencement of the action.

(d) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action.

(e) *Definitions.* The term "act" has the meaning specified in RCC § 22E-202.

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

(a) *Accomplice liability for victims of trafficking*. A person shall not be charged as an accomplice to the commission of an offense under this chapter if, prior to commission of the offense, the person was themself a victim of an offense under this chapter by the principal within 3 years prior to the conduct by the principal that constitutes the offense.

(b) *Conspiracy liability for victims of trafficking*. A person shall not be charged with conspiracy to commit an offense under this chapter if, prior to the conspiracy, the person was themself a victim of an offense under this chapter by a party to the conspiracy within 3 years prior to the formation of the conspiracy.

RCC § 22E-1613. Civil Forfeiture.

(a) *Property subject to forfeiture.* The following are subject to civil forfeiture:
  (1) In fact, all conveyances, including aircraft, vehicles or vessels, which are possessed with intent to be used, or are, in fact, used, to facilitate the commission of an offense under this chapter; and
  (2) In fact, all money, coins, and currency which are possessed with intent to be used, or are, in fact, used, to facilitate the commission of an offense under this chapter.

(b) *Requirements for forfeiture.* All seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

(c) *Definitions.* The term "intent" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "possessed" has the meaning specified in RCC § 22E-701.

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

RCC § 22E-1801. Stalking.

(a) *Offense.* An actor commits stalking when the actor:
  (1) Purposely engages in a course of conduct directed at a complainant that consists of 2 or more separate occasions of any of the following:
    (A) Physically following or physically monitoring the complainant;
    (B) Falsely personating the complainant;
    (C) Contacting the complainant, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, negligent as to the fact that the contact is without the complainant's effective consent; or
    (D) In fact, committing, soliciting, or attempting:
      (i) Criminal Threats under RCC § 22E-1204;
      (ii) Theft under RCC § 22E-2101;
      (iii) Identity Theft under RCC § 22E-2205;
      (iv) Arson under RCC § 22E-2501;
      (v) Criminal Damage to Property under RCC § 22E-2503;
      (vi) Criminal Graffiti under RCC § 22E-2504;
      (vii) Trespass under RCC § 22E-2601;
      (viii) Breach of Home Privacy under RCC § 22E-4205; or
      (ix) Indecent Exposure under RCC § 22E-4206;
  (2) Negligent as to the fact that the course of conduct is without the complainant's effective consent;
  (3) Either:
    (A) With intent to cause the complainant to:
      (i) Fear for the complainant's safety or the safety of another person; or
      (ii) Suffer significant emotional distress; or
    (B) Negligently causing the complainant to:
      (i) Fear for the complainant's safety or the safety of another person; or
      (ii) Suffer significant emotional distress.

(b) *Exclusions from liability*.
  (1) An actor does not commit an offense under subparagraph (a)(1)(C) of this section when, in fact, the actor is expressing an opinion on a political or public matter, and the expression is directed to a complainant who is a law enforcement officer, District official, candidate for elected office, or employee of a business that serves the public, while the complainant is involved in their official duties.

(2) An actor does not commit an offense under this section when, in fact, the actor is:
(A) Authorized to engage in the conduct by a court order or District statute, regulation, rule, or license; or
(B) Carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty.

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

(d) *Penalties*.
(1) Stalking is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) *Penalty enhancements*. The penalty classification of this offense is increased by one class when the actor, in fact:
(A) Violates a court order or condition of release prohibiting or restricting contact with the complainant;
(B) Has one or more prior convictions within 10 years for:
(i) Stalking under RCC § 22E-1801 or a comparable offense; or
(ii) Electronic Stalking under RCC § 22E-1802 or a comparable offense;
(C) Causes more than $5,000 in financial injury; or
(D) Is 18 years of age or older, is at least 4 years older than the complainant, and is reckless as to the fact that the complainant is under 18 years of age.
(3) *No repeat offender enhancement.* A person shall not be subject to both a penalty enhancement under subparagraph (d)(2)(B) of this section and a repeat offender penalty enhancement in RCC § 22E-606 for the same conduct.

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

RCC § 22E-1802. Electronic Stalking.

(a) *Offense.* An actor commits electronic stalking when the actor:
(1) Purposely engages in a course of conduct directed at a complainant that consists of 2 or more separate occasions of:

(A) Creating an image or an audio recording of the complainant, other than a derivative image or audio recording; or

(B) Accessing monitoring equipment or software, on property of another, that discloses the complainant's location;

(2) Negligent as to the fact that the course of conduct is without the complainant's effective consent;

(3) Either:

(A) With intent to cause the complainant to:

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

(ii) Suffer significant emotional distress; or

(B) Negligently causing the complainant to:

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

(ii) Suffer significant emotional distress.

(b) *Exclusions from liability*.

(1) An actor does not commit an offense under subparagraph (a)(1)(A) of this section when, in fact:

(A) The actor is a party to the communication on the audio recording; or

(B) One of the parties to the communication on the audio recording gives effective consent to the conduct.

(2) An actor does not commit an offense under this section when, in fact, the actor is:

(A) Authorized to engage in the conduct by a court order or District statute, regulation, rule, or license; or

(B) Carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty.

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

(d) *Penalties.*

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

(2) *Penalty enhancements*. The penalty classification of this offense is increased by one class when the actor, in fact:

(A) Violates a court order or condition of release prohibiting or restricting contact with the complainant;

(B) Has one or more prior convictions within 10 years for:

(i) Stalking under RCC § 22E-1801 or a comparable offense; or

(ii) Electronic Stalking under RCC § 22E-1802 or a comparable offense;

(C) Causes more than $5,000 in financial injury; or

(D) Is 18 years of age or older, is at least 4 years older than the complainant, and is reckless as to the fact that the complainant is under 18 years of age.

(3) *No repeat offender enhancement.* A person shall not be subject to both a penalty enhancement under subparagraph (d)(2)(B) of this section and a repeat offender penalty enhancement in RCC § 22E-606 for the same conduct.

(e) *Definitions*.

(1) The terms "intent," "negligent," "negligently," "purpose," "purposely," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "comparable offense," "complainant," "effective consent," "financial injury," "image," "monitoring equipment or software," "prior conviction," "property of another," and "significant emotional distress" have the meanings specified in RCC § 22E-701; and

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

RCC § 22E-1803. Voyeurism.

(a) *First degree*. An actor commits first degree voyeurism when the actor:

(1) Knowingly creates:

(A) An image, other than a derivative image, of the complainant's nude or undergarment-clad genitals, pubic area, anus, buttocks, or female breast below the top of the areola;

(B) An image or audio recording, other than a derivative image or audio recording, of the complainant engaging in or submitting to a sexual act or masturbation; or

(C) An image, other than a derivative image, of the complainant urinating or defecating;

(2) Without the complainant's effective consent; and

(3) In fact, the complainant has a reasonable expectation of privacy under the circumstances.

(b) *Second degree.* An actor commits second degree voyeurism when the actor:

(1) Knowingly observes directly:

(A) The complainant's nude or undergarment-clad genitals, anus, pubic area, buttocks, or female breast below the top of the areola;

(B) The complainant engaging in or submitting to a sexual act or masturbation; or

(C) The complainant urinating or defecating.

(2) Without the complainant's effective consent; and

(3) In fact, the complainant has a reasonable expectation of privacy under the circumstances.

(c) *Penalties.*

(1) First degree voyeurism is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree voyeurism is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) *Penalty enhancements*. The penalty classification of any gradation of this offense is increased by one class when the actor is reckless as to the fact that the complainant is under 18 years of age.

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

RCC § 22E-1804. Unauthorized Disclosure of a Sexual Recording.

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

(b) *Exclusions from liability.*
(1) An actor does not commit an offense under this section when, in fact, the actor is a licensee under the Communications Act of 1934 (47

U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.

(2) An actor does not commit an offense under this section when, in fact, the actor is an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.

(c) *Affirmative defense.* It is an affirmative defense to liability under this section, that the actor:

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

(2) Distributed the image or audio recording to a person whom the actor reasonably believes is:

(A) A law enforcement officer, prosecutor, or attorney; or

(B) A teacher, school counselor, school administrator, or a person with a responsibility under civil law for the health, welfare, or supervision of a person who is:

(i) Depicted in the image or audio recording; or

(ii) Involved in the creation of the image or audio recording.

(d) *Penalties.*

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

(2) *Penalty enhancements*. The penalty classification of this offense is increased by two classes when the actor knowingly:

(A) Distributes or displays the image or audio recording to 6 or more persons other than the complainant; or

(B) Makes the image or audio recording publicly accessible on an electronic platform to a user other than the complainant or actor.

(e) *Definitions.*

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

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

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

(a) *Offense*. An actor commits distribution of an obscene image when the actor:

(1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:

(A) Sexual act;
(B) Sadomasochistic abuse;
(C) Masturbation;
(D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
(E) Sexual contact; or
(F) Sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering;

(2) Without the complainant's effective consent; and
(3) Reckless as to the fact that the image is obscene.

(b) *Exclusions from liability.*

(1) An actor does not commit an offense under this section when, in fact, the actor is a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.
(2) An actor does not commit an offense under this section when, in fact, the actor is an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.
(3) An actor does not commit an offense under this section when, in fact, the actor distributes or displays an image to a complainant in a location open to the general public or in an electronic forum, unless the actor:
(A) Knowingly distributes or displays the image directly to the complainant; or
(B) Purposely distributes or displays the image to the complainant.
(4) An actor does not commit an offense under this section when, in fact, the actor reasonably believes that they are distributing the image or audio recording to:
(A) A person who is depicted in the image or audio recording;
(B) A person who was involved in the creation or distribution of the image or audio recording; or
(C) A person with a responsibility under civil law for the health, welfare, or supervision of a person who is:
(i) Depicted in the image or audio recording; or
(ii) Involved in the creation of the image or audio recording.

(c) *Affirmative defenses.*

(1) It is an affirmative defense to liability under this section that the actor, in fact:
(A) Is an employee of a school, museum, library, movie theater, or other venue;
(B) Is acting within the reasonable scope of that role; and
(C) Has no control over the selection of the image.
(2) It is an affirmative defense to liability under this section, that the actor:

(A) With intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney;
(B) Distributed the image or audio recording to a person whom the actor reasonably believes is:
(i) A law enforcement officer, prosecutor, or attorney; or
(ii) A teacher, school counselor, school administrator.

(d) *Penalties.* Distribution of an obscene image is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(e) *Definitions.*
(1) The terms "intent," "knowingly," "purposely," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "complainant," "effective consent," "image," "law enforcement officer," "movie theater," "obscene," "open to the general public," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701; and
(2) In this section, the term "licensee" has the meaning specified in 47 U.S.C. § 153(30).

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

(a) *Offense*. An actor commits distribution of an obscene image to a minor when the actor:
(1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:
(A) Sexual act;
(B) Sadomasochistic abuse;
(C) Masturbation;
(D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
(E) Sexual contact; or
(F) Sexual or sexualized display of the breast below the top of the areola or buttocks, when there is less than a full opaque covering;
(2) Reckless as to the fact that:
(A) The image is obscene; and
(B) The complainant is under 16 years of age; and
(3) In fact, the actor is 18 years of age or older and at least 4 years older than the complainant.
(b) *Exclusions from liability.*
(1) An actor does not commit an offense under this section when, in fact, the actor is a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.

(2) An actor does not commit an offense under this section when, in fact, the actor is an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.

(3) An actor does not commit an offense under this section when, in fact, the actor distributes or displays an image to a complainant in a location open to the general public or in an electronic forum, unless the actor:

(A) Knowingly distributes or displays the image directly to the complainant; or

(B) Purposely distributes or displays the image to the complainant.

(4) An actor does not commit an offense under this section when, in fact, the actor reasonably believes that they are distributing the image or audio recording to:

(A) A person who is depicted in the image or audio recording;

(B) A person who was involved in the creation or distribution of the image or audio recording; or

(C) A person with a responsibility under civil law for the health, welfare, or supervision of a person who is:

(i) Depicted in the image or audio recording; or

(ii) Involved in the creation of the image or audio recording.

(c) *Affirmative defenses.*

(1) It is an affirmative defense to liability under this section that the actor in fact:

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

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

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

(2) It is an affirmative defense to liability under this section that, in fact:

(A) The actor:

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

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

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

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

(e) *Definitions.*

(1) The terms "knowingly," "purposely," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor,"

"complainant," "domestic partnership," "effective consent," "image," "movie theater," "obscene," "open to the general public," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701; and

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

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

(a) *First degree*. An actor commits first degree creating or trafficking an obscene image of a minor when the actor:

(1) Knowingly:

(A) Creates an image, other than a derivative image, by recording, photographing, or filming the complainant, or produces or directs the creation of such an image;

(B) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image;

(C) Displays, distributes, or manufactures with intent to distribute an image;

(D) Makes an image accessible to another user on an electronic platform; or

(E) Sells or advertises an image;

(2) Is reckless as to the fact that the image depicts, or will depict, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:

(A) A sexual act or simulated sexual act;

(B) Sadomasochistic abuse or simulated sadomasochistic abuse;

(C) Masturbation or simulated masturbation; or

(D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second degree*. An actor commits second degree creating or trafficking an obscene image of a minor when the actor:

(1) Knowingly:

(A) Creates an image, other than a derivative image, by recording, photographing, or filming the complainant, or produces or directs the creation of such an image;

(B) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image;

(C) Displays, distributes, or manufactures with intent to distribute an image;

(D) Makes an image accessible to another user on an electronic platform; or

(E) Sells or advertises an image;

(2) Is reckless as to the fact that the image depicts, or will depict, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:

(A) An obscene sexual contact; or

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

(c) *Exclusions from liability.*

(1) An actor does not commit an offense under this section when, in fact, the actor is a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.

(2) An actor does not commit an offense under this section when, in fact, the actor is an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.

(d) *Affirmative defenses.*

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

(2) It is an affirmative defense to liability under subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D) of this section that, in fact:

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

(B) Either:

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

(ii) The actor reasonably believes that every person under 18 years of age who is, or who will be, depicted in the image, gives effective consent to the actor to engage in the conduct constituting the offense.

(3) It is an affirmative defense to liability under subparagraphs (a)(1)(A), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(C), and (b)(1)(D) of this section that, in fact:

(A) The actor is at least 18 years of age;

(B) Either:

(i) The actor is married to, or in a domestic partnership with, the complainant; or

(ii) The actor is in a romantic, dating, or sexual relationship with the complainant, and:

(I) When the complainant is under 16 years of age, the actor is less than 4 years older than the complainant; and

(II) When the complainant is under 18 years of age and the actor is at least 4 years older than the complainant, the actor is not in a position of trust with or authority over the complainant; and

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

(D) The actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense; and

(E) Under subparagraphs (a)(1)(C), (b)(1)(C), (a)(1)(D), and (b)(1)(D), the actor reasonably believes that the recipient, the planned recipient, or the user of the electronic platform is the complainant.

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

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

(B) In fact, distributes or displays the image to a person whom the actor reasonably believes is:

(i) A law enforcement officer, prosecutor, or attorney; or

(ii) A teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of a person that the actor reasonably believes to be depicted in the image or involved in the creation of the image.

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

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

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

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

(e) *Penalties.*

(1) First degree creating or trafficking an obscene image of a minor is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree creating or trafficking an obscene image of a minor is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.*

(1) The terms "intent," "knowingly," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "complainant," "domestic partnership," "effective consent," "image," "law enforcement officer," "movie theater," "obscene," "position of trust with or authority over," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701; and

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

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

(a) *First degree*. An actor commits first degree possession of an obscene image of a minor when the actor:

(1) Knowingly possesses an image;

(2) Is reckless as to the fact that the image depicts, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:

(A) A sexual act or simulated sexual act;

(B) Sadomasochistic abuse or simulated sadomasochistic abuse;

(C) Masturbation or simulated masturbation; or

(D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second degree*. An actor commits second degree possession of an obscene image of a minor when the actor:

(1) Knowingly possesses an image;

(2) Is reckless as to the fact that the image depicts, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:

(A) An obscene sexual contact; or

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

(c) *Exclusions from liability.*

(1) An actor does not commit an offense under this section when, in fact, the actor is a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.

(2) An actor does not commit an offense under this section when, in fact, the actor is an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.

(d) *Affirmative defenses.*

(1) It is an affirmative defense to liability under subsection (a) of this section that, in fact, the image has serious literary, artistic, political, or scientific value, when considered as a whole.
(2) It is an affirmative defense to liability under this section that, in fact:
    (A) The actor is under 18 years of age; and
    (B) Either:
        (i) The actor is the only person under 18 years of age who is depicted in the image; or
        (ii) The actor reasonably believes that every person under 18 years of age who is depicted in the image gives effective consent to the actor to engage in the conduct constituting the offense.
(3) It is an affirmative defense to liability under this section that, in fact:
    (A) The actor is at least 18 years of age;
    (B) Either:
        (i) The actor is married to, or in a domestic partnership with, the complainant; or
        (ii) The actor is in a romantic, dating, or sexual relationship with the complainant, and:
            (I) When the complainant is under 16 years of age, the actor is less than 4 years older than the complainant; and
            (II) When the complainant is under 18 years of age and the actor is at least 4 years older than the complainant, the actor is not in a position of trust with or authority over the complainant; and
    (C) The complainant is the only person who is depicted in the image, or the actor and the complainant are the only persons who are depicted in the image; and
    (D) The actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense.
(4) It is an affirmative defense to liability under this section that the actor:
    (A) With intent, exclusively and in good faith, to report possible illegal conduct or to seek legal counsel from any attorney;
    (B) In fact, promptly contacts a person whom the actor reasonably believes is:
        (i) A law enforcement officer, prosecutor, or attorney; or
        (ii) A teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believes to be depicted in the image; and
    (C) Either:

(i) Promptly distributes the image to one of the individuals specified in sub-subparagraph (d)(3)(B)(i) or sub-subparagraph (d)(3)(B)(ii) of this section, without making or retaining a copy; or

(ii) Affords a law enforcement officer access to the image.

(5) It is an affirmative defense to liability under this section that the actor, in fact:

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

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

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

(6) It is an affirmative defense to liability under this section that the actor possesses the image:

(A) With intent, exclusively and in good faith, to permanently dispose of the item; and

(B) In fact, the actor does not possess the item longer than is reasonably necessary to permanently dispose of the item.

(e) *Penalties.*

(1) First degree possession of an obscene image of a minor is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree possession of an obscene image of a minor is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.*

(1) The terms "intent," "knowingly," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "complainant," "domestic partnership," "effective consent," "image," "law enforcement officer," "movie theater," "obscene," "position of trust with or authority over," "possess," "possesses," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701; and

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

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

(a) *First degree*. An actor commits first degree arranging a live sexual performance of a minor when the actor:

(1) Knowingly:

(A) Creates, produces, or directs a live performance;

(B) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the creation of a live performance; or

(C) Sells admission to or advertises a live performance;

(2) Reckless as to the fact that the live performance depicts, or will depict, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:

(A) A sexual act or simulated sexual act;

(B) Sadomasochistic abuse or simulated sadomasochistic abuse;

(C) Masturbation or simulated masturbation; or

(D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second degree*. An actor commits second degree arranging a live sexual performance of a minor when the actor:

(1) Knowingly:

(A) Creates, produces, or directs a live performance;

(B) As a person with a responsibility under civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the creation of a live performance; or

(C) Sells admission to or advertises a live performance.

(2) Reckless as to the fact that the live performance depicts, or will depict, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:

(A) An obscene sexual contact; or

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

(c) *Affirmative defenses.*

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

(2) It is an affirmative defense to liability under subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B) of this section that, in fact:

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

(B) Either:

(i) The actor is the only person under 18 years of age who is, or who will be, depicted in the live performance; or

(ii) The actor reasonably believes that every person under 18 years of age who is, or who will be, depicted in the live performance, gives effective consent to the actor to engage in the conduct constituting the offense.

(3) It is an affirmative defense to liability under subparagraphs (a)(1)(A) and (b)(1)(A) of this section, that, in fact:

(A) The actor is at least 18 years of age:

(B) Either:

(i) The actor is married to, or in a domestic partnership with, the complainant; or

(ii) The actor is in a romantic, dating, or sexual relationship with the complainant, and;

(I) When the complainant is under 16 years of age, the actor is less than 4 years older than the complainant; and

(II) When the complainant is under 18 years of age and the actor is at least 4 years older than the complainant, the actor is not in a position of trust with or authority over the complainant; and

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

(D) The actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense; and

(E) The actor reasonably believes that the actor is the only audience for the live performance, other than the complainant.

(4) It is an affirmative defense to subparagraphs (a)(1)(C) and (b)(1)(C) that the actor, in fact:

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

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

(C) Has no control over the creation or selection of the live performance; and

(D) Does not record, photograph, or film the live performance.

(d) *Penalties.*

(1) First degree arranging a live sexual performance of a minor is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree arranging a live sexual performance of a minor is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "domestic partnership," "effective consent," "live performance," "movie theater," "obscene," "position of trust with or authority over," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

(a) *First degree.* An actor commits attending or viewing a live sexual performance of a minor when the actor:

(1) Knowingly attends or views a live performance or views a live broadcast;
(2) Reckless as to the fact that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:
(A) A sexual act or simulated sexual act;
(B) Sadomasochistic abuse or simulated sadomasochistic abuse;
(C) Masturbation or simulated masturbation; or
(D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second degree*. An actor commits attending or viewing a live sexual performance of a minor when the actor:
(1) Knowingly attends or views a live performance or views a live broadcast;
(2) Reckless as to the fact that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under 18 years of age engaging in or submitting to:
(A) An obscene sexual contact; or
(B) An obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.

(c) *Affirmative defenses.*
(1) It is an affirmative defense to liability under this section that, in fact, the live performance or live broadcast has serious literary, artistic, political, or scientific value, when considered as a whole.
(2) It is an affirmative defense to liability under this section that, in fact:
(A) The actor is under 18 years of age; and
(B) Either:
(i) The actor is the only person under 18 years of age who is depicted in the live performance or live broadcast; or
(ii) The actor reasonably believes that every person under 18 years of age who is depicted in the live performance or live broadcast gives effective consent to the actor to engage in the conduct constituting the offense.
(3) It is an affirmative defense to liability under this section that, in fact:
(A) The actor is at least 18 years of age;
(B) Either:
(i) The actor is married to, or in a domestic partnership with, the complainant; or
(ii) The actor is in a romantic, dating, or sexual relationship with the complainant, and;
(I) When the complainant is under 16 years of age, the actor is less than 4 years older than the complainant; and
(II) When the complainant is under 18 years of age and the actor is at least 4 years older than the

complainant, the actor is not in a position of trust with or authority over the complainant; and

(C) The complainant is the only person that is depicted in the live performance or live broadcast, or the actor and the complainant are the only persons that are depicted in the live performance or live broadcast;

(D) The actor reasonably believes that the complainant gives effective consent to the actor to engage in the conduct constituting the offense; and

(E) The actor reasonably believes that the actor is the only audience for the live performance or live broadcast, other than the complainant.

(4) It is an affirmative defense to liability under this section that the actor, in fact:

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

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

(C) Has no control over the creation or selection of the live performance or live broadcast; and

(D) Does not record, photograph, or film the live performance or live broadcast.

(d) *Penalties.*

(1) First degree attending or viewing a live sexual performance of a minor is a Class 8, crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree attending or viewing a live sexual performance of a minor is a Class 9, crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "domestic partnership," "effective consent," "live broadcast," "live performance," "movie theater," "obscene," "position of trust with or authority over," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701.

SUBTITLE III. PROPERTY OFFENSES.

Chapter 20. Property Offense Subtitle Provisions.

RCC § 22E-2001. Aggregation to Determine Property Offense Grades.

(a) *Requirements for aggregation.* When a single scheme or systematic course of conduct could give rise to multiple charges of an offense listed in subsection (b) of this section, the government instead may bring one charge and

aggregate the values, amounts of damage, or quantities of the property involved to determine the grade of the offense.

(b) *Offenses subject to aggregation.* Aggregation under subsection (a) of this section may be applied to the following offenses:
  (1) Theft under RCC § 22E-2101;
  (2) Unlawful Creation or Possession of a Recording under RCC § 22E-2105;
  (3) Fraud under RCC § 22E-2201;
  (4) Payment Card Fraud under RCC § 22E-2202;
  (5) Check Fraud under RCC § 22E-2203;
  (6) Forgery under RCC § 22E-2204;
  (7) Identity Theft under RCC § 22E-2205;
  (8) Unlawful Labeling of a Recording under RCC § 22E-2206;
  (9) Financial Exploitation of a Vulnerable Adult or Elderly Person under RCC § 22E-2208;
  (10) Extortion under RCC § 22E-2301;
  (11) Possession of Stolen Property under RCC § 22E-2401;
  (12) Trafficking of Stolen Property under RCC § 22E-2402;
  (13) Alteration of Motor Vehicle Identification Number under RCC § 22E-2403; and
  (14) Criminal Damage to Property under RCC § 22E-2503.

(c) *Definitions.* The terms "amount of damage," "property," and "value" have the meanings specified in RCC § 22E-701.

Chapter 21. Theft.

RCC § 22E-2101. Theft.

(a) *First degree.* An actor commits first degree theft when the actor:
  (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
  (2) Without the consent of an owner;
  (3) With intent to deprive an owner of the property; and
  (4) In fact, the property has a value of $500,000 or more.

(b) *Second degree.* An actor commits second degree theft when the actor:
  (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
  (2) Without the consent of an owner;
  (3) With intent to deprive an owner of the property; and
  (4) In fact, the property has a value of $50,000 or more.

(c) *Third degree.* An actor commits third degree theft when the actor:
  (1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
  (2) Without the consent of an owner;
  (3) With intent to deprive an owner of the property; and
  (4) In fact:

(A) The property has a value of $5,000 or more; or
(B) The property is a motor vehicle.

(d) *Fourth degree.* An actor commits fourth degree theft when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) Without the consent of an owner;
(3) With intent to deprive an owner of the property; and
(4) In fact:
(A) The property has a value of $500 or more; or
(B) The property is taken from a complainant who possesses the property within the complainant's immediate physical control.

(e) *Fifth degree.* An actor commits fifth degree theft when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) Without the consent of an owner;
(3) With intent to deprive an owner of the property; and
(4) In fact, the property has any value.

(f) *Exclusion from liability.* An actor does not commit an offense under this section for conduct that, in fact, constitutes a violation of D.C. Code § 35-252, Failure to pay established fare or to present valid transfer.

(g) *Penalties*.
(1) First degree theft is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree theft is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree theft is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree theft is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree theft is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "consent," "deprive," "motor vehicle," "owner," "possesses," "property," "property of another," and "value" have the meanings specified in RCC § 22E-701.

RCC § 22E-2102. Unauthorized Use of Property.

(a) *Offense.* An actor commits unauthorized use of property when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) Without the effective consent of an owner.

(b) *Exclusion from liability.* An actor does not commit an offense under this section for conduct that, in fact, constitutes a violation of D.C. Code § 35-252, Failure to pay established fare or to present valid transfer.

(c) *Defense.* It is a defense to liability under this section that, in fact:
(1) The actor reasonably believes that the property is lost or was stolen by a third party; and
(2) Engages in the conduct constituting the offense with intent to return the property to a lawful owner.
(d) *Penalties.* Unauthorized use of property is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(e) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "effective consent," "owner," "property," and "property of another" have the meanings specified in RCC § 22E-701.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

(a) *Offense.* An actor commits unauthorized use of a motor vehicle when the actor:
(1) Knowingly operates a motor vehicle;
(2) Without the effective consent of an owner.
(b) *Defense.* It is a defense to liability under this section that, in fact:
(1) The actor reasonably believes that the motor vehicle is lost or was stolen by a third party; and
(2) Engages in the conduct constituting the offense with intent to return the motor vehicle to a lawful owner.
(c) *Penalties*. Unauthorized use of a motor vehicle is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "effective consent," "motor vehicle," and "owner" have the meanings specified in RCC § 22E-701.

RCC § 22E-2104. Shoplifting.

(a) *Offense*. An actor commits shoplifting when the actor:
(1) Knowingly:
(A) Holds or carries on the actor's person, or conceals;
(B) Removes, alters, or transfers the price tag, serial number, or other identification mark that is imprinted on or attached to; or
(C) Transfers from one container or package to another container or package;
(2) Personal property of another that is:
(A) Displayed or offered for sale; or
(B) Held or stored on the premises in reasonably close proximity to the customer sales area, for future display or sale;
(3) With intent to take or make use of the property without complete payment.

(b) *No attempt liability*. The criminal attempt provision in RCC § 22E-301 does not apply to this section.

(c) *Penalties*. Shoplifting is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Qualified immunity.* A person who displays, holds, stores, or offers for sale personal property as specified in paragraph (a)(2) of this section, or an employee or agent of such a person, who detains or causes the arrest of a person in a place where such property is displayed, held, stored, or offered for sale shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest, in any proceeding arising out of such detention or arrest, if, in fact:

(1) The person detaining or causing the arrest has, at the time thereof, probable cause to believe that the person detained or arrested committed an offense described in this section;

(2) The manner of the detention or arrest is reasonable;

(3) Law enforcement authorities are notified as soon as practicable; and

(4) The person detained or arrested is released as soon as practicable after the detention or arrest, or is surrendered to law enforcement authorities as soon as practicable.

(e) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "person," "property," and "property of another" have the meanings specified in RCC § 22E-701.

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

(a) *First degree.* An actor commits first degree unlawful creation or possession of a recording when the actor:

(1) Knowingly makes, obtains, or possesses either:

(A) A sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972; or

(B) A sound recording or audiovisual recording of a live performance;

(2) Without the effective consent of an owner;

(3) With intent to sell, rent, or otherwise use the recording for commercial gain or advantage; and

(4) In fact, the number of recordings made, obtained, or possessed is 100 or more.

(b) *Second degree.* An actor commits second degree unlawful creation or possession of a recording when the actor:

(1) Knowingly makes, obtains, or possesses either:

(A) A sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972; or

(B) A sound recording or audiovisual recording of a live performance;

(2) Without the effective consent of an owner;

(3) With intent to sell, rent, or otherwise use the recording for commercial gain or advantage; and
(4) In fact, any number of recordings were made, obtained, or possessed.

(c) *Exclusions from liability.* An actor does not commit an offense under this section when the actor, in fact:
(1) Copies or reproduces a sound recording or audiovisual recording in the manner specifically permitted by Title 17 of the United States Code; or
(2) Copies or reproduces a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use.

(d) *Penalties*.
(1) First degree unlawful creation or possession of a recording is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree unlawful creation or possession of a recording is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Forfeiture.* Upon conviction under this section, the court may, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

(f) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "audiovisual recording," "effective consent," "live performance," "owner," "possessed," "possesses," and "sound recording" have the meanings specified in RCC § 22E-701.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Movie Theater.

(a) *Offense*. An actor commits unlawful operation of a recording device in a movie theater when the actor:
(1) Knowingly operates a recording device within a movie theater;
(2) Without the effective consent of an owner of the movie theater; and
(3) With intent to record a motion picture, or any part of it.

(b) *Penalties*. Unlawful operation of a recording device in a movie theater is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Qualified immunity.* An owner of the movie theater specified in subsection (a) of this section, or the owner's employee or agent, who detains or causes the arrest of a person in, or immediately adjacent to, the movie theater, shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest in any proceeding arising out of such detention or arrest, if, in fact:
(1) The person detaining or causing the arrest has, at the time thereof, probable cause to believe that the person detained or arrested

committed, or attempted to commit, an offense described in this section;
(2) The manner of the detention or arrest is reasonable;
(3) Law enforcement authorities are notified as soon as practicable; and
(4) The person detained or arrested is released as soon as practicable after the detention or arrest, or is surrendered to law enforcement authorities as soon as practicable.

(d) *Forfeiture.* Upon conviction under this section, the court may, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of any recording and all equipment used, or attempted to be used, in violation of this section.

(e) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "effective consent," "movie theater" "owner," "person," and "recording device" have the meanings specified in RCC § 22E-701.

Chapter 22. Fraud.

RCC § 22E-2201. Fraud.

(a) *First degree.* An actor commits first degree fraud when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive an owner of the property; and
(4) In fact:
(A) The property, other than labor or services, has a value of $500,000 or more; or
(B) The property is 2080 hours or more of labor or services.

(b) *Second degree*. An actor commits second degree fraud when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive an owner of the property; and
(4) In fact:
(A) The property, other than labor or services, has a value of $50,000 or more; or
(B) The property is 160 hours or more of labor or services.

(c) *Third degree*. An actor commits third degree fraud when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive an owner of the property; and
(4) In fact:

(A) The property, other than labor or services, has a value of $5,000 or more; or
(B) The property is 40 hours or more of labor or services.

(d) *Fourth degree*. An actor commits fourth degree fraud when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive an owner of the property; and
(4) In fact:
(A) The property, other than labor or services, has a value of $500 or more; or
(B) The property is 8 hours or more of labor or services.

(e) *Fifth degree*. An actor commits fifth degree fraud when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by deception;
(3) With intent to deprive an owner of the property; and
(4) In fact, the property has any value.

(f) *Penalties.*
(1) First degree fraud is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree fraud is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree fraud is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree fraud is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree fraud is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "consent," "deception," "deprive," "labor," "owner," "property," "property of another," "services," and "value" have the meanings specified in RCC § 22E-701.

RCC § 22E-2202. Payment Card Fraud.

(a) *First degree.* An actor commits first degree payment card fraud when the actor:
(1) Knowingly obtains or pays for property by using a payment card:
(A) Without the effective consent of the person to whom the payment card was issued;
(B) After the payment card was revoked or canceled;
(C) When the payment card was never issued; or

(D) For the actor's own purposes, when the actor is an employee or contractor and the payment card was issued to the actor for the employer's purposes; and

(2) In fact, the property has a value of $500,000 or more.

(b) *Second degree*. An actor commits second degree payment card fraud when the actor:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued;

(B) After the payment card was revoked or canceled;

(C) When the payment card was never issued; or

(D) For the actor's own purposes, when the actor is an employee or contractor and the payment card was issued to the actor for the employer's purposes; and

(2) In fact, the property has a value of $50,000 or more.

(c) *Third degree*. An actor commits third degree payment card fraud when the actor:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued;

(B) After the payment card was revoked or canceled;

(C) When the payment card was never issued; or

(D) For the actor's own purposes, when the actor is an employee or contractor and the payment card was issued to the actor for the employer's purposes; and

(2) In fact, the property has a value of $5,000 or more.

(d) *Fourth degree.* An actor commits fourth degree payment card fraud when the actor:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued;

(B) After the payment card was revoked or canceled;

(C) When the payment card was never issued; or

(D) For the actor's own purposes, when the actor is an employee or contractor and the payment card was issued to the actor for the employer's purposes; and

(2) In fact, the property has a value of $500 or more.

(e) Fifth degree. An actor commits fifth degree payment card fraud when the actor:

(1) Knowingly obtains or pays for property by using a payment card:

(A) Without the effective consent of the person to whom the payment card was issued; or

(B) After the payment card was revoked or canceled; or

(C) When the payment card was never issued; or

(D) For the actor's own purposes, when the actor is an employee or contractor and the payment card was issued to the actor for the employer's purposes; and

(2) In fact, the property has any value.

(f) *Penalties*.

(1) First degree payment card fraud is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree payment card fraud is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree payment card fraud is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) Fourth degree payment card fraud is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) Fifth degree payment card fraud is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "effective consent," "payment card," "person," "property," "revoked or canceled," and "value" have the meaning specified in RCC § 22E-701.

RCC § 22E-2203. Check Fraud.

(a) *First degree.* An actor commits first degree check fraud when the actor:

(1) Knowingly obtains or pays for property by using a check;

(2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and

(3) The amount of loss to the check holder is, in fact, $5,000 or more.

(b) *Second degree*. An actor commits second degree check when the actor:

(1) Knowingly obtains or pays for property by using a check;

(2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and

(3) The amount of loss to the check holder is, in fact, $500 or more.

(c) *Third degree*. An actor commits second degree check when the actor:

(1) Knowingly obtains or pays for property by using a check;

(2) With intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon; and

(3) The amount of loss to the check holder is, in fact, any amount.

(d) *Penalties*.

(1) First degree check fraud is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree check fraud is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree check fraud is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "check," and "property" have the meanings specified in RCC § 22E-701.

RCC § 22E-2204. Forgery.

(a) *First degree.* An actor commits first degree forgery when the actor:
(1) Commits third degree forgery; and
(2) The written instrument appears to be, in fact:
(A) A stock certificate, bond, or other instrument representing an interest in or claim against a corporation or other organization of its property;
(B) A public record, or instrument filed in a public office or with a public servant;
(C) A written instrument officially issued or created by a public office, public servant, or government instrumentality;
(D) A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or
(E) A written instrument having a value of $50,000 or more.

(b) *Second degree*. An actor commits second degree forgery when the actor:
(1) Commits third degree forgery; and
(2) The written instrument appears to be, in fact:
(A) A token, fare card, public transportation transfer certificate, or other article manufactured for use as a symbol of value in place of money for the purchase of property or services;
(B) A prescription of a duly licensed physician or other person authorized to issue the same for any controlled substance or other instrument or devices used in the taking or administering of controlled substances for which a prescription is required by law; or
(C) A written instrument having a value of $5,000 or more.

(c) *Third degree.* An actor commits third degree forgery when the actor:
(1) Knowingly does any of the following:
(A) Alters a written instrument without authorization, and the written instrument is reasonably adapted to deceive a person into believing it is genuine;

(B) Makes or completes a written instrument:
(i) That appears:
(I) To be the act of another who did not authorize that act, or
(II) To have been made or completed at a time or place or in a numbered sequence other than was in fact the case, or
(III) To be a copy of an original when no such original existed; and
(ii) The written instrument is reasonably adapted to deceive a person into believing the written instrument is genuine; or
(C) Transmits or otherwise uses a written instrument that was made, signed, or altered in a manner specified in subparagraphs (c)(1)(A) or (c)(1)(B);
(2) With intent to:
(A) Obtain the property of another by deception; or
(B) Harm another person.

(d) *Penalties.*
(1) First degree forgery is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree forgery is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree forgery is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The term "act" has the meaning specified in RCC § 22E-202; the terms "intent" and "knowingly" having the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "controlled substance," "deceive," "deception," "person," "property," "property of another," "services," "value," and "written instrument" have the meanings specified in RCC § 22E-701.

RCC § 22E-2205. Identity Theft.

(a) *First degree.* An actor commits identity theft when the actor:
(1) Commits fifth degree identity theft; and
(2) The value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $500,000 or more.

(b) *Second degree*. An actor commits second degree identity theft when the actor:
(1) Commits fifth degree identity theft; and
(2) The value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $50,000 or more.

(c) *Third degree*. An actor commits third degree identity theft when the actor:

(1) Commits fifth degree identity theft; and
(2) The value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $5,000 or more.

(d) *Fourth degree.* A person commits fourth degree identity theft when the actor:
(1) Commits fifth degree identity theft; and
(2) The value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury, whichever is greater, in fact, is $500 or more.

(e) *Fifth degree.* An actor commits fifth degree identity theft when the actor:
(1) Knowingly creates, possesses, or uses personal identifying information belonging to or pertaining to another person;
(2) Without that other person's effective consent; and
(3) With intent to use the personal identifying information to:
(A) Obtain the property of another by deception;
(B) Avoid payment due for any property, fines, or fees by deception; or
(C) Give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception.

(f) *Unit of prosecution and calculation of time to commence prosecution of offense.* Creating, possessing, or using a person's personal identifying information in violation of this section shall constitute a single course of conduct for determining the applicable period of limitation under D.C. Code § 23-113(b). The applicable time limitation under D.C. Code § 23-113 shall not begin to run until after the day after the course of conduct has been completed, or the person whose identifying information was taken, possessed, or used knows, or reasonably should have been aware, of the identity theft, whichever occurs earlier.

(g) *Penalties*.
(1) First degree identity theft is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree identity theft is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree identity theft is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree identity theft is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree identity theft is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Police reports*. The Metropolitan Police Department shall make a report of each complaint of identity theft and provide the complainant with a copy of the report.

(i) *Definitions*. The terms "intended," "intent," "knowingly," "known," and "knows" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor,"

"complainant," "deception," "effective consent," "financial injury," "person," "personal identifying information," "possessed," "possesses," "possessing," "property," "property of another," and "value" have the meanings specified in RCC § 22E-701.

RCC § 22E-2206. Identity Theft Civil Provisions.

(a) When a person is convicted, adjudicated delinquent, or found not guilty of identity theft under the mental disability affirmative defense in RCC § 22E-504, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of RCC § 22E-2205.

(b) In all other cases, a person who alleges that they are a victim of identity theft may petition the court for an expedited judicial determination that a District of Columbia public record contains false information as a result of a violation of RCC § 22E-2205. Upon a finding of clear and convincing evidence that the person was a victim of identity theft, the court may issue such orders as are necessary to correct any District of Columbia public record that contains false information as a result of a violation of RCC § 22E-2205.

(c) Notwithstanding any other provision of law, District of Columbia agencies shall comply with orders issued under subsection (a) of this section within 30 days of issuance of the order.

(d) *Definitions.*

(1) The term "person" has the meaning specified in RCC § 22E-701; and

(2) In this section, the term "District of Columbia public record" means any document, book, photographic image (as defined in RCC § 22E-701), electronic data recording, paper, sound recording (as defined in RCC § 22E-701), or other material, regardless of physical form or characteristic, made or received pursuant to law or in connection with the transaction of public business by any officer or employee of the District of Columbia.

RCC § 22E-2207. Unlawful Labeling of a Recording.

(a) *First degree.* An actor commits first degree unlawful labeling of a recording when the actor:

(1) Knowingly possesses sound recordings or audiovisual recordings that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jacket that, in fact, number 100 or more;

(2) With intent to sell or rent the sound recordings or audiovisual recordings.

(b) *Second degree.* An actor commits second degree unlawful labeling of a recording when the actor:

(1) Knowingly possesses one or more sound recordings or audiovisual recordings that does not clearly and conspicuously disclose the true name and address of the manufacturer on its label, cover, or jacket;
(2) With intent to sell or rent the sound recordings or audiovisual recordings.

(c) *Exclusions from liability.* An actor does not commit an offense under this section when the actor, in fact:
(1) Transfers any sounds or images recorded on a sound recording or audiovisual recording in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation; or
(2) Transfers, in their home for their own personal use, any sounds or images recorded on a sound recording or audiovisual recording.

(d) *Penalties*.
(1) First degree unlawful labeling of a recording is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree unlawful labeling of a recording is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Forfeiture.* Upon conviction under this section, the court may, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

(f) *Definitions*.
(1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "audiovisual recording," "image," "person," "possesses," and "sound recording" have the meanings specified in RCC § 22E-701; and
(2) In this section, the term "manufacturer" means the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording.

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

(a) *First degree*. An actor commits first degree financial exploitation of a vulnerable adult or elderly person when the actor:
(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person; and
(2) In fact, the value of the property or the amount of the financial injury, whichever is greater, is $500,000 or more.

(b) *Second degree*. An actor commits second degree financial exploitation of a vulnerable adult or elderly person when the actor:
(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person; and

(2) In fact, the value of the property or the amount of the financial injury, whichever is greater, is $50,000 or more.

(c) *Third degree*. An actor commits third degree financial exploitation of a vulnerable adult or elderly person when the actor:
(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person; and
(2) In fact, the value of the property or the amount of the financial injury, whichever is greater, is $5,000 or more.

(d) *Fourth degree*. An actor commits fourth degree financial exploitation of a vulnerable adult or elderly person when the actor:
(1) Commits fifth degree financial exploitation of a vulnerable adult or elderly person; and
(2) In fact, the value of the property or the amount of the financial injury, whichever is greater, is $500 or more.

(e) *Fifth degree*. An actor commits fifth degree financial exploitation of a vulnerable adult or elderly person when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another:
(A) With consent of an owner obtained by undue influence;
(B) Reckless as to the fact that the owner is a vulnerable adult or elderly person;
(C) With intent to deprive an owner of the property; and
(D) In fact, the property has any value; or
(2) Reckless as to the fact that the complainant is a vulnerable adult or elderly person, commits one or more District offenses that is, in fact:
(A) Theft under RCC § 22E-2101;
(B) Fraud under RCC § 22E-2201;
(C) Payment Card Fraud under RCC § 22E-2202;
(D) Check Fraud under RCC § 22E-2203;
(E) Forgery under RCC § 22E-22E-2204;
(F) Identity Theft under RCC § 22E-2205; or
(G) Extortion under RCC § 22E-2301.

(f) *Penalties*.
(1) First degree financial exploitation of a vulnerable adult or elderly person is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree financial exploitation of a vulnerable adult or elderly person is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree financial exploitation of a vulnerable adult or elderly person is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree financial exploitation of a vulnerable adult or elderly person is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) Fifth degree financial exploitation of a vulnerable adult or elderly person is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

(h) *Definitions.* The terms "intent," "knowingly," "reckless," and "recklessness" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "consent," "complainant," "deprive," "elderly person," "financial injury," "owner," "property," "property of another," "undue influence," "value," and "vulnerable adult" have the meanings specified in RCC § 22E-701.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions.

(a) *Petition for injunctive relief and protections.* Notwithstanding any other provision of law, if the Attorney General for the District of Columbia or the United States Attorney has reason to believe that any person has violated, or intends to violate, section RCC § 22E-2208, the Attorney General or the United States Attorney may bring a civil action in the Court, in the name of the District, which may be by ex parte motion and without notice to the person, to seek any of the following:

(1) A temporary or permanent injunction;

(2) Restitution of money or property;

(3) The cost of the action, including reasonable attorney's fees;

(4) Revocation of all permits, licenses, registrations, or certifications issued by the District authorizing the person to provide services to vulnerable adults or elderly persons, provided that such a revocation shall be effective upon the issuance of the Court's judgment, and the person shall not be entitled to a hearing with the relevant licensing board or agency;

(5) Civil penalties of not more than $10,000 per violation; or

(6) Any other relief the court deems just.

(b) In an action under this section;

(1) A related criminal proceeding need not have been initiated, nor judgment secured, prior to bringing the action;

(2) The Attorney General shall not be required to prove damages; and

(3) The burden of proof shall be by a preponderance of the evidence.

(c) *Standard for court review of petition.* The court may grant an ex parte motion authorized by subsection (a) of this section without notice to the person against whom the injunction or order is sought if the court finds that facts offered in support of the motion establish that:

(1) There is a substantial likelihood that the person committed financial exploitation of a vulnerable adult or elderly person;

(2) The harm that may result from the injunction or order is clearly outweighed by the risk of harm to the vulnerable adult or elderly person if the inunction or order is not issued; and

(3) If the Attorney General for the District of Columbia or the United States Attorney has petitioned for an order temporarily freezing assets, the order is necessary to prevent dissipation of assets obtained in violation of RCC § 22E-2208.

(d) *Effect of order to temporarily freeze assets.*

(1) An order temporarily freezing assets without notice to the person under subsections (a) and (c) of this section shall expire on a date set by the court, not later than 14 days after the court issues the order unless, before that time, the court extends the order for good cause shown.

(2) A person whose assets were temporarily frozen under subsections (a) and (c) of this section may move to dissolve or modify the order after notice to the Attorney General for the District of Columbia or the United States Attorney. The court shall hear and decide the motion or application on an expedited basis.

(e) *Appointment of receiver or conservator.* The court may issue an order temporarily freezing the assets of the vulnerable adult or elderly person to prevent dissipation of assets; provided, that the court also appoints a receiver or conservator for those assets. The order shall allow for the use of assets to continue care for the vulnerable adult or elderly person, and can only be issued upon a showing that a temporary injunction or temporary restraining order authorized by this section would be insufficient to safeguard the assets, or with the consent of the vulnerable adult or elderly person or their legal representative.

(f) *Definitions.* The term "intends" has the meanings specified in RCC § 22E-206; and the terms "consent," "elderly person," "person," and "vulnerable adult" have the meanings specified in RCC § 22E-701.

RCC § 22E-2210. Trademark Counterfeiting.

(a) *First degree.* An actor commits first degree trademark counterfeiting when the actor:

(1) Knowingly manufactures for sale, possesses with intent to sell, or offers to sell, property bearing or identified by a counterfeit mark; and

(2) In fact, the property consists of 100 or more items, or the property has a total retail value of $5,000 or more.

(b) *Second degree.* An actor commits second degree trademark counterfeiting when the actor:

(1) Knowingly manufactures for sale, possesses with intent to sell, or offers to sell, property bearing or identified by a counterfeit mark; and

(2) In fact, the property has any value.

(c) *Exclusion from liability.* An actor does not commit an offense under this section if the actor, in fact, uses a trademark in a manner that is legal under civil law.

(d) *Seizure and disposal of seized items bearing a counterfeit mark.*

(1) Any items bearing a counterfeit mark shall be seized, and all personal property, including any items, objects, tools, machines, equipment, instrumentalities, or vehicles of any kind, employed or used in connection with a violation of this chapter may be seized, by any law enforcement officer, including any designated civilian employee of the Metropolitan Police Department, in accordance with the procedures established by § 48-905.02.

(2) All seized personal property shall be subject to forfeiture pursuant to the standards and procedures set forth in D.C. Law 20-278.

(3) Upon the request of the owner of the trademark, service mark, trade name, label, term, picture, seal, word, or advertisement, all seized items bearing a counterfeit mark shall be released to the owner of the trademark, service mark, trade name, label, term, picture, seal, word, or advertisement for destruction or disposition.

(4) If the owner of the trademark, service mark, trade name, label, term, picture, seal, word, or advertisement does not request release of seized items bearing a counterfeit mark, such items shall be destroyed unless the owner of the of the trademark, service mark, trade name, label, term, picture, seal, word, or advertisement consents to another disposition.

(e) *Evidence of state or federal registration.* Any state or federal certificate of registration of any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement shall be prima facie evidence of the facts stated therein.

(f) *Penalties.*

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

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

(g) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "consents," "counterfeit mark," "law enforcement officer," "owner," "possesses," "property," "retail value," and "value" have the meanings specified in RCC § 22E-701.

Chapter 23. Extortion.

RCC § 22E-2301. Extortion.

(a) *First degree.* An actor commits first degree extortion when the actor:

(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by an explicit or implicit coercive threat;
(3) With intent to deprive an owner of the property; and
(4) In fact, the property has a value of $500,000 or more.

(b) *Second degree.* An actor commits second degree extortion when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by an explicit or implicit coercive threat;
(3) With intent to deprive an owner of the property; and
(4) In fact, the property has a value of $50,000 or more.

(c) *Third degree.* An actor commits third degree extortion when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by an explicit or implicit coercive threat;
(3) With intent to deprive an owner of the property; and
(4) In fact, the property has a value $5,000 or more.

(d) *Fourth degree.* An actor commits fourth degree extortion when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by an explicit or implicit coercive threat;
(3) With intent to deprive an owner of the property; and
(4) In fact, the property has a value of $500 or more.

(e) *Fifth degree.* An actor commits fifth degree extortion when the actor:
(1) Knowingly takes, obtains, transfers, or exercises control over the property of another;
(2) With the consent of an owner obtained by an explicit or implicit coercive threat;
(3) With intent to deprive an owner of the property; and
(4) In fact, the property has any value.

(f) *Penalties*.
(1) First degree extortion is a Class 6 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree extortion is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree extortion is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree extortion is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree extortion is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "coercive threat," "consent," "deprive," "owner," "property," "property of another," and "value" have the meanings specified in RCC § 22E-701.

Chapter 24. Stolen Property.

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

(a) *First degree.* An actor commits first degree possession of stolen property when the actor:
  (1) Knowingly buys or possesses property;
  (2) With intent that the property be stolen;
  (3) With intent to deprive an owner of the property; and
  (4) In fact, the property has a value of $500,000 or more.

(b) *Second degree.* An actor commits second degree possession of stolen property when the actor:
  (1) Knowingly buys or possesses property;
  (2) With intent that the property be stolen;
  (3) With intent to deprive an owner of the property; and
  (4) In fact, the property has a value of $50,000 or more.

(c) *Third degree.* An actor commits third degree possession of stolen property when the actor:
  (1) Knowingly buys or possesses property;
  (2) With intent that the property be stolen;
  (3) With intent to deprive an owner of the property; and
  (4) In fact, the property has a value of $5,000 or more.

(d) *Fourth degree.* An actor commits fourth degree possession of stolen property when the actor:
  (1) Knowingly buys or possesses property;
  (2) With intent that the property be stolen;
  (3) With intent to deprive an owner of the property; and
  (4) In fact, the property has a value of $500 or more.

(e) *Fifth degree.* An actor commits fifth degree possession of stolen property when the actor:
  (1) Knowingly buys or possesses property;
  (2) With intent that the property be stolen;
  (3) With intent to deprive an owner of the property;
  (4) In fact, the property has any value.

(f) *Penalties*.
  (1) First degree possession of stolen property is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree possession of stolen property is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree possession of stolen property is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree possession of stolen property is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree possession of stolen property is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "deprive," "owner," "possesses," "property," and "value" have the meanings specified in RCC § 22E-701.

RCC § 22E-2402. Trafficking of Stolen Property.

(a) *First degree.* An actor commits first degree trafficking of stolen property when the actor:
(1) Knowingly buys or possesses property on two or more separate occasions;
(2) With intent that the property be stolen;
(3) With intent to sell, pledge as consideration, or trade the property; and
(4) In fact, the total property trafficked has a value of $500,000 or more.

(b) *Second degree.* An actor commits second degree trafficking of stolen property when the actor:
(1) Knowingly buys or possesses property on two or more separate occasions;
(2) With intent that the property be stolen;
(3) With intent to sell, pledge as consideration, or trade the property; and
(4) In fact, the total property trafficked has a value of $50,000 or more.

(c) *Third degree.* An actor commits third degree trafficking of stolen property when the actor:
(1) Knowingly buys or possesses property on two or more separate occasions;
(2) With intent that the property be stolen;
(3) With intent to sell, pledge as consideration, or trade the property; and
(4) In fact, the total property trafficked has a value of $5,000 or more.

(d) *Fourth degree.* An actor commits fourth degree trafficking of stolen property when the actor:
(1) Knowingly buys or possesses property on two or more separate occasions;
(2) With intent that the property be stolen;
(3) With intent to sell, pledge as consideration, or trade the property; and

(4) In fact, the total property trafficked has a value of $500 or more.

(e) *Fifth degree.* An actor commits fifth degree trafficking of stolen property when the actor:
   (1) Knowingly buys or possesses property on two or more separate occasions;
   (2) With intent that the property be stolen;
   (3) With intent to sell, pledge as consideration, or trade the property; and
   (4) In fact, the property trafficked has any value.

(f) *Penalties*.
   (1) First degree trafficking of stolen property is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
   (2) Second degree trafficking of stolen property is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
   (3) Third degree trafficking of stolen property is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
   (4) Fourth degree trafficking of stolen property is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
   (5) Fifth degree trafficking of stolen property is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "possesses," "property," and "value" have the meanings specified in RCC § 22E-701.

RCC § 22E-2403. Alteration of a Motor Vehicle Identification Number.

(a) *First degree.* An actor commits first degree alteration of a motor vehicle identification number when the actor:
   (1) Knowingly alters a vehicle identification number of a motor vehicle or motor vehicle part;
   (2) With intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part; and
   (3) The value of such motor vehicle or motor vehicle part, in fact, is $5,000 or more.

(b) *Second degree.* An actor commits second degree alteration of a motor vehicle identification number when the actor:
   (1) Knowingly alters a vehicle identification number of a motor vehicle or motor vehicle part;
   (2) With intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part.

(c) *Penalties*.

(1) First degree alteration of a motor vehicle identification number is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree alteration of a motor vehicle identification number is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "motor vehicle," "value," and "vehicle identification number" have the meanings specified in RCC § 22E-701.

RCC § 22E-2404. Alteration of a Bicycle Identification Number.

(a) *Offense.* An actor commits alteration of a bicycle identification numbers when the actor:
(1) Knowingly alters an identification number of a bicycle or bicycle part;
(2) With intent to conceal or misrepresent the identity of the bicycle or bicycle part.

(b) *Penalties*. Alteration of a bicycle identification number is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.*
(1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "actor" has the meaning specified in RCC § 22E-701; and
(2) In this section, the terms "bicycle" and "identification number" have the meanings specified in D.C. Code § 50-1609.

Chapter 25. Property Damage.

RCC § 22E-2501. Arson.

(a) *First degree.* An actor commits first degree arson when the actor:
(1) Knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building;
(2) Reckless as to the fact that a person who is not a participant in the crime is present in the dwelling or building; and
(3) The fire or explosion, in fact, causes death or serious bodily injury to any person who is not a participant in the crime.

(b) *Second degree*. An actor commits second degree arson when the actor:
(1) Knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building;
(2) Reckless as to the fact that the fact that a person who is not a participant in the crime is present in the dwelling or building.

(c) *Third degree*. An actor commits third degree arson when the actor knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building.

(d) *Affirmative defense.* It is an affirmative defense to liability under subsection (c) of this section that the actor, in fact, has a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.

(e) *Penalties.*

(1) First degree arson is a Class 5 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree arson is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree arson is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "building," "dwelling," "person," and "serious bodily injury" have the meanings specified in RCC § 22E-701.

RCC § 22E-2502. Reckless Burning.

(a) *Offense.* An actor commits reckless burning when the actor:

(1) Knowingly starts a fire or causes an explosion;

(2) Reckless as to the fact that the fire or explosion damages or destroys a dwelling or building.

(b) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor, in fact, has a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit.

(c) *Penalties.* Reckless burning is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "building," and "dwelling" have the meanings specified in RCC § 22E-701.

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

(a) *First degree.* An actor commits first degree criminal damage to property when the actor:

(1) Knowingly damages or destroys the property of another;

(2) Without the effective consent of an owner; and

(3) In fact, the amount of damage is $500,000 or more.

(b) *Second degree.* An actor commits second degree criminal damage to property when the actor:
  (1) Knowingly damages or destroys the property of another;
  (2) Without the effective consent of an owner; and
  (3) In fact, the amount of damage is $50,000 or more.

(c) *Third degree.* An actor commits third degree criminal damage to property when the actor:
  (1) Knowingly damages or destroys the property of another;
    (A) Without the effective consent of an owner; and
    (B) In fact:
      (i) The amount of damage is $5,000 or more;
      (ii) The property is a cemetery, grave, or other place for the internment of human remains; or
      (iii) The property is a place of worship or a public monument; or
  (2) Recklessly damages or destroys property;
    (A) Knowing that it is the property of another;
    (B) Without the effective consent of an owner; and
    (C) In fact, the amount of damage is $50,000 or more.

(d) *Fourth degree.* An actor commits fourth degree criminal damage to property when the actor:
  (1) Recklessly damages or destroys property;
  (2) Knowing that it is the property of another;
  (3) Without the effective consent of an owner; and
  (4) In fact, the amount of damage is $500 or more.

(e) *Fifth degree.* An actor commits fifth degree criminal damage to property when the actor:
  (1) Recklessly damages or destroys property;
  (2) Knowing that it is the property of another;
  (3) Without the effective consent of an owner; and
  (4) In fact, there is any amount of damage to the property.

(f) *Penalties*.
  (1) First degree criminal damage to property is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree criminal damage to property is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Third degree criminal damage to property is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (4) Fourth degree criminal damage to property is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) Fifth degree criminal damage to property is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* The terms "knowing," "knowingly," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "amount of damage," "effective consent," "owner," "property," and "property of another" have the meanings specified in RCC § 22E-701.

RCC § 22E-2504. Criminal Graffiti.

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

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

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

Chapter 26. Trespass.

RCC § 22E-2601. Trespass.

(a) *First degree*. An actor commits first degree trespass when the actor:
(1) Knowingly enters or remains in a dwelling, or part thereof;
(2) Without a privilege or license to do so under civil law.

(b) *Second degree*. An actor commits second degree trespass when the actor:
(1) Knowingly enters or remains in a building, or part thereof;
(2) Without a privilege or license to do so under civil law.

(c) *Third degree*. An actor commits third degree trespass when the actor:
(1) Knowingly enters or remains in or on land, a watercraft, or a motor vehicle, or part thereof;
(2) Without a privilege or license to do so under civil law.

(d) *Exclusions from liability*.
(1) An actor does not commit an offense under this section by, in fact, violating a barring notice issued for District of Columbia Housing Authority properties unless the bar notice is lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis.
(2) An actor does not commit an offense under this section for conduct that, in fact, constitutes a violation of D.C. Code § 35-252, Failure to pay established fare or to present valid transfer.

(e) *Permissive inference.* In a trial determining a violation of this section, a factfinder may, but is not required to, infer that an actor lacks a privilege or license to enter or remain in or on a location that:
  (1) Is otherwise vacant;
  (2) Shows signs of a forced entry; and
  (3) Is either:
    (A) Secured in a manner that reasonably conveys that it is not to be entered; or
    (B) Displays signage that is reasonably visible prior to or outside the location's points of entry, and that sign says "no trespassing" or similarly indicates that a person may not enter.

(f) *Penalties.*
  (1) First degree trespass is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree trespass is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) Third degree trespass is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "building," "dwelling," "person," and "motor vehicle" have the meanings specified in RCC § 22E-701.

Chapter 27. Burglary.

RCC § 22E-2701. Burglary.

(a) *First degree*. An actor commits first degree burglary when the actor:
  (1) With intent to commit inside one or more District offenses that is, in fact, an offense under Subtitle II of this title or a predicate property offense;
  (2) Knowingly and fully enters or surreptitiously remains in a dwelling, or part thereof;
  (3) Without a privilege or license to do so under civil law;
  (4) Reckless as to the fact that a person who is not a participant in the burglary either is entering with the actor or is already inside and, in fact, directly perceives the actor while inside.

(b) *Second degree*. An actor commits second degree burglary when the actor:
  (1) With intent to commit inside one or more District offense that is, in fact, an offense under Subtitle II of this title or a predicate property offense;
  (2) Knowingly and fully enters or surreptitiously remains in:
    (A) A dwelling, or part thereof, without a privilege or license to do so under civil law; or
    (B) A building, or part thereof, without a privilege or license to do so under civil law:

(i) That is not open to the general public at the time of the burglary;
(ii) Reckless as to the fact that a person who is not a participant in the burglary either is entering with the actor or is already inside and, in fact, directly perceives the actor while inside.

(c) *Third degree*. An actor commits third degree burglary when the actor:
(1) With intent to commit inside one or more District offenses that is, in fact, an offense under Subtitle II of this title or a predicate property offense;
(2) Knowingly and fully enters or surreptitiously remains in:
(A) A building or business yard, or part thereof;
(B) That is not open to the general public at the time of the burglary;
(3) Without a privilege or license to do so under civil law.

(d) *Penalties.*
(1) First degree burglary is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree burglary is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree burglary is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) *Penalty enhancements*. The penalty classification of any gradation of this offense is increased by one class when the actor knowingly holds or carries on the actor's person, while entering or surreptitiously remaining in the location, what is, in fact, a dangerous weapon or imitation firearm.

(e) *Definitions.*
(1) The terms "intent," "knowingly," and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "building," "business yard," "dangerous weapon," "dwelling," "imitation firearm," "open to the general public," and "person" have the meanings specified in RCC § 22E-701; and
(2) In this section, the term "predicate property offense" means:
(A) Theft under RCC § 22E-2101;
(B) Unauthorized Use of Property under RCC § 22E-2102;
(C) Unauthorized Use of a Motor Vehicle under RCC § 22E-2103;
(D) Extortion under RCC § 22E-2301;
(E) Arson under RCC § 22E-2501;
(F) Reckless Burning under RCC § 22E-2502; or
(G) Criminal Damage to Property under RCC § 22E-2503.

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

(a) *Offense.* An actor commits possession of tools to commit property crime when the actor:
  (1) Knowingly possesses a tool, or tools, designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
  (2) With intent to use the tool or tools to commit one or more District offenses that is, in fact:
    (A) Theft under RCC § 22E-2101;
    (B) Unauthorized Use of Property under RCC § 22E-2102;
    (C) Unauthorized Use of a Motor Vehicle under RCC § 22E-2103;
    (D) Shoplifting under RCC § 22E-2301;
    (E) Alteration of Motor Vehicle Identification Number under RCC § 22E-2403;
    (F) Alteration of Bicycle Identification Number under RCC § 22E-2404;
    (G) Arson under RCC § 22E-2501;
    (H) Criminal Damage to Property under RCC § 22E-2503;
    (I) Criminal Graffiti under RCC § 22E-2504;
    (J) Trespass under RCC § 22E-2601; or
    (K) Burglary under RCC § 22E-2701.

(b) *No attempt liability*. The criminal attempt provision in RCC § 22E-301 does not apply to this section.

(c) *Penalties*. Possession of tools to commit property crime is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

SUBTITLE IV. OFFENSES AGAINST GOVERNMENT OPERATION.

Chapter 32. Perjury and Other Official Falsification Offenses.

RCC § 22E-3201. Impersonation of an Official.

(a) *First degree*. An actor commits first degree impersonation of an official when the actor:
  (1) With intent:
    (A) To deceive any other person as to the actor's lawful authority; and
    (B) Either:
      (i) To cause harm to another person; or
      (ii) That any person receive a personal benefit of any kind;
  (2) Knowingly and falsely represents themselves to currently hold lawful authority as a:

(A) Judge of a federal or local court in the District of Columbia;
(B) Prosecutor for the United States Attorney for the District of Columbia, or the Attorney General for the District of Columbia;
(C) Notary public;
(D) Law enforcement officer;
(E) Public safety employee;
(F) District official;
(G) District employee with power to enforce District laws or regulations; or
(H) Person authorized to solemnize marriage; and

(3) Performs the duty, exercises the authority, or attempts to perform the duty or exercise the authority pertaining to a person listed in paragraph (a)(2).

(b) *Second degree.* An actor commits second degree impersonation of an official when the actor:

(1) With intent:
(A) To deceive any other person as to the actor's lawful authority; and
(B) Either:
(i) To cause harm to another person; or
(ii) That any person receive a personal benefit of any kind;

(2) Knowingly and falsely represents themselves to currently hold lawful authority as a:
(A) Judge of a federal or local court in the District of Columbia;
(B) Prosecutor for the United States Attorney for the District of Columbia, or the Attorney General for the District of Columbia;
(C) Notary public;
(D) Law enforcement officer;
(E) Public safety employee;
(F) District official;
(G) District employee with power to enforce District laws or regulations; or
(H) Person authorized to solemnize marriage.

(c) *Civil provision regarding use of official uniform insignia.* The Metropolitan Police Department and the Fire and Emergency Medical Services Department shall have the sole and exclusive rights to have and use, in carrying out their respective missions, the official badges, patches, emblems, copyrights, descriptive or designating marks, and other official insignia displayed upon their current and future uniforms.

(d) *Penalties.*

(1) First degree impersonation of an official is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

(e) *Definitions.* The terms "intent" and "knowingly" have the meaning specified in RCC § 22E-206; and the terms "actor," "deceive," "District official," "law enforcement officer," and "public safety employee" have the meaning specified in RCC § 22E-701.

RCC § 22E-3202. Misrepresentation as a District of Columbia Entity.

(a) *Offense.* An actor commits misrepresentation as a District of Columbia entity when the actor:
  (1) Knowingly:
    (A) Engages in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services; and
    (B) Uses the words "District of Columbia," "District," or "D.C." in the business name or in a business communication;
  (2) With intent to:
    (A) Deceive any other person as to the actor's lawful authority as a District of Columbia entity; and
    (B) Receive a personal or business benefit of any kind; and
  (3) In fact, the name or communication would cause a reasonable person in the complainant's circumstances to believe that the actor is a District of Columbia government entity or representative.

(b) *Prosecutorial authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

(c) *Penalties.* Misrepresentation as a District of Columbia entity is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.*
  (1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "deceive" and "complainant" have the meanings specified in RCC § 22E-701; and
  (2) In this section, the term "actor," in addition to the meaning specified in RCC § 22E-701, includes a legal entity that is not a natural person.

Chapter 34. Government Custody.

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

(a) *First degree*. An actor commits first degree escape from a correctional facility or officer when the actor:
  (1) In fact, is subject to a court order that authorizes the actor's confinement in a correctional facility, secure juvenile detention

facility, or cellblock operated by the United States Marshals Service; and

(2) Knowingly, without the effective consent of the Mayor, the Director of the Department of Corrections, the Director of the Department of Youth Rehabilitation Services, or the United States Marshals Service, leaves the correctional facility, juvenile detention facility, or cellblock operated by the United States Marshals Service.

(b) *Second degree*. An actor commits second degree escape from an institution or officer when the actor:

(1) In fact, is in the lawful official custody of a law enforcement officer of the District of Columbia or of the United States; and

(2) Knowingly, without the effective consent of the law enforcement officer, leaves official custody.

(c) *Third degree*. An actor commits third degree escape from an institution or officer when the actor:

(1) In fact, is subject to a court order that authorizes the person's confinement in a correctional facility or halfway house; and

(2) Knowingly, without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services:

(A) Fails to return to the correctional facility or halfway house;

(B) Fails to report to the correctional facility or halfway house; or

(C) Leaves a halfway house.

(d) *Exclusion from liability.* An actor does not commit an offense under subsection (b) of this section when, in fact, the actor is within a correctional facility, juvenile detention facility, or halfway house.

(e) *Penalties*.

(1) First degree escape from a correctional facility or officer is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree escape from a correctional facility or officer is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree escape from a correctional facility or officer is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "correctional facility," "effective consent," "halfway house," "law enforcement officer," "official custody," and "secure juvenile detention facility" have the meanings specified in RCC § 22E-701.

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

(a) *Offense*. An actor commits tampering with a detection device when the actor:

(1) Knows the actor is required to wear a detection device while:

(A) Subject to a final civil protection order issued under D.C. Code § 16-1005;
(B) On pretrial release in a District of Columbia case;
(C) On presentence or predisposition release in a District of Columbia case;
(D) Committed to the Department of Youth Rehabilitation Services or incarcerated, in a District of Columbia case; or
(E) On supervised release, probation, or parole, in a District of Columbia case; and

(2) Either:
(A) Removes the detection device or allows an unauthorized person to do so; or
(B) Interferes with the emission or detection of the detection device or allows an unauthorized person to do so.

(b) *Jurisdiction*. An offense under this section shall be deemed to be committed in the District of Columbia, regardless of whether the actor is physically present in the District of Columbia.

(c) *Penalties*. Tampering with a detection device is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The term "knows" has the meaning specified in RCC § 22E-206; and the terms "actor" and "detection device" have the meanings specified in RCC § 22E-701.

RCC § 22E-3403. Correctional Facility Contraband.

(a) *First degree.* An actor commits first degree correctional facility contraband when the actor:
(1) With intent that an item be received by someone confined to a correctional facility or secure juvenile detention facility:
(A) Knowingly brings the item to a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
(C) The item, in fact, is Class A contraband; or
(2) In fact, is someone confined to a correctional facility or secure juvenile detention facility and:
(A) Knowingly possesses an item in a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
(C) The item, in fact, is Class A contraband.

(b) *Second degree.* An actor commits second degree correctional facility contraband when the actor:

(1) With intent that an item be received by someone confined to a correctional facility or secure juvenile detention facility:
(A) Knowingly brings the item to a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
(C) The item, in fact, is Class B contraband; or

(2) In fact, is someone confined to a correctional facility or secure juvenile detention facility and:
(A) Knowingly possesses an item in a correctional facility or secure juvenile detention facility;
(B) Without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services; and
(C) The item, in fact, is Class B contraband.

(c) *Exclusion from liability*. An actor does not commit an offense under this section for, in fact, possessing:
(1) A portable electronic communication device, in the course of a legal visit;
(2) A controlled substance that is prescribed to the actor and medically necessary to have immediately or constantly accessible; or
(3) A syringe, needle, or other medical device, that is medically necessary to have immediately or constantly available.

(d) *Detainment authority*. If there is probable cause to suspect an actor of committing correctional facility contraband under paragraph (a)(1) or (b)(1) of this section, the warden or director of a correctional facility may detain the actor for not more than 2 hours, pending surrender to the Metropolitan Police Department or a law enforcement agency acting pursuant to D.C. Code § 10-509.01.

(e) *Penalties*.
(1) First degree correctional facility contraband is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree correctional facility contraband is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "Class A contraband," "Class B contraband," "controlled substance," "correctional facility," "effective consent," "possesses," "possessing," and "secure juvenile detention facility" have the meanings specified in RCC § 22E-701.

SUBTITLE V. PUBLIC ORDER AND SAFETY OFFENSES.

Chapter 41. Weapon Offenses and Related Provisions.

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

(a) *First degree*. An actor commits first degree possession of a prohibited weapon or accessory when the actor:
  (1) Knowingly possesses a firearm or explosive;
  (2) Reckless as to the fact that the firearm or explosive is:
    (A) An assault weapon;
    (B) A machine gun;
    (C) A sawed-off shotgun;
    (D) A restricted explosive; or
    (E) A ghost gun.

(b) *Second degree*. An actor commits second degree possession of a prohibited weapon or accessory when the actor:
  (1) Knowingly possesses a firearm accessory;
  (2) Reckless as to the fact that the firearm accessory is:
    (A) A firearm silencer;
    (B) A bump stock; or
    (C) A large capacity ammunition feeding device.

(c) *Exclusion from liability*. An actor does not commit an offense under this section when, in fact, the actor satisfies the criteria in RCC § 22E-4118.

(d) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor possesses the item while, in fact, voluntarily surrendering the item pursuant to District or federal law.

(e) *Penalties*.
  (1) First degree possession of a prohibited weapon or accessory is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree possession of a prohibited weapon or accessory is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Merger.* A conviction for possession of a prohibited weapon or accessory does not merge with any other offense arising from the same course of conduct.

(f) *Definitions*. The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "assault weapon," "bump stock," "firearm," "ghost gun," "large capacity ammunition feeding device," "machine gun," "possesses," "restricted explosive," and "sawed-off shotgun" have the meanings specified in RCC § 22E-701.

RCC § 22E-4102. Carrying a Dangerous Weapon.

(a) *First degree*. An actor commits first degree carrying a dangerous weapon when the actor:

(1) Knowingly possesses:
(A) A firearm, other than a pistol;
(B) A pistol, without a license to carry under RCC § 22E-4110; or
(C) A restricted explosive;
(2) The firearm, pistol, or restricted explosive is conveniently accessible and within reach; and
(3) The actor is in a location:
(A) Other than the actor's home, place of business, or land; and
(B) That, in fact, is:
(i) Within 300 feet of the boundary line of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center; and
(ii) Displays clear and conspicuous signage indicating that firearms or explosives are prohibited.

(b) *Second degree*. An actor commits second degree carrying a dangerous weapon when the actor:
(1) Knowingly possesses:
(A) A firearm, other than a pistol;
(B) A pistol, without a license to carry under RCC § 22E-4110; or
(C) A restricted explosive;
(2) The firearm, pistol, or restricted explosive is conveniently accessible and within reach; and
(3) The actor is in a location other than the actor's home, place of business, or land.

(c) *Third degree*. An actor commits third degree carrying a dangerous weapon when the actor:
(1) Knowingly possesses a dangerous weapon;
(2) The dangerous weapon is conveniently accessible and within reach;
(3) The actor is in a location other than the actor's home, place of business, or land; and
(4) With intent to use the weapon, anytime in the future or if any condition is met, in a manner that is likely to cause death or serious bodily injury to another person.

(d) *Exclusion from liability*. An actor does not commit an offense under this section when, in fact, the actor satisfies the criteria in RCC § 22E-4118.

(e) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor possesses the item while, in fact, voluntarily surrendering the item pursuant to District or federal law.

(f) *Penalties*.
(1) First degree carrying a dangerous weapon is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree carrying a dangerous weapon is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree carrying a dangerous weapon is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(g) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "dangerous weapon," "firearm," "pistol," "possesses," "restricted explosive," and "serious bodily injury" have the meanings specified in RCC § 22E-701.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

(a) *First degree.* An actor commits first degree possession of a dangerous weapon with intent to commit crime when the actor:
  (1) Knowingly possesses an object designed to explode or produce uncontained combustion;
  (2) With intent to use the object to commit a criminal harm that is, in fact:
    (A) An offense under Subtitle II of this title; or
    (B) An offense under Subtitle III of this title.

(b) *Second degree.* An actor commits second degree possession of a dangerous weapon with intent to commit crime when the actor:
  (1) Knowingly possesses:
    (A) A dangerous weapon; or
    (B) An imitation firearm;
  (2) With intent to use the imitation firearm or dangerous weapon to commit a criminal harm that is, in fact:
    (A) An offense under Subtitle II of this title; or
    (B) Burglary under RCC § 22E-2701.

(c) *Limitation on attempt liability*. The criminal attempt provision in RCC § 22E-301 does not apply to this section if the actor does not actually possess an item with intent to use it to commit an offense under Subtitle II or III of this title.

(d) *Penalties*.
  (1) First degree possession of a dangerous weapon with intent to commit crime is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree possession of a dangerous weapon with intent to commit crime is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*. The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "dangerous weapon," "imitation firearm," "possess," and "possesses" have the meanings specified in RCC § 22E-701.

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

(a) *First degree*. An actor commits first degree possession of a dangerous weapon during a crime when the actor:

(1) Knowingly possesses a firearm;
(2) In furtherance of and while committing what, in fact, is an offense under Subtitle II of this title.

(b) *Second degree*. An actor commits second degree possession of a dangerous weapon during a crime when the actor:
(1) Knowingly possesses:
(A) An imitation firearm; or
(B) A dangerous weapon;
(2) In furtherance of and while committing what, in fact, is an offense under Subtitle II of this title.

(c) *Penalties*.
(1) First degree possession of a dangerous weapon during a crime is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree possession of a dangerous weapon during a crime is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "dangerous weapon," "firearm," "imitation firearm," and "possesses" have the meanings specified in RCC § 22E-701.

RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

(a) *First degree.* An actor commits first degree possession of a firearm by an unauthorized person when the actor:
(1) Knowingly possesses a firearm; and
(2) Has a prior conviction for what is, in fact, a crime of violence other than conspiracy, or a comparable offense.

(b) *Second degree.* An actor commits second degree possession of a firearm by an unauthorized person when the actor:
(1) Knowingly possesses a firearm; and
(2) In addition:
(A) Is a fugitive from justice;
(B) Has a prior conviction for what is, in fact:
(i) A District offense that is currently punishable by imprisonment for a term exceeding one year, or a comparable offense, committed within 10 years of the current possession of a firearm;
(ii) An offense under Chapter 41 of this subtitle, or a comparable offense, committed within 5 years of the current possession of a firearm; or
(iii) An intrafamily offense, as defined in D.C. Code § 16-1001(8), that requires as an element confinement, sexual act, sexual contact, bodily injury, or threats, or a

comparable offense, committed within 5 years of the current possession of a firearm; or

(C) Is subject to a final civil protection order issued under D.C. Code § 16-1005 or a final anti-stalking order issued under D.C. Code § 16-1064.

(c) *Exclusion from liability*. An actor does not commit an offense under this section for, in fact, possessing a firearm within the first 24 hours of the prior conviction or service of the protection order, or, when the judicial officer sentencing the actor or issuing the protection order specifically orders a shorter period of time for the actor to retrieve and safely transport the firearm or relinquish ownership, within the time specified by the judicial officer.

(d) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor possesses the item while, in fact, voluntarily surrendering the item pursuant to District or federal law.

(e) *Penalties.*

(1) First degree possession of a firearm by an unauthorized person is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree possession of a firearm by an unauthorized person is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*.

(1) The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "bodily injury," "comparable offense," "crime of violence," "firearm," "prior conviction," "possesses," "possessing," "possession," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "fugitive from justice" means a person who has an open arrest warrant for:

(A) Fleeing to avoid prosecution for a crime;

(B) Fleeing to avoid giving testimony in a criminal proceeding; or

(C) Escape from a correctional facility or officer under RCC § 22E-3401.

RCC § 22E-4106. Negligent Discharge of Firearm.

(a) *Offense*. An actor commits negligent discharge of a firearm when the actor:

(1) Negligently discharges a projectile from a firearm outside a licensed firing range; and

(2) In fact, does not have:

(A) A written permit issued by the Metropolitan Police Department; or

(B) Other permission under District or federal law.

(b) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(c) *Penalties.* Negligent discharge of a firearm is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The term "negligently" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor" and "firearm" have the meanings specified in RCC § 22E-701.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

(a) *Offense.* An actor commits alteration of a firearm identification mark when the actor:
    (1) Knowingly alters or removes from a firearm:
        (A) The name of the maker;
        (B) The model;
        (C) The manufacturer's number; or
        (D) Other identifying mark;
    (2) With intent to conceal or misrepresent the identity of the firearm.
(b) *Penalties*. Alteration of a firearm identification mark is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Definitions.*
    (1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the terms "actor" and "firearm" have the meanings specified in RCC § 22E-701; and
    (2) In this section, the term "manufacturer" has the meaning specified in D.C. Code § 7-2505.03.

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

(a) The District may prohibit or restrict the possession of firearms on its property and any property under its control.
(b) Private persons or entities owning property in the District may prohibit or restrict the possession of firearms on their property by any person other than a law enforcement officer while that law enforcement officer is lawfully authorized to enter onto the private property.
(c) *Definitions*. The terms "firearm," "law enforcement officer," "possession," and "property" have the meanings specified in RCC § 22E-701.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

(a) Notwithstanding any other District law, a person shall be permitted to transport a firearm or ammunition under the following circumstances:
    (1) The person is not otherwise prohibited by law from possessing a firearm or ammunition;
    (2) The transportation of the firearm or ammunition is:

(A) For any lawful purpose;
(B) From any place where the person may lawfully possess the firearm or ammunition;
(C) To any place where the person may lawfully possess the firearm or ammunition;

(3) When the firearm is transported in a motor vehicle, the firearm is unloaded, and:
(A) If the motor vehicle has a compartment separate from the passenger area, neither the firearm nor any ammunition is conveniently accessible and within reach from the passenger area of the motor vehicle; or
(B) If the motor vehicle does not have a compartment separate from the passenger area, the firearm and any ammunition is in a locked container other than the glove compartment or console; and

(4) When the firearm is not transported in a motor vehicle, the firearm is:
(A) Unloaded;
(B) Inside a locked container; and
(C) Separate from any ammunition.

(b) *Definitions*. The terms "ammunition," "firearm," "possess," "possessing," and "motor vehicle" have the meanings specified in RCC § 22E-701.

RCC § 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol.

(a) The Chief of the Metropolitan Police Department may, upon the application of a person having a bona fide residence or place of business within the District of Columbia, or of a person having a bona fide residence or place of business within the United States and a license to carry a pistol concealed upon their person issued by the lawful authorities of any state or subdivision of the United States, issue a license to such person to carry a pistol concealed upon their person within the District of Columbia for not more than 2 years from the date of issue, if it appears that the person is a suitable person to be so licensed.

(b) A non-resident who lives in a state or subdivision of the United States that does not require a license to carry a concealed pistol may apply to the Chief of the Metropolitan Police Department for a license to carry a pistol concealed upon their person within the District of Columbia for not more than 2 years from the date of issue, provided that the person meets the same reasons and requirements set forth in subsection (a) of this section.

(c) For any person issued a license pursuant to this section, or renewed pursuant to D.C. Code § 7-2509.03, the Chief of the Metropolitan Police Department may limit the geographic area, circumstances, or times of the day, week, month, or year in which the license is effective, and may subsequently limit, suspend, or revoke the license as provided under D.C. Code § 7-2509.05.

(d) The application for a license to carry shall be on a form prescribed by the Chief of the Metropolitan Police Department and shall bear the name, address, description, photograph, and signature of the licensee.
(e) Except as provided in D.C. Code § 7-2509.05(b), any person whose application has been denied or whose license has been limited or revoked may, within 15 days after the date of the notice of denial or notice of intent, appeal to the Concealed Pistol Licensing Review Board established pursuant to D.C. Code § 7-2509.08.
(f) *Definitions*. The term "pistol" has the meaning specified in RCC § 22E-701.

RCC § 22E-4111. Unlawful Sale of a Pistol.

(a) *Offense.* An actor commits unlawful sale of a pistol when the actor:
    (1) Knowingly sells a pistol;
    (2) Reckless as to the fact that the purchaser is:
        (A) Not of sound mind;
        (B) Prohibited from possessing a firearm by RCC § 22E-4105; or
        (C) Under 21 years of age, except when the purchaser is a child or ward of the actor.
(b) *Penalties*. Unlawful sale of a pistol is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "firearm," "pistol," and "possessing" have the meanings specified in RCC § 22E-701.

RCC § 22E-4112. Unlawful Transfer of a Firearm.

(a) *Offense.* An actor commits unlawful transfer of a firearm when the actor:
    (1) Knowingly, as the seller of a firearm, delivers the firearm to a purchaser:
        (A) Fewer than 10 days after the date of the purchase, except in the case of sales to law enforcement officers; or
        (B) In a manner other than as specified in RCC § 22E-4109;
    (2) Knowingly, as the purchaser of a firearm, fails to sign in duplicate and deliver to the seller a statement containing the purchaser's full name, address, occupation, date and place of birth, the date of purchase, the caliber, make, model, and manufacturer's number of the firearm and a statement that the purchaser is not prohibited from possessing a firearm under RCC § 22E-4105;
    (3) Knowingly, as the seller of a firearm, fails to sign and attach their address to the purchaser's statement described in paragraph (a)(2) of this section and deliver one copy to such person or persons as the Chief of the Metropolitan Police Department may designate, and retain the other copy for 6 years; or
    (4) Knowingly sells an assault weapon, machine gun, or sawed-off shotgun:

(A) To any person other than the persons designated in RCC § 22E-4118(b) as entitled to possess the same; or
(B) Without prior permission to make such sale obtained from the Chief of the Metropolitan Police Department.

(b) *Exclusion from liability*. An actor does not commit an offense under this section when, in fact, the actor is a wholesale dealer selling a firearm to a dealer licensed under RCC § 22E-4114.
(c) *Penalties*. Unlawful transfer of a firearm is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "assault weapon," "firearm," "law enforcement officer," "machine gun," "possess," "possessing," and "sawed-off shotgun" have the meanings specified in RCC § 22E-701.

RCC § 22E-4113. Sale of a Firearm Without a License.

(a) *Offense.* An actor commits sale of a firearm without a license when the actor knowingly:
(1) As a retail dealer:
(A) Sells, exposes for sale, or possesses with intent to sell, a firearm;
(B) Without a license under RCC § 22E-4114; or
(2) As a wholesale dealer, sells, or possesses with intent to sell, a firearm to any person other than a dealer licensed under RCC § 22E-4114.
(b) *Penalties*. Unlawful sale of a firearm without a license is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(c) *Definitions.* The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; and the terms "actor," "firearm," and "possesses," have the meanings specified in RCC § 22E-701.

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

(a) The Mayor of the District of Columbia may, in their discretion, grant licenses and may prescribe the form thereof, effective for not more than one year after the date of issue, permitting the licensee to sell a firearm at retail within the District of Columbia.
(b) Any license issued under this section shall require the licensee to follow the following licensure requirements:
(1) Firearm sales shall occur only in the building designated in the license.
(2) The license or a copy thereof, certified by the issuing authority, shall be clearly and conspicuously displayed on the premises.
(3) No firearm shall be sold if the purchaser is:
(A) Not of sound mind;
(B) Prohibited from possessing a firearm under RCC § 22E-4105;

(C) Under 21 years of age; or
(D) Unknown to the seller, unless the purchaser presents clear evidence of the purchaser's identity.

(4) No assault weapon, machine gun, or sawed-off shotgun shall be sold to any person other than the persons specified in RCC § 22E-4118(b) as entitled to possess the same, and then only after permission to make such sale has been obtained from the Chief of the Metropolitan Police Department.

(5) A true record shall be made of all firearms in the possession of the licensee, in a form prescribed by the Mayor. The record shall contain the date of purchase, the caliber, make, model, and manufacturer's number of each weapon, to which shall be added, when sold, the date of sale.

(6) A true record in duplicate shall be made of every firearm sold, in a form prescribed by the Mayor. The record shall be personally signed by the purchaser and by the person effecting the sale, each in the presence of the other, and shall contain the date of sale; the name, address, occupation, and place of birth of the purchaser; so far as applicable, the caliber, make, model, and manufacturer's number of the weapon; and a statement by the purchaser that the purchaser is not a person prohibited from possessing a firearm under RCC § 22E-4105. A copy of the record shall, within 7 days after the sale, be forwarded by mail to the Chief of the Metropolitan Police Department and the other copy retained by the seller for 6 years after the sale.

(7) No firearm or imitation firearm or placard advertising the sale of a firearm or imitation firearm shall be clearly and conspicuously displayed on the premises, where it can readily be seen from outside.

(c) Any license shall be subject to forfeiture for any violation of the requirements specified in subsection (b) of this section.

(d) Any license issued under this section shall be issued by the Metropolitan Police Department as a Public Safety endorsement to a basic business license under the basic business license system as set forth in subchapter I-A of Chapter 28 of Title 47 of the D.C. Code (§ 47-2851.01 et seq.).

(e) *Definitions*.

(1) The terms "assault weapon," "building," "firearm," "imitation firearm," "machine gun," "possess," "possessing," "possession," and "sawed-off shotgun" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "manufacturer" has the meaning specified in D.C. Code § 7-2505.03.

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

(a) *Offense.* An actor commits unlawful sale of a firearm by a licensed dealer when the actor:

(1) In fact, is a licensed dealer under RCC § 22E-4114; and

(2) Recklessly violates a licensure requirement specified in RCC § 22E-4114(b).

(b) *Penalties*. Unlawful sale of a firearm by a licensed dealer is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* The term "recklessly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor" and "firearm" have the meanings specified in RCC § 22E-701.

RCC § 22E-4116. Use of False Information for Purchase or Licensure of a Firearm.

(a) *Offense.* An actor commits use of false information for purchase or licensure of a firearm when the actor knowingly gives false information or false evidence of identity to:

(1) Purchase a firearm; or

(2) Apply for a license to carry a pistol under RCC § 22E-4110.

(b) *Penalties*. Use of false information for purchase or licensure of a firearm is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; and the terms "actor," "firearm," and "pistol" have the meanings specified in RCC § 22E-701.

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

(a) A dangerous article unlawfully owned, possessed, or carried is hereby declared to be a nuisance.

(b) When a police officer, in the course of a lawful arrest or lawful search, or when a designated civilian employee of the Metropolitan Police Department in the course of a lawful search, discovers a dangerous article that the officer reasonably believes is a nuisance under subsection (a) of this section the officer shall take it into their possession and surrender it to the Property Clerk of the Metropolitan Police Department.

(c) *Hearing procedures.*

(1) Within 30 days after the date of such surrender, any person may file in the office of the Property Clerk of the Metropolitan Police Department a written claim for possession of such dangerous article. Upon the expiration of the period, the Property Clerk shall notify each claimant, by registered mail addressed to the address shown on the claim, of the time and place of a hearing to determine which claimant, if any, is entitled to possession of such dangerous article. The hearing shall be held within 60 days after the date of such surrender.

(2) At the hearing the Property Clerk shall hear and receive evidence with respect to the claims filed under paragraph (c)(1) of this section. Thereafter the Property Clerk shall determine which claimant, if any,

is entitled to possession of such dangerous article and shall reduce their decision to writing. The Property Clerk shall send a true copy of the written decision to each claimant by registered mail addressed to the most recent address of the claimant.

(3) Any claimant may, within 30 days after the day on which the copy of the decision was mailed to such claimant, file an appeal in the Superior Court of the District of Columbia. If the claimant files an appeal, the claimant shall at the same time give written notice thereof to the Property Clerk. If the decision of the Property Clerk is so appealed, the Property Clerk shall not dispose of the dangerous article while the appeal is pending and, if the final judgment is entered by the court, the Property Clerk shall dispose of the dangerous article in accordance with the judgment of the court. The court is authorized to determine which claimant, if any, is entitled to possession of the dangerous article and to enter a judgment ordering a disposition of the dangerous article consistent with subsection (e) of this section.

(4) If there is no appeal, or if the appeal is dismissed or withdrawn, the Property Clerk shall dispose of the dangerous article in accordance with subsection (e) of this section.

(5) The Property Clerk shall make no disposition of a dangerous article under this section, whether in accordance with their own decision or in accordance with the judgment of the court, until the United States Attorney for the District of Columbia or the Attorney General for the District of Columbia certifies to the Property Clerk that the dangerous article will not be needed as evidence.

(d) A person claiming a dangerous article shall be entitled to its possession only if:

(1) The claimant shows, on satisfactory evidence that the ownership is lawful and:

(A) The person is the owner of the dangerous article; or

(B) The person is the accredited representative of the owner and has a power of attorney from the owner;

(2) The claimant shows, on satisfactory evidence, that at the time the dangerous article was taken into possession by a police officer or a designated civilian employee of the Metropolitan Police Department, it was not unlawfully owned and was not unlawfully possessed or carried by the claimant or with their awareness or consent; and

(3) The receipt of possession by the claimant does not cause the article to be a nuisance.

(e) If a person claiming a dangerous article is entitled to its possession as determined under subsections (c) and (d) of this section, possession of such dangerous article shall be given to the claimant. If no person so claiming is entitled to its possession as determined under subsections (c) and (d) of this section, or if there is no claimant, the dangerous article shall be destroyed or, upon order of the Mayor of the District of Columbia, transferred to and used by any federal or District government law enforcement agency. A District

government agency receiving a dangerous article under this section shall establish responsibility and records for the item.

(f) The Property Clerk shall not be liable in damages for any action performed in good faith under this section.

(g) *Definitions*.

(1) The terms "consent," "owner," "possessed," and "possession" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "dangerous article" means:

(A) A bump stock, as defined in RCC § 22E-701;

(B) A firearm, as defined in RCC § 22E-701;

(C) A firearm silencer;

(D) A large capacity ammunition feeding device, as defined in RCC § 22E-701; and

(E) A restricted explosive, as defined in RCC § 22E-701.

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

(a) *Scope of exclusion.* The exclusions from liability specified in this section apply to the following District offenses:

(1) Possession of an Unregistered Firearm, Destructive Device, or Ammunition under RCC § 7-2502.01A;

(2) Possession of a Stun Gun under RCC § 7-2502.15;

(3) Carrying an Air or Spring Gun under RCC § 7-2502.17;

(4) Carrying a pistol in an unlawful manner under RCC § 7-2509.06A;

(5) Possession of a Prohibited Weapon or Accessory under RCC § 22E-4101; and

(6) Carrying a Dangerous Weapon under RCC § 22E-4102.

(b) *Exclusion from liability.* Notwithstanding any other District law, an actor does not commit an offense specified in subsection (a) of this section when, in fact, the actor is:

(1) A member of the Army, Navy, Air Force, or Marine Corps of the United States;

(2) An on-duty member of the National Guard or Organized Reserves;

(3) A qualified law enforcement officer as defined in 18 U.S.C. § 926B;

(4) A qualified retired law enforcement officer as defined in 18 U.S.C. § 926C, who carries a concealed pistol that is registered under D.C. Code § 7-2502.07 and is conveniently accessible and within reach;

(5) An on-duty licensed special police officer or campus police officer, who possesses or carries a firearm registered under D.C. Code § 7-2502.07 in accordance with D.C. Code § 5-129.02 and all rules promulgated under that section;

(6) An on-duty director, deputy director, officer, or employee of the District of Columbia Department of Corrections who possesses or carries a firearm registered under D.C. Code § 7-2502.07;

(7) An employee of the District or federal government, who is on duty and acting within the scope of those duties;

(8) Lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense;
(9) Lawfully engaging in the business of shipping or delivering the weapon involved in the offense; or
(10) Acting within the scope of authority granted by the Chief of the Metropolitan Police Department or a competent court.

(c) *Exclusion from liability.* Notwithstanding any other District law, an actor shall not be subject to prosecution for an offense specified in subsection (a) of this section if, in fact, the actor:
(1) Holds a valid registration certificate issued under D.C. Code § 7-2502.07; and
(2) Possesses the registered firearm or ammunition for a firearm of the same caliber while:
(A) At the home or place of business designated on the registration certificate;
(B) Transporting the firearm or ammunition, in accordance with RCC § 22E-4109, to or from:
(i) A place of sale;
(ii) The person's home or place of business;
(iii) A place of repair;
(iv) A firearms training and safety class conducted by a firearms instructor; or
(v) A lawful recreational firearm-related activity; or
(C) Transporting the firearm or ammunition for a lawful purpose as expressly authorized by a District or federal statute and in accordance with the requirements of that statute.

(d) *Exclusion from liability.* Notwithstanding any other District law, an actor does not commit an offense specified in subsection (a) of this section when, in fact, the actor possesses or carries a firearm while participating in a firearms training and safety class conducted by a firearms instructor.

(e) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "ammunition," "firearm," "firearms instructor," "law enforcement officer," "pistol," and "possesses" have the meanings specified in RCC § 22E-701.

RCC § 22E-4119. Merger of Related Weapon Offenses.

(a) *Merger of possessory offenses and offenses related to other crime.* Multiple convictions for 2 or more of the following offenses merge when arising from the same act or course of conduct:
(1) Possession of an Unregistered Firearm, Destructive Device, or Ammunition under RCC § 7-2502.01A;
(2) Possession of a Stun Gun under RCC § 7-2502.15;
(3) Carrying an Air or Spring Gun under RCC § 7-2502.17;
(4) Carrying a Dangerous Weapon under RCC § 22E-4102;

(5) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103; and
(6) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104.

(b) *Merger of offenses related to other crime and display or use of weapon.* Multiple convictions for 2 or more of the following offenses merge when arising from the same act or course of conduct:
(1) Possession of a Dangerous Weapon with Intent to Commit Crime under RCC § 22E-4103;
(2) Possession of a Dangerous Weapon During a Crime under RCC § 22E-4104; and
(3) Any offense under Subtitle II or Subtitle III of this title that includes as an element of any gradation or enhancement that the person displayed or used a dangerous weapon.

(c) *Merger procedure and rule of priority.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(d) *Definitions*. The term "act" has the meaning specified in RCC § 22E-202; and the terms "actor" and "dangerous weapon" have the meanings specified in RCC § 22E-701.

RCC § 22E-4120. Endangerment with a Firearm.

(a) *Offense*. An actor commits endangerment with a firearm when the actor:
(1) Knowingly discharges a projectile from a firearm outside a licensed firing range; and
(2) Either:
(A) The discharged projectile creates a substantial risk of death or bodily injury to another person; or
(B) In fact:
(i) The actor or the discharged projectile is in a location that is:
(I) Open to the general public at the time of the offense;
(II) A communal area of multi-unit housing;
(III) A public conveyance; or
(IV) A rail transit station; and
(ii) The actor does not have permission to discharge a projectile from a firearm under:
(I) A written permit issued by the Metropolitan Police Department; or
(II) Other District or federal law.

(b) *Penalties.* Endangerment with a firearm is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for another offense that has as an objective

element in the offense definition or applicable penalty enhancement the use or display, or attempted use or display, of a firearm, imitation firearm, or dangerous weapon shall merge when the convictions arise from the same act or course of conduct and the same complainant.

(d) *Merger procedure and rule of priority.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall follow the procedures specified in subsections (b) and (c) of RCC § 22E-214.

(e) *Definitions*. The term "objective element" has the meaning specified in RCC § 22E-201; the term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "dangerous weapon," "firearm," "imitation firearm," "open to the general public," "public conveyance," and "rail transit station" have the meanings specified in RCC § 22E-701.

Chapter 42. Breaches of Peace.

RCC § 22E-4201. Disorderly Conduct.

(a) *Offense*. An actor commits disorderly conduct when the actor:
  (1) In fact, is in a location that is:
    (A) Open to the general public at the time of the offense;
    (B) Inside a public conveyance or a rail transit station; or
    (C) A communal area of multi-unit housing; and
  (2) Engages in any of the following conduct:
    (A) Recklessly, by conduct other than speech, causes any person present to reasonably believe that they are likely to suffer immediate criminal bodily injury, taking of property, or damage to property;
    (B) Purposely commands, requests, or tries to persuade any person present to cause immediate criminal bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to occur;
    (C) Purposely directs abusive speech to any person present, reckless as to the fact that such conduct is likely to provoke immediate retaliatory criminal bodily injury, taking of property, or damage to property; or
    (D) Knowingly continues or resumes fighting with another person after receiving a law enforcement officer's order to stop.

(b) *Exclusions from liability*.
  (1) An actor does not commit an offense under subparagraph (a)(2)(A) of this section when, in fact, the other person present is a law enforcement officer in the course of official duties.
  (2) An actor does not commit an offense under subparagraph (a)(2)(C) of this section when, in fact, the conduct is directed to or likely to provoke a law enforcement officer in the course of official duties.

(c) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.
(d) *Penalties.* Disorderly conduct is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(e) *Definitions.* The terms "knowingly," "purposely," "reckless," and "recklessly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "law enforcement officer," "open to the general public," "property," "public conveyance," "rail transit station" and "speech" have the meanings specified in RCC § 22E-701.

RCC § 22E-4202. Public Nuisance.

(a) *Offense*. An actor commits public nuisance when the actor purposely causes significant interruption to:
    (1) The orderly conduct of a meeting by a District or federal public body;
    (2) A person's reasonable, quiet enjoyment of their dwelling, between 10:00 p.m. and 7:00 a.m., and continues or resumes the conduct after receiving oral or written notice to stop; or
    (3) A person's lawful use of a public conveyance; or
    (4) A religious service, funeral, or wedding, that is, in fact, lawful and in a location that is open to the general public at the time of the offense.
(b) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.
(c) *Penalties.* Public nuisance is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.*
    (1) The term "purposely" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "dwelling," "open to the general public," and "public conveyance" have the meanings specified in RCC § 22E-701; and
    (2) In this section, the terms "meeting" and "public body" have the meanings specified in D.C. Code § 2-574.

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

(a) *Offense*. An actor commits blocking a public way when the actor:
    (1) Knowingly blocks a street, sidewalk, bridge, path, entrance, exit, or passageway;
    (2) While on land or in a building that is owned by a government, government agency, or government-owned corporation; and
    (3) Continues or resumes the blocking after receiving a law enforcement officer's order that, in fact, is lawful, to stop.
(b) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(c) *Penalties.* Blocking a public way is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "blocks," "building," and "law enforcement officer" have the meanings specified in RCC § 22E-701.

RCC § 22E-4204. Unlawful Demonstration.

(a) *Offense*. An actor commits unlawful demonstration when the actor:
    (1) Knowingly engages in a demonstration;
    (2) In a location where the demonstration, in fact, is otherwise unlawful under District or federal law; and
    (3) Continues or resumes engaging in the demonstration after receiving a law enforcement order to stop.
(b) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.
(c) *Penalties.* Unlawful demonstration is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor" and "demonstration" have the meanings specified in RCC § 22E-701.

RCC § 22E-4205. Breach of Home Privacy.

(a) *Offense.* An actor commits breach of home privacy when the actor:
    (1) Knowingly and surreptitiously observes inside a dwelling, by any means; and
    (2) In fact, an occupant of the dwelling would have a reasonable expectation of privacy.
(b) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.
(c) *Penalties.* Breach of home privacy is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor" and "dwelling" have the meanings specified in RCC § 22E-701.

RCC § 22E-4206. Indecent Exposure.

(a) *First degree.* An actor commits first degree indecent exposure when the actor:
    (1) Knowingly engages in:
        (A) A sexual act;
        (B) Masturbation; or

(C) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; and

(2) The conduct is:

(A) Is visible to the complainant;

(B) Is without the complainant's effective consent; and

(C) Is with the purpose of alarming or sexually abusing, humiliating, harassing, or degrading the complainant.

(b) *Second degree.* An actor commits second degree indecent exposure when the actor:

(1) Knowingly engages in:

(A) A sexual act;

(B) Masturbation; or

(C) A display of the genitals, pubic area, or anus, when there is less than a full opaque covering;

(2) In, or visible from, a location that is:

(A) Open to the general public at the time of the offense;

(B) A communal area of multi-unit housing;

(C) A public conveyance; or

(D) A rail transit station; and

(3) Reckless as to the fact that the conduct:

(A) Is visible to the complainant;

(B) Is without the complainant's effective consent; and

(C) Alarms or sexually abuses, humiliates, harasses, or degrades any person.

(c) *Exclusions from liability.*

(1) An actor does not commit an offense under subsection (a) of this section when, in fact:

(A) The actor is inside their own individual dwelling unit; and

(B) The conduct is not visible to any person outside the dwelling.

(2) An actor shall not be subject to prosecution under this section when, in fact, the actor is:

(A) An employee of a licensed sexually-oriented business establishment; and

(B) Acting within the reasonable scope of that role.

(d) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of subsection (b) of this section.

(e) *Penalties.*

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

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

(f) *Definitions.*

(1) The terms "knowingly," "purpose," and "reckless" have the meaning specified in RCC § 22E-206; the term "in fact" has the meaning

specified in RCC § 22E-207; the terms "actor," "complainant," "dwelling," "effective consent," "open to the general public," "public conveyance," "rail transit station," and "sexual act" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "sexually-oriented business establishment" has the meaning specified in 11 DCMR § 199.1.

Chapter 43. Group Misconduct.

RCC § 22E-4301. Rioting.

(a) *Offense*. An actor commits rioting when the actor:
   (1) Knowingly commits or attempts to commit a criminal bodily injury, taking of property, or damage to property;
   (2) Reckless as to the fact 7 or more other people are each personally and simultaneously committing or attempting to commit a criminal bodily injury, taking of property, or damage to property, in the area reasonably perceptible to the actor.

(b) *No attempt liability*. The criminal attempt provision in RCC § 22E-301 does not apply to this section.

(c) *Penalties*. Rioting is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "bodily injury," and "property" have the meanings specified in RCC § 22E-701.

RCC § 22E-4302. Failure to Disperse.

(a) *Offense*. An actor commits failure to disperse when the actor:
   (1) Knowingly fails to obey a law enforcement officer's dispersal order;
   (2) Reckless as to the fact that 8 or more people are each personally and simultaneously committing or attempting to commit a criminal bodily injury, taking of property, or damage to property, in the area reasonably perceptible to the actor; and
   (3) In fact, the actor's presence substantially impairs the ability of a law enforcement officer to safely prevent or stop the criminal conduct.

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

(c) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "law enforcement officer," and "property" have the meaning specified in RCC § 22E-701.

Chapter 44. Prostitution and Related Statutes.

RCC § 22E-4401. Prostitution.

(a) *Offense.* An actor commits prostitution when the actor knowingly:
  (1) Pursuant to a prior agreement, explicit or implicit, engages in or submits to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value;
  (2) Agrees, explicitly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value; or
  (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value.

(b) *Immunity.*
  (1) An actor does not commit an offense under this section when, in fact, the actor is under 18 years of age.
  (2) The Metropolitan Police Department and any other District agency designated by the Mayor shall refer any person under 18 years of age that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of a minor under RCC § 22E-1605.

(c) *Penalties*. Prostitution is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

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

RCC § 22E-4402. Patronizing prostitution.

(a) *Offense.* An actor commits patronizing prostitution when the actor knowingly:
  (1) Pursuant to a prior agreement, explicit or implicit, engages in or submits to a sexual act or sexual contact in exchange for the actor giving another person anything of value;
  (2) Agrees, explicitly or implicitly, to give anything of value to another person in exchange for that person or a third party engaging in or submitting to a sexual act or sexual contact; or
  (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor giving another person anything of value.

(b) *Penalties*.
  (1) Patronizing prostitution is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty enhancements*. The penalty classification of this offense is increased by one class when the actor:

(A) Is reckless as to the fact that the person patronized is under 18 years of age, or, in fact, the person patronized is under 12 years of age; or

(B) Is reckless as to the fact that the person patronized is:

(i) Incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or

(ii) Incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact.

(c) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "consent," "sexual act," and "sexual contact" have the meanings specified in RCC § 22E-701.

RCC § 22E-4403. Trafficking in Commercial Sex.

(a) *Offense.* An actor commits trafficking in commercial sex when the actor:

(1) With intent to receive anything of value as a result, purposely:

(A) Causes, procures, provides, recruits, or entices a person to engage in or submit to a commercial sex act with or for another person; or

(B) Provides or maintains a location for a person to engage in or submit to a commercial sex act with or for another person;

(2) Knowingly receives anything of value as a result of:

(A) Causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a commercial sex act with or for another person; or

(B) Providing or maintaining a location for a person to engage in or submit to a commercial sex act with or for another person; or

(3) Obtains anything of value from the proceeds or earnings of a commercial sex act that a person has engaged in or submitted to, either without consideration or when the consideration is providing or maintaining a location for a commercial sex act.

(b) *Penalties*.

(1) Trafficking in commercial sex is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Penalty enhancements*. The penalty classification of this offense is increased by one class when the actor:

(A) Is reckless as to the fact that the person trafficked is under 18 years of age, or, in fact, the person trafficked is under 12 years of age;
(B) Is reckless as to the fact that the person trafficked is:
(i) Incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or
(ii) Incapable of communicating willingness or unwillingness to engage in the commercial sex act.

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

RCC § 22E-4404. Civil Forfeiture.

(a) *Property subject to forfeiture.* The following are subject to civil forfeiture:
(1) In fact, all conveyances, including aircraft, vehicles or vessels, which are possessed with intent to be used, or are, in fact, used, to facilitate the commission of Trafficking in Commercial Sex under RCC § 22E-4403; and
(2) In fact, all money, coins, and currency which are possessed with intent to be used, or are, in fact, used, to facilitate the commission of Trafficking in Commercial Sex under RCC § 22E-4403.

(b) *Requirements for forfeiture.* All seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

(c) *Definitions.* The term "intent" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the term "possessed" has the meaning specified in RCC § 22E-701.

Chapter 46. Offenses Against the Family.

RCC § 22E-4601. Contributing to the Delinquency of a Minor.

(a) *Offense.* An actor commits contributing to the delinquency of a minor when the actor:
(1) In fact, is 18 years of age or older and at least four years older than the complainant;
(2) Is reckless as to the fact that the complainant is under 18 years of age; and
(3) In fact, either:

(A) Is an accomplice to the complainant under RCC § 22E-210 for any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction; or

(B) Engages in criminal solicitation of the complainant under RCC § 22E-302 for any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction.

(b) *Exclusions from liability.*

(1) An actor does not commit an offense under this section when, in fact, during a demonstration, the complainant's conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction.

(2) An actor does not commit an offense under this section when, in fact, the actor satisfies the requirements specified under D.C. Code § 7-403.

(c) *Relationship to minor's conduct*. An actor may be convicted of an offense under this section even though the complainant has not been arrested, prosecuted, convicted, or adjudicated delinquent for an offense.

(d) *Affirmative defense.* It is an affirmative defense to liability under this section that the actor engages in the conduct constituting the offense:

(1) With intent to safeguard or promote the welfare of the complainant; and

(2) In fact, such conduct:

(A) Is reasonable in manner and degree, under all the circumstances; and

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

(e) *Penalties.* Contributing to the delinquency of a minor is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*. The terms "intent" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "comparable offense," "complainant," "demonstration," and "serious bodily injury" have the meanings specified in RCC § 22E-701.

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

RCC § 7-2502.01A. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

(a) *First degree*. An actor commits first degree possession of an unregistered firearm, destructive device, or ammunition when the actor knowingly possesses:
  (1) A firearm without, in fact, being the holder of a registration certificate issued under D.C. Code § 7-2502.07 for that firearm;
  (2) A destructive device; or
  (3) One or more restricted pistol bullets.

(b) *Second degree*. An actor commits second degree possession of an unregistered firearm, destructive device, or ammunition when the actor knowingly possesses ammunition without, in fact, being the holder of a registration certificate issued under D.C. Code § 7-2502.07 for a firearm of the same caliber.

(c) *Exclusions from liability*.
  (1) An actor does not commit an offense under subsection (a) of this section for, in fact, possessing a firearm frame, receiver, muffler, or silencer.
  (2) An actor does not commit an offense under subsection (a) of this section for, in fact, possessing a lacrimator or sternutator.
  (3) An actor does not commit an offense under subsection (a) of this section when, in fact, the actor is a nonresident of the District of Columbia who is:
    (A) Participating in a lawful recreational firearm-related activity inside the District; or
    (B) Traveling to or from a lawful recreational firearm-related activity outside the District; and
      (i) Upon demand of a law enforcement officer exhibits proof that:
        (I) The actor is traveling to or from a lawful recreational firearm-related activity outside the District; and
        (II) The actor's possession or control of the firearm is lawful in the actor's jurisdiction of residence; and
      (ii) The firearm is transported in accordance with the requirements specified in RCC § 22E-4109.
  (4) An actor does not commit an offense under subsection (b) of this section when, in fact, the actor is the holder of an ammunition collector's certificate effective on or before September 24, 1976.
  (5) An actor does not commit an offense under subsection (b) this section for, in fact, possessing one or more empty cartridge cases, shells, or spent bullets.
  (6) An actor does not commit an offense under this section when, in fact, the actor satisfies the criteria in RCC § 22E-4118.

(d) *Affirmative defense.* It is an affirmative defense to liability under this section that the person possesses the item while, in fact, voluntarily surrendering the item pursuant to District or federal law.

(e) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(f) *Penalties*.

(1) First degree possession of an unregistered firearm, destructive device, or ammunition is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree possession of an unregistered firearm, destructive device, or ammunition is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Administrative disposition*. The Attorney General for the District of Columbia may, in its discretion, offer an administrative disposition under D.C. Code § 5-335.01 et seq. for a violation of this section.

(g) *Definitions*.

(1) The term "knowingly" has the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "ammunition," "law enforcement officer," "possesses," "possessing," and "possession" have the meanings specified in RCC § 22E-701; and

(2) In this section, the terms "destructive device," "firearm," and "restricted pistol bullet" have the meaning specified in D.C. Code § 7-2501.01.

(h) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 7-2502.15. Possession of a Stun Gun.

(a) *Offense.* An actor commits possession of a stun gun when the actor knowingly possesses a stun gun and is:

(1) Under 18 years of age; or

(2) In a location that:

(A) Is a building, building grounds, or part of a building, that is occupied by the District of Columbia;

(B) Is a building, building grounds, or part of a building, that is occupied by a preschool, a primary or secondary school, public recreation center, or a children's day care center; or

(C) Displays clear and conspicuous signage indicating that stun guns are prohibited.

(b) *Exclusion from liability*. An actor does not commit an offense under this section when, in fact, the actor satisfies the criteria in RCC § 22E-4118.

(c) *Affirmative defense*. It is an affirmative defense to liability under this section that, in fact:

(1) A person lawfully in charge of the location gave effective consent to the conduct charged to constitute the offense; or

(2) The actor reasonably believes that a person lawfully in charge of the location gave effective consent to the conduct charged to constitute the offense.

(d) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.
(e) *Penalties.* Possession of a stun gun is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(f) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "building," "effective consent," "possesses," and "stun gun" have the meanings specified in RCC § 22E-701.
(g) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 7-2502.17. Carrying an Air or Spring Gun.

(a) *Offense.* An actor commits carrying an air or spring gun when the actor:
    (1) Knowingly possesses any instrument or weapon of the kind commonly called an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, or bowgun;
    (2) While outside a building; and
    (3) The instrument or weapon is conveniently accessible and within reach.
(b) *Exclusions from liability*.
    (1) An actor does not commit an offense under this section if, in fact, the conduct occurs:
        (A) As part of a lawful theatrical performance, athletic contest, or educational or cultural presentation;
        (B) In a licensed firing range; or
        (C) With the permission of the Metropolitan Police Department.
    (2) An actor does not commit an offense under this section if, in fact, the actor:
        (A) Is 18 years of age or older; and
        (B) Transports the instrument or weapon while it is unloaded and securely wrapped.
    (3) An actor does not commit an offense under this section when, in fact, the actor satisfies the criteria in RCC § 22E-4118.
(c) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.
(d) *Penalties.* Carrying an air or spring gun is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(e) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "building," and "possesses" have the meanings specified in RCC § 22E-701.
(f) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 7-2507.02A. Unlawful Storage of a Firearm.

(a) *Offense.* An actor commits unlawful storage of a firearm when the actor:
  (1) Knowingly possesses a firearm that is:
    (A) Not conveniently accessible and within reach;
    (B) Not in a securely locked container; and
    (C) Not in another location that a reasonable person would believe to be secure; and
  (2) Is negligent as to the fact that:
    (A) A person other than the actor who is under 18 years of age is able to access the firearm without the permission of their parent or guardian; or
    (B) A person other than the actor who is prohibited from possessing a firearm under District law is able to access the firearm.

(b) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(c) *Penalties*.
  (1) Unlawful storage of a firearm is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty enhancements*. The penalty classification of an offense under subparagraph (a)(1)(A) of this section is increased by one class when, in fact, a person under 18 years of age accesses and uses the firearm to cause either:
    (A) A criminal bodily injury; or
    (B) A bodily injury to themselves.

(d) *Definitions.* The terms "knowingly" and "negligent" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "firearm," "possesses," and "possessing" have the meanings specified in RCC § 22E-701.

(e) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 7-2509.06A. Carrying a Pistol in an Unlawful Manner.

(a) *Offense.* An actor commits carrying a pistol in an unlawful manner when the actor:
  (1) Knowingly possesses a pistol;
  (2) While outside the actor's home or place of business;
  (3) The pistol is conveniently accessible and within reach; and
  (4) In addition:
    (A) The actor possesses ammunition that is conveniently accessible and within reach and is either:
      (i) More than is required to fully load the pistol twice; or
      (ii) More than 20 rounds;
    (B) The pistol is not entirely hidden from public view; or

(C) The pistol is not in a holster on the actor's person in a firmly secure manner that is reasonably designed to prevent loss, theft, and accidental discharge of the pistol.

(b) *Exclusions from liability*. An actor does not commit an offense under this section when, in fact, the actor satisfies the criteria in RCC § 22E-4118.

(c) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(d) *Penalties*. Carrying a pistol in an unlawful manner is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.* The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "ammunition," "pistol," and "possesses" have the meanings specified in RCC § 22E-701.

(f) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

D.C. Code § 16-705. Jury trial; trial by court.

(a) Until [midnight on a date three years after enactment of the RCC], in a criminal case tried in the Superior Court:

(1) Except as provided in paragraph (a)(2) of this section, a trial for the offense shall be by jury when:

(A) According to the Constitution of the United States, the defendant is entitled to a jury trial;

(B) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000, or by imprisonment for more than 60 days, or for more than six months in the case of the offense of contempt of court;

(C) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (a)(1)(B) of this section;

(D) The defendant is charged with an offense under Chapter 12 of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(E) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(F) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law, or denial of naturalization under federal immigration law; or

(G) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $1,000 or a cumulative term of imprisonment of more than 60 days; and

(2) A trial for the offense shall be by a single judge whose verdict shall have the same force and effect as that of a jury:
(A) In any case not specified in paragraphs (a)(1)(A) – (a)(1)(G) of this section; or
(B) In any case specified in paragraphs (a)(1)(A) – (a)(1)(G) of this section if the defendant in open court expressly waives trial by jury and requests trial by the court more than 10 days before the scheduled trial or, with the consent of the court, within 10 days of the scheduled trial.

(b) After [midnight on a date three years after enactment of the RCC], in a criminal case tried in the Superior Court:
(1) Except as provided in paragraph (b)(2) of this section, a trial shall be by jury when:
(A) According to the Constitution of the United States, the defendant is entitled to a jury trial;
(B) The defendant is charged with an offense that is punishable by a fine or penalty of more than $250, or by imprisonment, or for more than six months in the case of the offense of contempt of court;
(C) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $250; and
(2) A trial shall be by a single judge whose verdict shall have the same force and effect as that of a jury:
(A) In any case not specified in paragraphs (b)(1)(A) – (b)(1)(C) of this section; or
(B) In any case specified in paragraphs (b)(1)(A) – (b)(1)(C) of this section if the defendant in open court expressly waives trial by jury and requests trial by the court more than 10 days before the scheduled trial or, with the consent of the court, within 10 days of the scheduled trial.

(c) If a defendant in a criminal case is charged with 2 or more offenses and the offenses include at least one jury demandable offense and one non-jury demandable offense the trial for all offenses charged against that defendant shall be by jury unless the defendant in open court expressly waives trial by jury and requests trial by the court, in which case the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.

(d) The jury shall consist of twelve persons, unless the parties, with the approval of the court and in the manner provided by rules of the court, agree to a number less than twelve. Even absent such agreement, if, due to extraordinary circumstances, the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court, a valid verdict may be returned by the remaining eleven jurors.

RCC § 16-1005A. Criminal Contempt for Violation of a Civil Protection Order.

(a) *Offense*. An actor commits criminal contempt for violation of a civil protection order when the actor:
  (1) Knows they are subject to a protection order that, in fact:
    (A) Is one of the following:
      (i) A temporary civil protection order issued under D.C. Code § 16-1004;
      (ii) A final civil protection order issued under D.C. Code § 16-1005; or
      (iii) A valid foreign protection order;
    (B) Is in writing;
    (C) Advises the actor of the consequences for violating the order, including immediate arrest, the issuance of a warrant for the person's arrest, and the criminal penalties under this section; and
    (D) Is sufficiently clear and specific to serve as a guide for the actor's conduct; and
  (2) Knowingly fails to comply with the order.

(b) *Defense*. An actor does not commit an offense under this section when, in fact, a judicial officer gives effective consent to the conduct constituting the offense.

(c) *Jurisdiction*. An oral or written statement made by an actor located outside the District of Columbia to a person located in the District of Columbia by means of telecommunication, mail, or any other method of communication shall be deemed to be made in the District of Columbia.

(d) *Penalties*. Criminal contempt for violation of a civil protection order is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*.
  (1) The terms "knowingly" and "knows" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor" and "effective consent" have the meanings specified in RCC § 22E-701; and
  (2) In this section:
    (A) The term "judicial officer" has the meaning specified in D.C. Code § 16-1001; and
    (B) The term "valid foreign protection order" has the meaning specified in D.C. Code § 16-1041.

(f) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 16-1021. Parental Kidnapping Definitions.

For the purposes of this subchapter, the terms:
  (1) "Child" means a person under 16 years of the age.
  (2) "Lawful custodian" means a person who is authorized to have custody under District law, or by an order of the Superior Court of the District of Columbia

or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child.

(3) "Relative" means a parent, other ancestor, brother, sister, uncle, or aunt, or one who has been lawful custodian at some prior time.

RCC § 16-1022. Parental Kidnapping.

(a) *First degree*. An actor commits the offense of first degree parental kidnapping when the actor:
  (1) Commits fourth degree parental kidnapping; and
  (2) Knowingly takes, conceals, or detains the child outside of the District for more than 24 hours; and
  (3) The child is, in fact, outside the custody of the lawful custodian for more than 30 days.

(b) *Second degree*. An actor commits the offense of second degree parental kidnapping when the actor:
  (1) Commits fourth degree parental kidnapping; and
  (2) Knowingly takes, conceals, or detains the child outside of the District for more than 24 hours; and
  (3) Fails to release the child without injury in a safe place prior to arrest.

(c) *Third degree*. An actor commits the offense of third degree parental kidnapping when the actor:
  (1) Commits fourth degree parental kidnapping; and
  (2) Knowingly takes, conceals, or detains the child outside of the District for more than 24 hours.

(d) *Fourth degree*. An actor commits the offense of fourth degree parental kidnapping when the actor:
  (1) Knowingly takes, conceals, or detains a person who has another lawful custodian;
  (2) With intent to prevent a lawful custodian from exercising rights to custody of the person;
  (3) The person taken, concealed, or detained is, in fact, under 16 years of age; and
  (4) The actor is a relative of the complainant, or a person who believes they are acting pursuant to the direction of a relative of the complainant.

(e) *Exclusion from liability.* An actor does not commit an offense under this section when, in fact:
  (1) The actor is a parent who reasonably believes they are fleeing from imminent physical harm to the parent;
  (2) The actor has the effective consent of the other parent; or
  (3) The actor has intent to protect the child from imminent physical harm.

(f) *Defense.*
  (1) If a person engages in conduct constituting a violation of this section, the person may file a petition in the Superior Court of the District of Columbia that:

(A) States that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and

(B) Seeks to establish custody, to transfer custody, or to revise or to clarify the existing custody order; except that if the Superior Court of the District of Columbia does not have jurisdiction over the custody issue, the person shall seek to establish, transfer, revise, or clarify custody in a court of competent jurisdiction.

(2) It is a defense to prosecution under this section that the actor filed a petition as provided in paragraph (f)(1) within 5 business days of the action taken, and that the court finds that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child.

(g) *Continuous offense.* The offense prohibited by this section is continuous in nature and continues for so long as the child is concealed, detained, or otherwise unlawfully physically removed from the lawful custodian.

(h) *Penalties.*

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

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

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

(4) Fourth degree parental kidnapping is a Class E crime, subject to a maximum fine of [X], or both.

(5) *Reimbursement of expenses.* Any expenses incurred by the District in returning the child shall be assessed by the court against any person convicted of the violation and reimbursed to the District. Those expenses reasonably incurred by the lawful custodian and child victim as a result of a violation of this section shall be assessed by the court against any person convicted of the violation and reimbursed to the lawful custodian.

(6) *First and second degree parental kidnapping designated as felonies.* Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies under D.C. Code § 22-563.

(i) *Definitions.*

(1) The term "act" has the meaning specified in RCC § 22E-202; the terms "intent" and "knowing" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "complainant," and "effective consent" have the meaning specified in RCC § 22E-701; and

(2) In this section, the terms "child," "lawful custodian," and "relative" have the meanings specified in RCC § 16-1021.

(j) *Interpretation of statute*. The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code shall apply to this offense.

RCC § 16-1023. Protective Custody and Return of Child.

(a) A law enforcement officer may take a child into protective custody if it reasonably appears to the officer that any person is in violation of this subchapter and unlawfully will flee the District with the child.

(b) A child who has been detained or concealed shall be returned by a law enforcement officer to the lawful custodian or placed in the custody of another entity authorized by law.

(c) *Definitions.* The term "law enforcement officer" has the meaning specified in RCC § 22E-701.

RCC § 16-1024. Expungement of Parental Kidnapping Conviction.

Any parent convicted in the Superior Court of the District of Columbia of violating any provision of this subchapter with respect to their child may apply to the court for an order to expunge from all official records all records relating to the conviction at such time that the parent's youngest child has reached the age of 18 years, provided that the parent has no more than one conviction for a violation of this subchapter at the time that the application for expungement is made. Any other person convicted of violating the provisions of this subchapter may apply to the court for an order to expunge all records relating to the conviction 5 years after the conviction, or at such time as the child has reached the age of 18 years, whichever shall later occur, provided that the person has no more than one conviction for violating any provision of this subchapter at the time that the application for expungement is made.

RCC § 23-586. Failure to Appear after Release on Citation or Bench Warrant Bond.

(a) *First degree*. An actor commits first degree failure to appear after release on citation or bench warrant bond when the actor:

(1) Knows that they are released on a condition to appear before a judicial officer on a specified date and time either:

(A) By a citation that, in fact, is issued under D.C. Code § 23-584 for a felony; or

(B) After knowingly posting a bond that is, in fact, for a bench warrant issued from the Superior Court of the District of Columbia in a felony case; and

(2) Knowingly fails to appear or remain for the hearing.

(b) *Second degree.* An actor commits second degree failure to appear after release on citation or bench warrant bond when the actor:

(1) Knows that they are released on a condition to appear before a judicial officer on a specified date and time either:
(A) By a citation that, in fact, is issued under D.C. Code § 23-584 for a felony or misdemeanor; or
(B) After knowingly posting a bond that is, in fact, for a bench warrant issued from the Superior Court of the District of Columbia in a felony or misdemeanor case; and
(2) Knowingly fails to appear or remain for the hearing.

(c) *Defenses*.
(1) It is a defense to liability under this section that, in fact, a releasing official, prosecutor, or judicial officer gives effective consent to the conduct constituting the offense.
(2) It is a defense to liability under this section that, in fact, the actor makes good faith, reasonable efforts to appear or remain for the hearing.

(d) *Penalties*.
(1) First degree failure to appear after release on citation or bench warrant bond is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree failure to appear after release on citation or bench warrant bond is a Class D crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*.
(1) The terms "knowingly" and "knows" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "effective consent," "felony," and "misdemeanor" have the meanings specified in RCC § 22E-701; and
(2) In this section:
(A) The term "judicial officer" has the meaning specified in D.C. Code § 23-501; and
(B) The term "releasing official" has the meaning specified in D.C. Code § 23-1110.

(f) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 23-1327. Failure to Appear in Violation of a Court Order.

(a) *First degree*. An actor commits first degree failure to appear in violation of a court order when the actor:
(1) Knows that they are required to appear before a judicial officer on a specified date and time by a court order for what is, in fact, a hearing:
(A) In a case in which the actor is charged with a felony; or
(B) In which the actor is scheduled to be sentenced; and
(2) Knowingly fails to appear or remain for the hearing.

(b) *Second degree*. An actor commits second degree failure to appear in violation of a court order when the actor:

(1) Knows that they are required to appear before a judicial officer on a specified date and time by a court order for what is, in fact, a hearing:
(A) In a case in which the actor is charged with a felony or misdemeanor; or
(B) In which the actor is scheduled to appear as a material witness in a criminal case; and
(2) Knowingly fails to appear or remain for the hearing.

(c) *Defenses*.
(1) It is a defense to liability under this section that, in fact, a judicial officer gives effective consent to the conduct constituting the offense.
(2) It is a defense to liability under this section that, in fact, the actor makes good faith, reasonable efforts to appear or remain for the hearing.

(d) *Penalties*.
(1) First degree failure to appear in violation of a court order is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree failure to appear in violation of a court order is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) *Forfeiture*. Upon conviction under this section, the court may, subject to the provisions of the Federal Rules of Criminal Procedure, order the forfeiture of any security which was given or pledged for the actor's release.

(e) *Definitions*.
(1) The terms "knowingly" and "knows" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "effective consent," "felony," and "misdemeanor" have the meanings specified in RCC § 22E-701; and
(2) In this section, the term "judicial officer" has the meaning specified in D.C. Code § 23-1331.

(f) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 23-1329A. Criminal Contempt for Violation of a Release Condition.

(a) *Offense*. An actor commits criminal contempt for violation of a release condition when the actor:
(1) Knows they are subject to a conditional release order that, in fact:
(A) Is issued under D.C. Code § 23-1321;
(B) Is in writing;
(C) Advises the actor of the consequences for violating the order, including immediate arrest or the issuance of a warrant for the actor's arrest, the criminal penalties under this section, the pretrial release penalty enhancements under RCC § 22E-607,

and the criminal penalties for obstruction of justice under D.C. Code § 22-722; and

(D) Is sufficiently clear and specific to serve as a guide for the actor's conduct; and

(2) Knowingly fails to comply with the conditional release order.

(b) *Defense*. It is a defense to liability under this section that, in fact, a judicial officer gives effective consent to the conduct constituting the offense.

(c) *Prosecutorial authority*. A judicial officer or a prosecutor may initiate a proceeding for contempt under this section.

(d) *Non-jury hearing.* A proceeding determining a violation of this section shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.

(e) *Penalties*. Criminal contempt for violation of a release condition is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions*.

(1) The terms "knowingly" and "knows" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor" and "effective consent" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "judicial officer" has the meaning specified in D.C. Code § 23-1331.

(g) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 24-241.05A. Violation of Work Release.

(a) *Offense*. An actor commits violation of work release when the actor:

(1) In fact, is granted a work release privilege under D.C. Code § 24-241.02; and

(2) Knowingly fails to return at the time and to the place of confinement designated in their work release plan.

(b) *Defense*. An actor does not commit an offense under this section when, in fact, a judicial officer, the Director of the Department of Corrections, or the Chairman of the United States Parole Commission gives effective consent to the conduct constituting the offense.

(c) *Prosecutorial authority*. The Attorney General for the District of Columbia shall prosecute violations of this section.

(d) *Penalties*. Violation of work release is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions*.

(1) The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor" and "effective consent" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "judicial officer" has the meaning specified in D.C. Code § 23-1331.

(f) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000.

(a) For any felony committed on or after August 5, 2000, the court shall impose a sentence that:
  (1) Reflects the seriousness of the offense and the criminal history of the person found guilty;
  (2) Provides for just punishment and affords adequate deterrence to potential criminal conduct of the person found guilty and others; and
  (3) Provides the person found guilty with needed educational or vocational training, medical care, and other correctional treatment.

(b)
  (1) If a person found guilty is sentenced to imprisonment, or to commitment pursuant to § 24-903, under this section, the court shall impose an adequate period of supervision ("supervised release") to follow release from the imprisonment or commitment.
  (2) If the court imposes a sentence of more than one year, the court shall impose a term of supervised release of:
    (A) Not more than 5 years, if the maximum term of imprisonment authorized for the offense is 24 years or more;
    (B) Not more than 3 years, if the maximum term of imprisonment authorized for the offense is 8 years or more, but less than 24 years; or
    (C) Not more than 1 year, if the maximum term of imprisonment authorized for the offense is less than eight years.
  (3) [Reserved].
  (4) In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of:
    (A) Not more than 10 years; or
    (B) Not more than life if the person is required to register for life.
  (5) The term of supervised release commences on the day the incarcerated person is released from imprisonment, and runs concurrently with any federal, state, or local term of probation, parole, or supervised release for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a federal, state, or local crime unless the period of imprisonment is less than 30 days.

(6) Persons on supervised release shall be subject to the authority of the United States Parole Commission until completion of the term of supervised release. The Parole Commission shall have and exercise the same authority as is vested in the United States District Courts by 18 U.S.C. § 3583(d)-(i), except that:
  (A) The procedures followed by the Parole Commission in exercising such authority shall be those set forth in chapter 311 of title 18 of the United States Code; and
  (B) An extension of a term of supervised release under 18 U.S.C. § 3583(e)(2) may be ordered only by the court upon motion from the Parole Commission.

(7) A person whose term of supervised release is revoked may be imprisoned for a period of:
  (A) Not more than 5 years, if the maximum term of imprisonment authorized for the offense is 40 years or more;
  (B) Not more than 3 years, if the maximum term of imprisonment authorized for the offense is 24 years or more, but less than 40 years;
  (C) Not more than 2 years, if the maximum term of imprisonment authorized for the offense is 8 years or more, but less than 24 years; or
  (D) Not more than 1 year, if the maximum term of imprisonment authorized for the offense is less than 8 years.

(b-1) The maximum term of imprisonment authorized upon revocation of supervised release pursuant to subsection (b)(7) shall not be deducted from the maximum term of imprisonment or commitment authorized for such offense.

(c)

(1) Except as provided under paragraph (2) of this subsection, a sentence under this section of imprisonment, or of commitment pursuant to § 24-903, shall be for a definite term, which shall not exceed the maximum term allowed by law or be less than any minimum term required by law.

(2) Notwithstanding any other provision of law, if the person committed the offense for which they are being sentenced under this section while under 18 years of age:
  (A) The court may issue a sentence less than the minimum term otherwise required by law; and
  (B) The court shall not impose a sentence of life imprisonment without the possibility of parole or release.

(c-1) A person sentenced under this section to imprisonment, or to commitment pursuant to § 24-903, shall serve the term of imprisonment or commitment specified in the sentence, less any time credited toward service of the sentence under subsection (d) of this section and subject to § 24-403.03, if applicable.

(d) Notwithstanding any other law, a person sentenced to imprisonment, or to commitment pursuant to § 24-903, under this section for any offense may receive good time credit toward service of the sentence only as provided in 18 U.S.C. § 3624(b).

(d-1)

(1) A person sentenced to imprisonment under this section for a nonviolent offense may receive up to a one-year reduction in the term the person must otherwise serve if the person successfully completes a substance abuse treatment program in accordance with 18 U.S.C. § 3621(e)(2).

(2) For the purposes of this subsection, the term "nonviolent offense" means any crime other than those included within the definition of "crime of violence" in § 23-1331(4).

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.[7]

(a) Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed upon a defendant for an offense if:

(1) The defendant was sentenced pursuant to § 24-403 or § 24-403.01, or was committed pursuant to § 24-903, and has served at least 15 years in prison; and

(2) The court finds, after considering the factors set forth in subsection (c) of this section, that the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.

(b)

(1) A defendant convicted as an adult of an offense may file an application for a sentence modification under this section. The application shall be in the form of a motion to reduce the sentence. The application may include affidavits or other written material. The application shall be filed with the sentencing court and a copy shall be served on the United States Attorney.

(2) The court may direct the parties to expand the record by submitting additional testimony, examinations, or written materials related to the motion. The court shall hold a hearing on the motion at which the defendant and the defendant's counsel shall be given an opportunity to speak on the defendant's behalf. The court may permit the parties to introduce evidence. The court may consider any records related to the underlying offense.

(3)

(A) Except as provided in subparagraph (B) of this paragraph, the defendant shall be present at any hearing conducted under this

[7] The text of RCC § 24-403.03 includes changes to the text as approved in the Omnibus Public Safety and Justice Amendment Act of 2020, Act A23-0568 (Projected Law Date of May 18, 2021). The RCC assumes the Omnibus text will proceed into law after Congressional review.

section unless the defendant waives the right to be present. Any proceeding under this section may occur by video teleconferencing and the requirement of a defendant's presence is satisfied by participation in the video teleconference.

(B) During a period of time for which the Mayor has declared a public health emergency pursuant to section 5a of the District of Columbia Public Emergency Act of 1980, effective October 17, 2002 (D.C. Law 14-194; D.C. Official Code § 7-2304.01), a defendant in the custody of the Bureau of Prisons, who committed the offense for which the defendant has filed the application for sentence modification under this section on or after the defendant's 18th birthday, may not petition the court to return to the Department of Corrections for a proceeding under this section.

(4) The court shall issue an opinion in writing stating the reasons for granting or denying the application under this section, but the court may proceed to sentencing immediately after granting the application.

(c) The court, in determining whether to reduce a term of imprisonment pursuant to subsection (a) of this section, shall consider:

(1) The defendant's age at the time of the offense;

(2) The history and characteristics of the defendant;

(3) Whether the defendant has substantially complied with the rules of the institution to which the defendant has been confined, and whether the defendant has completed any educational, vocational, or other program, where available;

(4) Any report or recommendation received from the United States Attorney;

(5) Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;

(6) Any statement, provided orally or in writing, provided pursuant to § 23-1904 or 18 U.S.C. § 3771 by a victim of the offense for which the defendant is imprisoned, or by a family member of the victim if the victim is deceased;

(7) Any reports of physical, mental, or psychiatric examinations of the defendant conducted by licensed health care professionals;

(8) The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

(9) The extent of the defendant's role in the offense and whether and to what extent another person was involved in the offense;

(10) The diminished culpability of juveniles and persons under age 25, as compared to that of older adults, and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences, which counsel against sentencing them to lengthy terms in prison, despite the brutality or cold-blooded nature of any particular crime, and the defendant's personal circumstances that support an aging out of crime; and

(11) Any other information the court deems relevant to its decision.

(d) If the court denies or grants only in part the defendant's 1st application under this section, a court shall entertain a 2nd application under this section no sooner than 3 years after the date that the order on the initial application becomes final. If the court denies or grants only in part the defendant's 2nd application under this section, a court shall entertain a 3rd and final application under this section no sooner than 3 years following the date that the order on the 2nd application becomes final. No court shall entertain a 4th or successive application under this section.

(e)

(1) Any defendant whose sentence is reduced under this section shall be resentenced pursuant to § 24-403, § 24-403.01, or § 24-903, as applicable.

(2) Notwithstanding any other provision of law, when resentencing a defendant under this section, the court:

(A) May issue a sentence less than the minimum term otherwise required by law; and

(B) Shall not impose a sentence of life imprisonment without the possibility of parole or release.

(f) The version of this section that was effective from May 10, 2019, to the effective date of the Omnibus Public Safety and Justice Amendment Act of 2020, as approved by the Committee on the Judiciary and Public Safety on November 23, 2020 (Committee print of Bill 23-127), shall apply to all proceedings initiated under this section in any District of Columbia court, including any appeals thereof, by defendants who were eligible under this section prior to the effective date of the Omnibus Public Safety and Justice Amendment Act of 2020, as approved by the Committee on the Judiciary and Public Safety on November 23, 2020 (Committee print of Bill 23-127), and shall apply to all proceedings under this section in any District of Columbia court, including any appeals thereof, that were pending prior to the effective date of the Omnibus Public Safety and Justice Amendment Act of 2020, as approved by the Committee on the Judiciary and Public Safety on November 23, 2020 (Committee print of Bill 23-127).

(g) In considering applications filed by defendants for offenses committed after the defendant's 18th birthday, the court shall endeavor to prioritize consideration of the applications of defendants who have been incarcerated the longest; except, that the inability to identify those defendants shall not delay the court acting on other applications under this section.

(h) Notwithstanding any other law, if a District government workforce development program requires District residency as a condition of program eligibility, the residency requirement shall be waived for defendants resentenced pursuant to this section.

(i) Beginning in Fiscal Year 2022, the Office of Victim Services and Justice Grants shall, 1353 on an annual basis, issue a grant of $200,000 to an organization that provides advocacy, case, management, and legal services, for the purpose of developing and offering restorative justice practices for

survivors of violent crimes who seek such practices, such as for survivors impacted by post-conviction litigation.

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

(a) *Offense*. An actor commits possession of an open container or consumption of alcohol in a motor vehicle when the actor:
  (1) Knowingly:
    (A) Consumes an alcoholic beverage; or
    (B) Possesses an alcoholic beverage in an open container;
  (2) In the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway.

(b) *Exclusion from liability.* An actor does not commit an offense under this section when, in fact, the actor is:
  (1) Located in:
    (A) The passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation; or
    (B) The living quarters of a house coach or house trailer; and
  (2) Not operating the motor vehicle.

(c) *No attempt liability*. The criminal attempt provision in RCC § 22E-301 does not apply to this section.

(d) *Penalties.* Possession of an open container or consumption of alcohol in a motor vehicle is a Class C crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.*
  (1) The term "knowingly" has the meaning specified in RCC § 22E-206; the terms "actor," "motor vehicle," and "possesses" have the meanings specified in RCC § 22E-701; and
  (2) In this section:
    (A) The terms "alcoholic beverage" and "open container" have the meanings specified in D.C. Code § 25-101; and
    (B) The term "highway" has the meaning specified in D.C. Code § 50-2206.01.

(f) *Interpretation of statute.* Chapters 1 through 6 of Subtitle I of Title 22E shall apply to this offense.

RCC § 48-904.01a. Possession of a Controlled Substance.

(a) *First degree*. An actor commits first degree possession of a controlled substance when the actor:
  (1) Knowingly possesses a measurable amount of a controlled substance; and
  (2) The controlled substance is, in fact:

(A) Opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;
(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) Opium poppy or poppy straw;
(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) Methamphetamine, its salts, isomers, or salts of its isomers;
(G) Phenmetrazine, or its salts; or
(H) Phencyclidine or a phencyclidine immediate precursor.

(b) *Second degree*. An actor commits second degree possession of a controlled substance when the actor knowingly possesses a measurable amount of any controlled substance.

(c) *Exclusions from liability.* An actor does not commit an offense under this section when, in fact, the actor:
(1) Possesses a controlled substance that was obtained directly from, or pursuant to a valid prescription or order of, a practitioner while acting in the course of their professional practice, or as authorized by this chapter or Chapter 16B of Title 7; or
(2) Satisfies the requirements specified under D.C. Code § 7-403.

(d) *Penalties.*
(1) First degree possession of a controlled substance is a Class C offense subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree possession of a controlled substance is a Class D offense subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions.*
(1) The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "controlled substance," and "possesses" have the meanings specified in RCC § 22E-701; and
(2) In this section, the terms "distribute," "immediate precursor," "manufacture," "opium poppy," and "poppy straw" have the meanings specified in D.C. Code § 48-901.02.

(f) *Interpretation of statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code shall apply to this offense.

(g) *Judicial deferral and dismissal of proceedings*.
(1) Notwithstanding RCC § 22E-602(c), when a person is convicted of possession of a controlled substance under RCC § 48-904.01a the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings on that offense and place the person on probation upon such reasonable conditions as it may require

and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation the person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this subsection shall be without court adjudication of guilt. Such discharge or dismissal shall not be deemed a conviction with respect to disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under § 48-904.08 for second or subsequent convictions) or for any other reason.

(2) Upon the dismissal of such proceedings and discharge of the person under paragraph (g)(1) of this section, such person may apply to the court for an order to expunge from all official records all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that the proceedings were dismissed and the person discharged, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.

RCC § 48-904.01b. Trafficking of a Controlled Substance.

(a) *First degree*. An actor commits first degree trafficking of a controlled substance when the actor:

(1) Knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance; and

(2) The controlled substance is, in fact:

(A) More than 200 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;

(B) More than 200 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;

(C) More than 200 grams of a compound or mixture containing opium poppy or poppy straw;
(D) More than 400 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) More than 400 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) More than 200 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;
(G) More than 200 grams of a compound or mixture containing phenmetrazine, or its salts; or
(H) More than 100 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor.

(b) *Second degree*. An actor commits second degree trafficking of a controlled substance when the actor:
(1) Knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance; and
(2) The controlled substance is, in fact:
(A) More than 20 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;
(B) More than 20 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) More than 20 grams of a compound or mixture containing opium poppy or poppy straw;
(D) More than 50 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) More than 50 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) More than 20 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;
(G) More than 20 grams of a compound or mixture containing phenmetrazine, or its salts; or
(H) More than 10 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor.

(c) *Third degree*. An actor commits third degree trafficking of a controlled substance when the actor:
(1) Knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance; and

(2) The controlled substance is, in fact, a compound or mixture containing:
(A) Opium, its phenanthrene alkaloids, or their derivatives, except isoquinoline alkaloids of opium;
(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;
(C) Opium poppy or poppy straw;
(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;
(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;
(F) Methamphetamine, its salts, isomers, or salts of its isomers;
(G) Phenmetrazine, or its salts; or
(H) Phencyclidine or a phencyclidine immediate precursor.

(d) *Fourth degree*. An actor commits fourth degree trafficking of a controlled substance when the actor knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of any controlled substance that is, in fact, listed in Schedule I, II, or III as defined in Subchapter II of this Chapter.

(e) *Fifth degree*. An actor commits fifth degree trafficking of a controlled substance when the actor knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of any controlled substance.

(f) *Aggregation of quantities.* When a single scheme or systematic course of conduct could give rise to multiple charges under this section, the government instead may bring one charge and aggregate the quantities of a controlled substance involved in the scheme or systematic course of conduct to determine the grade of the offense.

(g) *Weight of mixtures and compounds not to include edible products or non-consumable containers.*
(1) For controlled substances that are contained within edible products and that are planned to be consumed as food or beverages, the total weight of the controlled substance shall be determined by calculating the concentration of the controlled substance contained within the mixture and then calculating the total amount of controlled substance that is present. The weight of the inert edible mixture will not be added to determine the total weight of the compound or mixture containing a controlled substance.
(2) The weight of a non-consumable container in which a controlled substance is stored or carried shall not be included in the weight of the compound or mixture containing the controlled substance.

(h) *Penalties*.
(1) First degree trafficking of a controlled substance is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree trafficking of a controlled substance is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree trafficking of a controlled substance is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree trafficking of a controlled substance is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree trafficking of a controlled substance is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(6) *Penalty enhancements.* The penalty classification of any gradation of this offense is increased by one class when the actor commits the offense:
(A) When the actor is, in fact, 21 years of age or older, and distributes a controlled substance to a person reckless as to the fact that the person is under 18 years of age;
(B) By knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon in furtherance of and while distributing, or possessing with intent to distribute, a controlled substance;
(C) When the actor is, in fact, 21 years of age or older, and the actor engages in the conduct constituting the offense by enlisting, hiring, contracting, or encouraging any person to sell or distribute any controlled substance for the profit or benefit of the actor, recklessness as to the fact the person is under 18 years of age; or
(D) When the actor commits an offense under this section when in a location that, in fact:
(i) Is within 300 feet of the boundary line of a school, college, university, public swimming pool, public playground, public recreation center, public library, or children's day care center; and
(ii) Displays clear and conspicuous signage that indicates controlled substances are prohibited in the location or that the location is a drug free zone.

(i) *Defenses.*
(1) It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but, in fact, does not do so in exchange for something of value or expectation of future financial gain from distribution of a controlled substance and either the quantity of the controlled substance distributed does not

exceed the amount for a single use by the recipient, or recipient plans to immediately use the controlled substance.

(2) It is a defense to prosecution under this section for manufacturing or possession with intent to manufacture that the actor packaged, repackaged, labeled, or relabeled a controlled substance for the person's own personal use, or possessed a controlled substance with intent to do so.

(j) *Definitions*.

(1) The terms "intended," "intends," "intent," "knowingly," "reckless," and "recklessness" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "controlled substance," "dangerous weapon," "firearm," "imitation firearm," "possesses," "possessing," "possession," and "value" have the meanings specified in RCC § 22E-701; and

(2) In this section, the terms "distribute," "immediate precursor," "manufacture," "opium poppy," "person," and "poppy straw" have the meanings specified in D.C. Code § 48-901.02.

(k) *Interpretation of statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code shall apply to this offense.

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

(a) *First degree*. An actor commits first degree trafficking of a counterfeit substance when the actor:

(1) Knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of a counterfeit substance; and

(2) The counterfeit substance is, in fact:

(A) More than 200 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives (except isoquinoline alkaloids of opium);

(B) More than 200 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;

(C) More than 200 grams of a compound or mixture containing opium poppy or poppy straw;

(D) More than 400 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;

(E) More than 400 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;

(F) More than 200 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;

(G) More than 200 grams of a compound or mixture containing phenmetrazine, or its salts; or

(H) More than 100 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor;

(b) *Second degree*. An actor commits second degree trafficking of a counterfeit substance when the actor:

(1) Knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of a counterfeit substance; and

(2) The counterfeit substance is, in fact:

(A) More than 20 grams of any compound or mixture containing opium, its phenanthrene alkaloids, or their derivatives (except isoquinoline alkaloids of opium);

(B) More than 20 grams of any compound or mixture containing any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;

(C) More than 20 grams of a compound or mixture containing opium poppy or poppy straw;

(D) More than 20 grams of a compound or mixture containing cocaine, its salts, optical and geometric isomers, or salts of isomers;

(E) More than 20 grams of a compound or mixture containing ecgonine, its derivatives, their salts, isomers, or salts of isomers;

(F) More than 20 grams of a compound or mixture containing methamphetamine, its salts, isomers, or salts of its isomers;

(G) More than 20 grams of a compound or mixture containing phenmetrazine, or its salts; or

(H) More than 10 grams of a compound or mixture containing phencyclidine or a phencyclidine immediate precursor;

(c) *Third degree*. An actor commits third degree trafficking of a counterfeit substance when the actor:

(1) Knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of a counterfeit substance; and

(2) The counterfeit substance is, in fact a compound or mixture containing:

(A) Opium, its phenanthrene alkaloids, or their derivatives (except isoquinoline alkaloids of opium);

(B) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subparagraph (A) of this paragraph;

(C) Opium poppy or poppy straw;

(D) Cocaine, its salts, optical and geometric isomers, or salts of isomers;

(E) Ecgonine, its derivatives, their salts, isomers, or salts of isomers;

(F) Methamphetamine, its salts, isomers, or salts of its isomers;

(G) Phenmetrazine, or its salts; or

(H) Phencyclidine or a phencyclidine immediate precursor.

(d) *Fourth degree*. An actor commits fourth degree trafficking of a counterfeit substance when the actor knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of any counterfeit substance that is, in fact, a controlled substance under Schedule I, II, or III, as defined in Subchapter II of this Chapter.

(e) *Fifth degree*. An actor commits fifth degree trafficking of a counterfeit substance when the actor knowingly distributes, creates, or possesses with intent to distribute a measurable quantity of any counterfeit substance.

(f) *Aggregation of quantities.* When a single scheme or systematic course of conduct could give rise to multiple charges under this section, the government instead may bring one charge and aggregate the quantities of a counterfeit substance involved in the scheme or systematic course of conduct to determine the grade of the offense.

(g) *Weight of mixtures and compounds not to include edible products or non-consumable containers.*

(1) For controlled substances that are contained within edible products and that are planned to be consumed as food or beverages, the total weight of the controlled substance shall be determined by calculating the concentration of the controlled substance contained within the mixture and then calculating the total amount of controlled substance that is present. The weight of the inert edible mixture will not be added to determine the total weight of the compound or mixture containing a controlled substance.

(2) The weight of a non-consumable container in which a controlled substance is stored or carried shall not be included in the weight of the compound or mixture containing the controlled substance.

(h) *Penalties*.

(1) First degree trafficking of a counterfeit substance is a Class 7 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree trafficking of a counterfeit substance is a Class 8 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree trafficking of a counterfeit substance is a Class 9 crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) Fourth degree trafficking of a counterfeit substance is a Class A crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(5) Fifth degree trafficking of a counterfeit substance is a Class B crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(6) *Penalty enhancements.* The penalty classification of any gradation of this offense is increased by one class when, in addition to the elements of the offense gradation, if the actor knowingly possesses, either on the

actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon in furtherance of and while distributing, or possessing with intent to distribute, a counterfeit substance.

(i) *Definitions*.

(1) The terms "intended," "intent," and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; the terms "actor," "controlled substance," "dangerous weapon," "firearm" "imitation firearm," "possesses," and "possessing" have the meanings specified in RCC § 22E-701; and

(2) In this section, the terms "distribute," "immediate precursor," "manufacture," "opium poppy," "person," and "poppy straw" have the meanings specified in D.C. Code § 48-901.02.

(j) *Interpretation of statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code shall apply to this offense.

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

(a) *Offense.* An actor commits possession of drug manufacturing paraphernalia when the actor knowingly possesses an object with intent to use the object to manufacture a controlled substance.

(b) *Exclusions from liability.* An actor does not commit an offense under this section:

(1) If the object possessed is, in fact, 50 years of age or older;

(2) If the actor possesses an object with intent solely to use the object to package or repackage a controlled substance for the actor's own use; or

(3) If the actor, in fact, satisfies the requirements specified under D.C. Code § 7-403.

(c) *Penalties*. Possession of drug manufacturing paraphernalia is a Class D offense, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*.

(1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the terms "actor," "controlled substance," "possessed," and "possesses" have the meanings specified in RCC § 22E-701; and

(2) In this section, the term "manufacture" has the meaning specified in D.C. Code § 48-901.02.

(e) *Interpretation of statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code shall apply to this offense.

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

(a) *Offense.* An actor commits trafficking of drug paraphernalia when the actor:

(1) Knowingly sells or delivers, or possesses with intent to sell or deliver, an object;
(2) With intent that another person will use the object to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance.

(b) *Defenses.* It is a defense to prosecution under this section that the object specified in paragraph (a)(1) of this section is, in fact:
(1) Testing equipment or other objects used, planned for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance or for ingestion or inhalation of a controlled substance, provided that the actor is a community-based organization;
(2) An unused hypodermic syringe or needle;
(3) An item planned for use in a medical procedure or treatment permitted under District or federal civil law, to be performed by a licensed health professional or by a person acting at the direction of a licensed health professional; or
(4) An object that is 50 years of age or older.

(c) *Penalties.* Trafficking of drug paraphernalia is a Class D offense, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions.*
(1) The terms "intended," "intent," and "knowingly" have the meanings specified in RCC § 22E-206; the terms "actor," "controlled substance," "health professional," and "possesses" have the meanings specified in RCC § 22E-701; and
(2) In this section:
(A) The term "community-based organization" has the meaning specified in D.C. Code § 7-404; and
(B) The terms "distributes" and "manufacture" have the meaning specified in D.C. Code § 48-901.02.

(e) *Interpretation of statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code shall apply to this offense.

RCC § 48-904.12. Maintaining Methamphetamine Production.

(a) *Offense.* An actor commits the offense of maintaining methamphetamine production when the actor knowingly maintains or opens any location with intent that the location will be used to manufacture, other than by mere packaging, repackaging, labeling, or relabeling, methamphetamine, its salts, isomers, or salts of its isomers.

(b) *Penalties*. Maintaining methamphetamine production is a Class A offense, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*.
(1) The term "knowingly" has the meaning specified in RCC § 22E-206; the term "actor" has the meaning specified in RCC § 22E-701; and

(2) In this section, the term "manufacture" has the meaning specified in D.C. Code § 48-901.02.

(d) *Interpretation of statute.* The general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code shall apply to this offense.

COMMENTARY:
SUBTITLE I. GENERAL PART

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

Explanatory Note. This section provides a short title for the Revised Criminal Code and provisions necessary for an orderly transition. The section ensures that implementation of the Revised Criminal Code will not raise *ex post facto* concerns under the U.S. Constitution by establishing that the Revised Criminal Code does not apply to conduct committed prior to the effective date. Such conduct is instead governed by prior laws, which remain in force solely to deal with these prosecutions.

Relation to Current District Law. This section is in accordance with, but fills a gap in, District law. The use of a short title for a section of the D.C. Code is common practice.[1] Also, several Titles of the D.C. Code set a specific effective date by their own terms.[2] With respect to subsection (c), D.C. Code § 45-404 states that repeal of an act of the Council does not "release or extinguish any penalty . . . incurred pursuant to the act," and that "the [repealed] act shall be treated as remaining in force for the purpose of sustaining any . . . prosecution for the enforcement of any penalty . . . ." This "savings" statute has been used to ensure that crimes committed prior to a change in a criminal law are prosecuted under the prior version.[3] However, neither the savings statute nor any other statute in the D.C. Code states when a penalty is "incurred" under a repealed law. Nor has the DCCA clarified the matter. To resolve this ambiguity and fill a gap in District law, subsection (c) states that if a single element of a crime is committed before the effective date of the Revised Criminal Code, then the superseded law should apply.

[1] *See*, *e.g.*, D.C. Code § 19-1301.01 ("This chapter may be cited as the 'Uniform Trust Code'."); D.C. Code § 29-101.01(a) ("This title may be cited as the 'Business Organizations Code'."); D.C. Code § 46-351.01 ("This chapter may be cited as the Uniform Interstate Family Support Act.").
[2] *See*, *e.g.*, D.C. Code § 2-118 ("This subchapter shall become effective 6 months from the date of their [sic] approval.").
[3] *See Holiday v. United States*, 683 A.2d 61, 80 (D.C. 1996) ("The general savings statutes, therefore . . . preserve mandatory-minimum sentences in all cases where the offense was committed" before repeal of the mandatory minimum).

RCC § 22E-102. Rules of Interpretation.

1. § 22E-102 (a) — Interpretation Generally.

Explanatory Note. This subsection codifies the general rules of statutory interpretation that should be used to determine the meaning of provisions in the Revised Criminal Code. The subsection specifies that a provision first shall be interpreted according to the plain meaning of its text. However, in addition to its plain meaning, a provision also may be interpreted based on its structure, purpose, and history when necessary to determine the legislative intent.[1] This subsection is intended to codify existing District law concerning the general rules of interpretation applicable to criminal statutes. Such codification provides notice to the public as to applicable rules of interpretation.

Relation to Current District Law. The D.C. Code currently provides no notice of how criminal statutes are to be interpreted. This subsection codifies the general rules of interpretation in District case law.

Longstanding Supreme Court and District case law holds that the first, mandatory step in statutory interpretation is always examination of the text.[2] This examination of the text should use the ordinary, common sense meaning of words.[3] This requirement has been called the "plain meaning" rule of interpretation, and the rule's primacy stems from the fact that the statutory text is generally the best way to ascertain the legislative intent for a law.[4] The plain meaning rule also reflects the importance of the public being able to understand and comply with criminal laws.[5]

However, as recognized in the second sentence of subsection (a), the plain meaning rule is not necessarily the last or decisive step in interpreting a statutory provision.[6] In

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[1] RCC § 22E-102(a) refers to the "legislature's meaning" and "goal" to avoid use of the RCC defined culpable mental state terms "purpose" and "intent." However, District case law usually refers to the latter terms, and use of "legislature's meaning" and "goal" in RCC § 22E-102(a) should be construed consistent with "legislative intent" and "purpose" in that case law.

[2] *Tippett v. Daly,* 10 A.3d 1123, 1126 (D.C. 2010) (en banc) ("We start, as we must, with the language of the statute") (quoting *Bailey v. United States,* 516 U.S. 137, 144 (1995)).

[3] *Tippett,* 10 A.3d at 1126 ("Moreover, in examining the statutory language, it is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'") (quoting *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc) (internal citations omitted).

[4] *Peoples Drug Stores*, 470 A.2d at 753 ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used."). *Varela v. Hi-Lo Powered Stirrups, Inc.,* 424 A.2d 61, 64 (D.C.1980) (en banc) (quoting *United States v. Goldenberg,* 168 U.S. 95, 102-03 (1897)).

[5] *Peoples Drug Stores*, 470 A.2d at 755 ("There are strong policy reasons for maintaining the certainty, fairness, and respect for the legal system that the plain meaning rule engenders in most instances. Unless the meaning of statutes can be readily ascertained by a reading of statutory language, the ability of citizens to comply with statutory standards is diminished and the administration of such standards may be unmanageable or even erratic.").

[6] *Id*. at 754 ("Although the 'plain meaning' rule is certainly the first step in statutory interpretation, it is not always the last or the most illuminating step. This court has found it appropriate to look beyond the plain meaning of statutory language in several different situations.").

some situations, it may be necessary to look beyond the plain meaning of statutory text.[7] In such situations, the purpose,[8] structure,[9] or history[10] of the provision and surrounding statutory text may be examined to determine legislative intent. There does not appear to be consensus in District case law about when it is necessary to look beyond the plain meaning of a statutory provision to determine legislative intent.[11] However, there is agreement that looking beyond the plain meaning of a statutory provision to the purpose, structure or history is "unusual",[12] and requires "persuasive reasons" for doing so.[13] To the extent there may be ambiguity in District case law as to when the exceptions to the plain meaning rule should be applied, this subsection is intended merely to codify existing law, not resolve these ambiguities.

2. § 22E-102 (b) — Rule of Lenity.

Explanatory Note. Subsection (b) codifies how to interpret statutory language when the rules of statutory interpretation in subsection (a) fail to resolve the matter. Subsection (b) states that if of the meaning of statutory language remains in doubt after examination of the statute's plain meaning, structure, purpose,[14] and history, then the

[7] *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 65 (D.C. 1980) ("However, while (t)he plain meaning of the words is generally the most persuasive evidence of the intent of the legislature ... the plain meaning rule has limitations. It has long been recognized that the literal meaning of a statute will not be followed when it produces absurd results. And since the judicial function is to ascertain the legislative intention the Court may properly exercise that function with recourse to the legislative history, and may depart from the literal meaning of the words when at variance with the intention of the legislature as revealed by legislative history. (*District of Columbia National Bank v. District of Columbia*, 121 U.S.App.D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted). *See also Davis v. United States*, D.C.App., 397 A.2d 951 (1979).)").

[8] *See, e.g., Tippett,* 10 A.3d at 1127 ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.") (quoting *Bailey v. United States,* 516 U.S. 137, 145 (1995)).

[9] *See, e.g., Tippett,* 10 A.3d at 1127 ("Therefore, 'we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them.'") (quoting *District of Columbia v. Beretta, U.S.A., Corp*., 872 A.2d 633, 652 (D.C.2005) (en banc)).

[10] *See, e.g., Peoples Drug Stores*, 470 A.2d at 755 ("Finally, a court may refuse to adhere strictly to the plain wording of a statute in order 'to effectuate the legislative purpose.'") (internal citations omitted).

[11] Some judicial opinions suggest that unless absurd, it is never necessary to inquire further if the plain meaning of a provision is clear. *See*, *e.g*., *Eaglin v. District of Columbia*, 123 A.3d 953, 955 (D.C. 2013) ("[I]f the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, we will look no further." *Smith v. United States,* 68 A.3d 729, 735 (D.C.2013) (quoting *Hood v. United States,* 28 A.3d 553, 559 (D.C.2011))); *In re Al-Baseer*, 19 A.3d 341, 344 (D.C. 2011) ("The court's task in interpreting a statute begins with its language, and, where it is clear, and its import not patently wrong or absurd, our task comes to an end") (quoting *In re Orshansky*, 952 A.2d 199, 210 (D.C. 2008) (internal citations omitted)). Other opinions specifically note that the clarity of a plain meaning interpretation may be misleading and further examination is required. *See*, *e.g*., *Peoples Drug Stores*, 470 A.2d at 754 ("[E]ven where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.") (quoting *Sanker v. United States,* 374 A.2d 304, 307 (D.C. 1977) (internal citations omitted)).

[12] *District of Columbia v. Place*, 892 A.2d 1108, 1111 (D.C. 2006).

[13] *Peoples Drug Stores*, 470 A.2d at 755.

[14] RCC § 22E-102(b) refers to "goal" to avoid use of the RCC defined culpable mental state term "purpose." However, District case law usually refers to the latter term, and the use of "goal" in RCC § 22E-102(b) should be construed to be consistent with "purpose" in that case law.

interpretation that is most favorable to the defendant applies. This codifies existing District case law concerning the rule of lenity.

Relation to Current District Law. The DCCA has held that the rule of lenity is "a secondary canon of construction" that is to be applied after other rules of interpretation, and only if necessary.[15] In other words, the rule of lenity is a rule of last resort.[16] The rule can "tip the balance in favor of criminal defendants only where, exclusive of the rule, a penal statute's language, structure, purpose and legislative history leave its meaning genuinely in doubt."[17] Moreover, the interpretation favoring the defendant must still be a "reasonable" interpretation of a statute's language, structure, purpose and history.[18] The rule of lenity reflects a policy decision that imprisonment should not be imposed except where the legislative intent is clear.[19]

3. § 22E-102 (c) — Effect of Headings and Captions.

Explanatory Note. This subsection states that the headings and captions throughout Title 22E may be used to aid interpretation of statutory provisions that are otherwise ambiguous.

Relation to Current District Law. Criminal statutes in the District historically have not been in enacted titles of the D.C. Code. To the extent the Official D.C. Code now contains headings and captions for criminal offenses, these are typically notations added by codification counsel or code publication experts. This section is consistent with current D.C. Court of Appeals (DCCA) case law that has held that courts may rely upon headings and captions to interpret statutory provisions.[20] However, both the RCC statute and DCCA clarify that headings and captions should only be used when the text of the statutory provision is ambiguous.[21]

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[15] *Luck v. District of Columbia*, 617 A.2d 509, 515 (D.C. 1992).
[16] *See, e.g., Luck*, 617 A.2d at 515 (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)); *Heard v. United States,* 686 A.2d 1026, 1029 (D.C. 1996) (citing *Moskal v. United States,* 498 U.S. 103, 108 (1990)).
[17] *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C.1989) (quoting *United States v. Otherson*, 637 F.2d 1276, 1285 (9th Cir.1980)).
[18] *Henson v. United States,* 399 A.2d 16, 21 (D.C.1979).
[19] *Luck*, 617 A.2d at 515 ("This policy embodies the instinctive distaste against men [and women] languishing in prison unless the lawmaker has clearly said they should.") (quoting *United States v. Bass,* 404 U.S. 336, 348 (1971)).
[20] *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013) ("We agree with the Supreme Court of Arizona that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title, *Maricopa County v. Douglas,* 69 Ariz. 35, 208 P.2d 646, 648 (1949), and we shall do so here.").
[21] *In re J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) ("We agree that bolt cutters may be used to commit a crime and that there was abundant evidence that appellant carried them for that purpose. Thus, a cursory comparison of these facts to the title of the statute—"possession of implements of crime"—might lead to the conclusion that appellant is guilty of the crime charged. However, "[t]he significance of the title of the statute should not be exaggerated." *Mitchell v. United States,* 64 A.3d 154, 156 (D.C.2013). "[H]eadings and titles are not meant to take the place of the detailed provisions of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.,* 331 U.S. 519, 528, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). We therefore focus our analysis on the text of the statute, which limits its reach to tools and implements "for picking locks or pockets." Because bolt cutters

4. § 22E-102 (d) — Effect of Definition Cross-references.

Explanatory Note. This subsection states that cross-references to definitions in Title 22E, or the fact that there is an omission of a cross-reference to a definition in Title 22E, may be used to aid interpretation of statutory provisions that are otherwise ambiguous. Subsection (d) indicates that cross-references to definitions in Title 22E are to be treated like headings and captions in subsection (c). The inclusion or omission of such a cross-reference does not, of itself, mean that a definition for a term in the statute does or does not apply.

The inclusion of clarificatory definition cross-references in RCC statutes greatly enhances the transparency and accessibility of the statutes' meaning. Should drafting errors occur, however, the inadvertent omission of a cross-reference is not by itself decisive as to whether a definition elsewhere in the RCC applies.

The definitions in Subtitle I (General Part) of Title 22E apply to all provisions unless there is specific language to the contrary. Most definitions in Title 22 are codified in RCC § 22E-701, which prefaces the list of definitions by stating that, "[u]nless otherwise defined in a particular section, in this title the term…[X] [means] [Y]." Other terms are defined somewhere in Subtitle I of the RCC, such as the definition of "act" in RCC § 22E-202, and through RCC § 22E-104 apply to all other provisions of Title 22E absent a statutory provision to the contrary. Either way, regardless of cross-references, terms defined in Subtitle I apply to other subtitles absent statutory language to the contrary.[22]

Subsection (d) does not address cross-references to definitions outside Title 22E or definitions themselves (as opposed to cross-references), which are to be accorded the same status as other substantive statutory text. Definitions outside Title 22E do not already apply to Title 22E by their own language, so a cross-reference to such a non-Title 22E definition in an RCC statute is substantive, not merely clarificatory, text.

Relation to Current District Law. Criminal statutes in the District historically have not utilized generally-applicable definitions. The use of standardized definitions across the RCC is new to District criminal law. However, it is expected that clarificatory cross-references to definitions in the RCC will be treated similarly to how captions and titles are treated in D.C. Court of Appeals (DCCA) case law—which provides that courts may rely upon headings and captions to interpret statutory provisions.[23] However, both RCC § 22E-102 and DCCA case law clarify that headings and captions (and similarly cross-references to definitions in Title 22E) should only be used when the text of a statutory provision is ambiguous.[24]

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are not "lock-picking tools" within the definition we have adopted, there was insufficient evidence to sustain J.W.'s adjudication. We therefore vacate the adjudication for possessing implements of crime.").

[22] In some cases, application of a definition under RCC § 22E-701 to a particular statute may be non-sensical or produce absurd results. In these cases, the omission of a cross-reference may indicate that the definition under § 22E-701 does not apply to a term as used in that particular statute.

[23] *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013) ("We agree with the Supreme Court of Arizona that in determining the extent and reach of an act of the legislature, the court should consider not only the statutory language, but also the title, *Maricopa County v. Douglas,* 69 Ariz. 35, 208 P.2d 646, 648 (1949), and we shall do so here.").

[24] *In re J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) ("We agree that bolt cutters may be used to commit a crime and that there was abundant evidence that appellant carried them for that purpose. Thus, a cursory comparison

5. § 22E-102 (e) — Definitions

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

of these facts to the title of the statute—"possession of implements of crime"—might lead to the conclusion that appellant is guilty of the crime charged. However, "[t]he significance of the title of the statute should not be exaggerated." *Mitchell v. United States,* 64 A.3d 154, 156 (D.C.2013). "[H]eadings and titles are not meant to take the place of the detailed provisions of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.,* 331 U.S. 519, 528, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). We therefore focus our analysis on the text of the statute, which limits its reach to tools and implements "for picking locks or pockets." Because bolt cutters are not "lock-picking tools" within the definition we have adopted, there was insufficient evidence to sustain J.W.'s adjudication. We therefore vacate the adjudication for possessing implements of crime.").

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

Explanatory Note. This section limits the scope of Title 22E provisions to avoid unintended consequences that otherwise might arise from applying the title's provisions to other laws. Subsection (a) provides that the provisions of Title 22E will not apply to any law outside of Title 22E unless expressly specified by statute. Crimes in other titles of the D.C. Code will not be affected by the general provisions of Title 22E unless a law specifically states that the general provisions so apply.

Subsection (b) provides that unless expressly specified by statute or otherwise provided by law, Title 22E will not have any unintended effect on current civil law. The words "otherwise provided by law" are intended to include all sources of law, including statutes, regulatory provisions, and case law. For example, unless specified by statute or otherwise specified by law, Title 22E's revisions to the crime of assault will not change the elements required for common law assault under the law of torts. However, under general principles of collateral estoppel recognized under D.C. Court of Appeals case law, a person convicted of an assault offense under Title 22E may still be estopped from re-litigating issues of fact in subsequent civil litigation related to the same events.

Relation to Current District Law. None.

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

Explanatory Note. This section clarifies that provisions in the General Part, subtitle I of the Revised Criminal Code, by default apply to all the statutes contained within Title 22E, unless expressly specified in statute. For example, the definition of the term "recklessly" in Section 22E-205 applies to all instances of the word within Title 22E, including other general provisions. However, any statute within Title 22E may contain a provision stating that one or more provisions in the General Part do not apply to that statute, overriding the default applicability of the General Part provisions. For instance, the Revised Criminal Code's burglary offense could make the Section 22E-205 definition of "recklessly" not applicable if the burglary offense states as much. This section clarifies and fills gaps in current District law regarding the applicability of general provisions.

Relation to Current District Law. The D.C. Code (including Title 22[1]) contains some provisions that are generally applicable.[2] However, these statutes either themselves provide for possible exceptions[3] or are stated as universally applicable. The D.C. Code does not appear to have codified a broad limitation on the applicability of general provisions. District case law, however, has filled this gap. The DCCA has long recognized "the well-settled rule of statutory construction that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms."[4]

[1] *See*, *e.g.*, D.C. Code § 22-1801 ("Writing" and "paper" defined) *and* D.C. Code § 22-1802 ("Anything of value" defined.). Other provisions in Chapter 18 of Title 22, labeled "General offenses" by Codification Counsel, also apply generally to Title 22 offenses, as do certain penalty provisions in Chapters 35 and 36.
[2] *See*, *e.g.*, D.C. Code §§ 45-601- 606 (Rules of Construction).
[3] *See*, *e.g.*, D.C. Code § 22-1801 ("*Except where otherwise provided for* where such a construction would be unreasonable, the words "writing" and "paper," wherever mentioned in this title, are to be taken to include instruments wholly in writing or wholly printed, or partly printed and partly in writing.") (emphasis added).
[4] *Martin v. United States*, 283 A.2d 448 (D.C. 1971).

RCC § 22E-201. PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT.

1. RCC § 22E-201(a)—Proof of Offense Elements Beyond a Reasonable Doubt

Explanatory Note. Subsection (a) states the burden of proof governing offense elements. It establishes that proof of each offense element beyond a reasonable doubt is the foundation of liability for any offense in the RCC. This provision is intended to codify the well-established constitutional principle recognized by the U.S. Supreme Court in *In re Winship*: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[1] Pursuant to this principle, "it is up to the prosecution 'to prove beyond a reasonable doubt all of the elements included in the definition of the offense.'"[2]

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a statement on the burden of proof governing offense elements, it is well established by the DCCA that every element of an offense must be proven by the government beyond a reasonable doubt in order to support a criminal conviction.[3]

2.RCC § 22E-201(c)—Burden of proof for exclusions from liability, defenses, and affirmative defenses

Explanatory Note. Subsection (b) states the burden of proof governing exclusions to liability, defenses, and affirmative defenses. Paragraph (b)(1) establishes that for exclusions to liability, if there is any evidence presented at trial whether by the government or the defense, the government must prove beyond a reasonable doubt the absence of at least one element of the exclusion. Paragraph (b)(2) establishes that for defenses, if there is any evidence presented at trial whether by the government or the defense, that the government must prove beyond a reasonable doubt the absence of at least one element of the defense. Some exclusions and defenses have alternate elements, each of which are sufficient to bar liability. If evidence is presented that supports more than one alternate

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[1] 397 U.S. 358, 364 (1970). This constitutional principle is a central component of the American criminal justice system:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id.

[2] *Conley v. United States*, 79 A.3d 270, 278 (D.C. 2013) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)).

[3] *See, e.g., Conley*, 79 A.3d at 278 ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. This means it is up to the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense.") (citations, quotations, alterations, and footnote call numbers removed); *Hatch v. United States*, 35 A.3d 1115, 1121 (D.C. 2011).

element, proving the absence of one element does not preclude the alternate element from providing a defense.[4] Paragraph (b)(3) establishes that for affirmative defenses the actor must prove each element of the defense by a preponderance of the evidence.

Relation to Current District Law. Subsection (b) is broadly consistent with current District law and practice. The DCCA has held that when evidence of a defense is presented at trial, "from either the prosecution or defense case,"[5] the government bears the burden of disproving the defense beyond a reasonable doubt.[6] The DCCA has upheld "affirmative defenses" which require that the defendant prove the defense by a preponderance of the evidence.[7] Current District law does not codify the burden of proof for exclusions to liability.

3. RCC § 22E-201(c)—Offense Element Defined

Explanatory Note. Subsection (c) provides the definition of "offense element" applicable to subsection (a) and throughout the RCC. It is an open-ended definition, which establishes that both the necessary objective elements and culpability required for an offense are among the offense elements subject to the burden of proof set forth in subsection (a).[8] What is left unresolved by this non-exclusive list is whether any other aspect of criminal liability not addressed by the RCC should also be treated as an offense element subject to the burden of proof set forth in subsection (a).[9] Under subsection (c), these issues are left for judicial resolution.

Relation to Current District Law. Subsection (c) codifies District law. While the D.C. Code does not contain a definition of "offense element," it is clear under DCCA case law that the objective elements and culpability required for an offense are among the facts subject to the proof beyond a reasonable doubt standard.[10]

4. RCC § 22E-201(d)—Objective Element Defined

Explanatory Note. Subsection (d) provides the definition of "objective element" applicable to subsection (c) and throughout the RCC. It establishes that the objective

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[4] For example, the trafficking of a controlled substance offense under RCC § 48-904.01b includes a defense if the actor did not receive anything of value for the controlled substance, and *either* the quantity of controlled substance does not exceed the amount for a single use, *or* the recipient intends to immediately use the controlled substance. If evidence is presented in support of both of these alternate elements, the government must prove the absence of *both* elements.

[5] *Lihlakha v. United States*, 123 A.3d 167, 169 (D.C. 2015)

[6] *E.g.*, *Richardson v. United States*, 98 A.3d 178, 187 (D.C. 2014).

[7] *Russell v. United States*, 698 A.2d 1007, 1016 (D.C. 1997).

[8] *See, e.g., United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) ("In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur."); *In re Winship*, 397 U.S. at 364 (observing that both of these requirements are among the "fact[s] necessary to constitute the crime with which [the accused] is charged.").

[9] Other aspects of liability not addressed by this provision include facts establishing: the absence of a general justification defense, jurisdiction, venue, or satisfaction of a statute of limitations.

[10] *See, e.g., Conley*, 79 A.3d at 278; *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

elements of an offense—often referred to as an offense's *actus reus*—are the conduct elements, result elements, and circumstance elements contained in an offense definition. All of these elements are subject to the burden of proof set forth in subsection (a).

Subsection (d) also provides precise definitions for these three kinds of objective elements. "Conduct element" is narrowly defined in paragraph (d)(1) as an "act" or "omission," which terms are in turn respectively defined in section 202 as a "bodily movement" or "failure to act" under specified circumstances.[11] This definition of conduct element makes it easier to analytically separate what is usually inconsequential (i.e. the required bodily movement, or where relevant, the failure to make one), from other aspects of a criminal offense that are more central to assessing culpability.[12] One such aspect is a "result element," which is defined in paragraph (d)(2) as "any consequence caused by a person's act or omission that is required to establish liability for an offense." The other relevant aspect is a "circumstance element," which paragraph (d)(3) defines as "any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense." The terms "circumstance element" and "result element" include elements in defenses or exclusions to liability applicable to a given offense, as the presence or absence of these elements also establishes liability for an offense.[13]

Under this definitional scheme, any verb employed in an offense definition is likely to constitute either a conduct element and a result element or a conduct element and a circumstance element. For example, in a homicide offense that prohibits "knowingly killing another human being," the verb "killing" implies an act or omission—such as pulling the trigger of a gun—performed by the defendant (a conduct element), which causes death (a result element). Similarly, in a destruction of property offense that prohibits "knowingly destroying property of another without consent," the verb "destroying" implies an act or omission—for example, swinging a baseball bat—performed by the defendant (a conduct element), which causes destruction (a result element).

Verbs such as "killing" and "destroying" refer to a consequence caused by a person's conduct. Where, in contrast, a verb employed in an offense definition refers to a particular characteristic of a person's conduct, that verb is instead likely to constitute a conduct element and a circumstance element.[14] For example, in a joyriding offense that

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[11] RCC §§ 22E-202(b), (c).

[12] This definition of conduct element reflects the view that in any causal sequence initiated by a bodily movement, "there are no further actions, only further descriptions." DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 61 (2d ed. 2001). These "further descriptions," in turn, are reflected in the result and circumstance elements of an offense definition.

[13] For example, if a person is prosecuted for assault, and there is evidence that the person acted in self-defense, the term "circumstance element" includes the absence of at least one of the circumstances that comprises self-defense. Accordingly, the culpable mental states defined in RCC § 22E-206 and the term "in fact," which specifies that no culpable mental state is required, may also apply to elements of defenses.

[14] Which is to say: this definitional scheme treats all "issues raised by the nature of one's conduct"—for example, whether one's bodily movement amounts to "use" or a "taking"—"as circumstance elements." Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 712 (1983); *compare* Model Penal Code § 2.02(2) (defining culpable mental states with respect to "nature of [the] conduct" elements). For this reason, it will no longer makes sense to refer to "conduct crimes" under the RCC. Every offense under the prescribed framework will be comprised of, at minimum, a conduct element and either a circumstance element or result element. *See* Larry Alexander

prohibits "knowingly using a motor vehicle without consent," the verb "using" implies an act or omission—such as stepping on the accelerator—performed by the defendant (a conduct element), which is of a specific character, namely, it amounts to use in the particular context in which it occurs (a circumstance element). Similarly, in a theft offense that prohibits "knowingly taking property of another without consent," the verb "taking" implies an act or omission—for example, reaching for a wallet—performed the defendant (a conduct element), which is of a specific character, namely, it amounts to a taking in the particular context in which it occurs (a circumstance element).[15]

Under this definitional scheme, the terms that modify the verbs in an offense definition (other than mental states) are likely to constitute circumstance elements. So, for example, the requirement that the victim of a homicide offense be a "human being" is a circumstance element. Similarly, the requirement in a property destruction offense that the object destroyed be "property of another" is a circumstance element, as is the requirement that this destruction have occurred "without consent." Likewise, the requirements in a joyriding offense that the object used be a "motor vehicle" and that this use have occurred "without consent" are both circumstance elements, as are the requirements in a theft offense that the object taken be "property of another" and that this taking have occurred "without consent."

Relation to Current District Law. Subsection (d) broadly reflects District law. Although the D.C. Code lacks any explicit reference to the classification of objective elements, the DCCA has recently recognized the distinction between "conduct, resulting harm, [and] attendant circumstances"—as well as the importance of clearly making it—in recent opinions.[16]

& Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 380 (2008) (observing that a person's "willed bodily movement may be qualified by circumstances and results so that [one's] conduct can be redescribed in any number of ways; and some redescriptions render [that person's] conduct criminal.").

[15] Note that the same verb employed in an offense definition may constitute either a combined conduct/circumstance element or conduct/result element depending upon how the crime was committed in a given case. For example, although the verb "taking" may typically constitute a combined conduct/circumstance element (see above theft illustration), it would constitute a combined conduct/result element in a theft prosecution where the causal nexus between the defendant's conduct and the prohibited social harm is mediated by another person or object. Consider the situation of a parent who tells his young child to go inside a neighbor's unlocked house and retrieve the neighbor's wallet resting on the backyard patio based on the lie that the neighbor has "volunteered" to give it to him. Under these conditions, the parent is liable for the theft based on the child's role as an innocent or irresponsible agent. *See* RCC § 22E-211. In this situation, however, the act, the communication to the child, is clearly distinct from the resultant taking, which does not occur until the child retrieves the wallet. A similar analysis applies if the parent employs a drone, rather than his child, to steal the wallet. Under these conditions, the parent is liable for the theft based on his use of an automated intermediary to retrieve the neighbor's property. Here again, however, the act, the movement of the drone remote, is clearly distinct from the resultant taking, which does not occur until the drone retrieves the wallet.

[16] *See, e.g., Jones v. United States*, 124 A.3d 127, 130 n.3 (D.C. 2015) ("Ideally, instead of describing a crime as a 'general intent' or 'specific intent' crime, courts and legislatures would simply make clear what mental state . . . is required for whatever material element is at issue (for example, *conduct, resulting harm, or an attendant circumstance* such as dealing drugs in a school zone or assaulting a police officer).") (italics added); *Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (*en banc*) ("We adopt these ["conduct element," "result element," and "circumstance element"] classifications from the Model Penal Code § 1.13

5. RCC § 22E-201(e)—Culpability Required Defined

Explanatory Note. Subsection (e) provides the definition of "culpability required" applicable to subsection (c) and throughout the RCC. It is an open-ended definition, which establishes that the voluntariness requirement and culpable mental state requirement are part of the culpability required for an offense. Also included in this definition is "[a]ny other aspect of culpability specifically required for an offense," such as, for example, the premeditation, deliberation, and absence of mitigating circumstances that are required to secure a first degree murder conviction.[17] All facts that comprise the culpability required for an offense are subject to the burden of proof set forth in subsection (a). What is left unresolved by this non-exclusive list is whether any other aspect of criminal liability not addressed by the RCC should also be treated as part of the culpability required for an offense (and therefore subject to that burden of proof).[18] Under subsection (e), these issues are left for judicial resolution.

Relation to Current District Law. *See* Commentary on the voluntariness requirement, RCC § 22E-203, and the culpable mental state requirement, RCC § 22E-205.

RCC § 22E-202. CONDUCT REQUIREMENT.

1. RCC § 22E-202(a)—Conduct Requirement

Explanatory Note. Subsection (a) states the conduct requirement governing all offenses in the RCC. It establishes that commission of an act or omission is a prerequisite to criminal liability. This provision is intended to codify the well-established prohibition against punishing a person for merely possessing undesirable thoughts or status.[1] By establishing that some conduct—whether an act or omission—is necessary for criminal

(9) (Am. Law Inst., Proposed Official Draft 1962)."); *see also Harris v. United States*, 125 A.3d 704, 708 n.3 (D.C. 2015).

[17] *See, e.g.,* RCC § 22E-1101(a) (requiring premeditation and deliberation for first degree murder); *id.* at paragraph (f)(2) ("If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the actor is not guilty of murder.").

[18] Other aspects of liability not addressed by this provision include facts establishing the absence of a general excuse defense.

[1] *See, e.g.,* Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 282 (2002) ("The maxim that civilized societies should not criminally punish individuals for their 'thoughts alone' has existed for three centuries."); *United States v. Muzii,* 676 F.2d 919, 920 (2d Cir. 1982) ("The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts.") (citing S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 207 (1969)).

liability under the RCC, subsection (a) safeguards a "basic premise of Anglo-American criminal law,"[2] which is also "constitutionally required."[3]

Possession satisfies the conduct requirement whenever it is based on an act,[4] as defined in subsection (b), or an omission,[5] as defined in subsection (c).[6]

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a statement on the conduct requirement, the DCCA has clearly

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[2] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 6.1(b) (3d ed. Westlaw 2019) ("One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone. Something in the way of an act, or of an omission to act where there is a legal duty to act, is required too."). As LaFave observes:

> To wish an enemy dead, to contemplate [sexual assault], to think about taking another's wallet—such thoughts constitute none of the existing crimes (not murder or rape or larceny) so long as the thoughts produce no action to bring about the wished-for results. But, while it is no crime merely to entertain an intent to commit a crime, an attempt (or an agreement with another person) to commit it may be criminal; but the reason is that an attempt (or a conspiracy) requires some activity beyond the mere entertainment of the intent.

Id.

[3] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.04(c) (6th ed. 2012) ("Some conduct by the defendant is constitutionally required in order to punish a person.") (discussing *Robinson v. California*, 392 U.S. 514 (1968) and *Powell v. Texas*, 392 U.S. 514 (1968)); *see* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(b) ("A statute purporting to make it criminal simply to think bad thoughts would, in the United States, be held unconstitutional.") (collecting cases).

[4] For example, where purchaser X and dealer Y engage in a direct, hand-to-hand exchange of cash for drugs, X's physical possession is based on an act, and therefore would satisfy the conduct requirement. *See* RCC § 22E-202(b) (defining "act" as a "bodily movement"); *see also id.* at 901(X)(1) (defining "possesses" as "[h]olds or carries on one's person").

[5] For example, where purchaser X electronically delivers payment for controlled substances to dealer Y, and Y in turn drops the controlled substances in a mailbox over which X has the ability and desire to exercise control, X's constructive possession is based on an omission, and therefore would satisfy the conduct requirement. *See* RCC § 22E-202(c) (defining "omission" as "a failure to act when," *inter alia*, [a] person is under a legal duty to act"); *see also id.* at 901(X)(2) (defining "possesses" as "[h]as the ability and desire to exercise control over").

[6] As Dressler observes:

> Possession crimes do not necessarily dispense with the voluntary act requirement. Courts typically interpret possession statutes to require proof that the defendant knowingly procured or received the property possessed (thus, a voluntary act must be proven), or that she failed to dispossess herself of the object after she became aware of its presence. In the latter case, "possession" is equivalent to an omission, in which the defendant has a statutory duty to dispossess herself of the property. She is not guilty if the contraband was "planted" on her, and she did not have sufficient time to terminate her possession after she learned of its presence.

Dressler, *supra* note 3, at § 9.03(c); *see, e.g.,* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(e) ("So construed, knowingly receiving an item or retention after awareness of control over it could be considered a sufficient act or omission to serve as the proper basis for a crime."); Francisco Muñoz-Conde & Luis Ernesto Chiesa, *The Act Requirement As A Basic Concept of Criminal Law*, 28 CARDOZO L. REV. 2461, 2477 (2007) ("[P]roperly understood, possession crimes do not pose a problem for criminal liability because what is really being punished is either the act of acquiring the object or the failure to get rid of it.") (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 8 (2d ed. 1961)).

recognized that the conduct requirement is a basic and necessary ingredient of criminal liability given that "bad thoughts alone cannot constitute a crime."[7]

2. RCC § 22E-202(b)—Act Defined

Explanatory Note. Subsection (b) provides the definition of "act" applicable to both subsection (a) and throughout the RCC. It establishes that the term "act" is to be understood narrowly, as a person's bodily movement. This narrow definition should make it easier to distinguish between a person's relevant conduct—for example, throwing an object in the direction of a child—and any results or circumstances associated with that conduct—for example, the serious bodily injury to the child inflicted by the projectile.[8]

Relation to Current District Law. Subsection (b) fills a gap in District law. Neither the D.C. Code nor District case law provides a definition of the term "act." However, the DCCA has recognized in passing that an "act" is, generally speaking, a "bodily movement."[9]

3. RCC § 22E-202(c) & (d)—Omission Defined and Existence of Legal Duty

Explanatory Note. Subsection (c) provides the definition of "omission" applicable to subsection (a) and throughout the RCC. Broadly speaking, this definition establishes that the term "omission" is to be understood narrowly, as a person's failure to engage in an "act" (i.e. a bodily movement) that he or she is otherwise obligated to perform. This narrow definition should make it easier to distinguish between a person's relevant conduct—for example, failing to turn off the bath water after having placed one's infant child in the tub—and any results or circumstances associated with that conduct—for example, the fatal drowning of the infant that ensues after the parent leaves the room for a significant period of time.[10]

The definition of omission contained in subsection (c) also incorporates two important principles of omission liability. The first principle, set forth in paragraph (c)(1), is that only a failure to perform a *legal* duty constitutes an omission. Pursuant to this well-established common law principle, "[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.'"[11]

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[7] *Trice v. United States*, 525 A.2d 176, 187 n.5 (D.C. 1987) (Mack, J. dissenting) (internal quotations and alterations omitted); *see, e.g., Conley v. United States*, 79 A.3d 270, 278-79 (D.C. 2013); *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

[8] *See* RCC § 22E-201(c): Explanatory Note (discussing differences between conduct, result, and circumstance elements).

[9] *Trice*, 525 A.2d at 187 n.5 (Mack, J. dissenting).

[10] *See* RCC § 22E-201(c): Explanatory Note (discussing differences between conduct, result, and circumstance elements).

[11] *See, e.g., United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) ("It is a long-established principle that criminal law generally regulates action, rather than omission, and that '[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.'") (quoting LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(b)); Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571 (2013) ("[T]he general rule is that one is not liable for omissions absent a legal duty to act.").

The second principle, set forth in paragraph (c)(2), is that the requisite legal duty must be one of which the accused is either aware or culpably unaware.[12] This limitation on omission liability amounts to a type of culpability required as to the existence of a legal duty in omission prosecutions.[13] It is intended to codify the D.C. Court of Appeals' decision in *Conley v. United States*,[14] which interprets the U.S. Supreme Court's decision in *Lambert v. California*[15] to stand for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[16]

Subsection (d) addresses the scope of a legal duty to act for purposes of omission liability. Specifically, it establishes that a legal duty to act exists under two different sets of circumstances. The first, addressed in paragraph (d)(1), is where the criminal statute for which the accused is being prosecuted expressly defines the offense in terms of an omission.[17] The second, addressed in paragraph (d)(2), is where a law—whether criminal or civil—distinct from the offense for which the defendant is being prosecuted creates a legal duty.[18]

Relation to Current District Law. Subsections (c) and (d) fill a gap in, but are consistent with, various aspects of District law concerning omission liability.

While the D.C. Code does not contain a generally applicable definition of omission (or any other general statement on omission liability), a handful of District statutes expressly criminalize omissions to fulfill particular legal duties, such as the "duty to provide care [to] a vulnerable adult or elderly person"[19] or the duty "to appear before any court or judicial officer as [legally] required."[20] And District case law generally establishes that the imposition of criminal liability under these circumstances is appropriate.[21]

District case law also establishes, however, that omission liability premised on the failure to perform a legal duty not otherwise specified in an offense definition may be appropriate. For example, the U.S. Court of Appeals for the District of Columbia Circuit (CADC) in *Jones v. United States*[22]—a decision handed down before the creation of the

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[12] A person is "culpably unaware" of a legal duty when a reasonable person in the actor's situation would have been aware of the legal duty.

[13] *See, e.g.,* Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 602 (1958) ("The maxim, 'ignorance of the law is no excuse,' ought to have no application in the field of criminal omissions, for the mind of the offender has no relationship to the prescribed conduct if he has no knowledge of the relevant regulation. The strictest liability that makes any sense is a liability for culpable ignorance.").

[14] 79 A.3d at 273.

[15] 355 U.S. 225 (1957).

[16] *Conley*, 79 A.3d at 273.

[17] Illustrative of such offenses are statutes criminalizing a motorist's failure to stop after involvement in an accident, a taxpayer's failure to file a tax return, a parent's neglect of the health of his child, and a failure to report certain communicable diseases. PAUL H. ROBINSON, 1 CRIM. L. DEF. § 86 (Westlaw 2019).

[18] Illustrative of such duties are those created by special relationships, landowners, contract, voluntary assumption of responsibility, and the creation of peril. ROBINSON, *supra* note 17, at 1 CRIM. L. DEF. § 86.

[19] D.C. Code § 22-934.

[20] D.C. Code § 23-1327.

[21] *See, e.g., Fearwell v. United States*, 886 A.2d 95, 100 (D.C. 2005); *Jackson v. United States*, 996 A.2d 796 (D.C. 2010).

[22] 308 F.2d 307 (D.C. Cir. 1962).

local District judicial system[23]—recognized that "the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, [can] make the other chargeable."[24] However, the *Jones* court also noted that "the omission of a duty owed by one individual to another" can only establish criminal liability when "the duty neglected [is] a legal duty"—i.e. "[i]t must be a duty imposed by law or by contract" rather than a "mere moral obligation."[25]

Recently, the DCCA appears to have established that not just any legal duty will suffice for purposes of omission liability. Rather, it must be a legal duty that the actor "knew or should have known" about under the circumstances.[26] In *Conley v. United States*, the DCCA struck down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm[27] on the basis that it "criminalize[d] entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle[]—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise."[28] Observing that "the average person [would not] know that he may be committing a felony offense merely by remaining in [a] vehicle, even if the gun belongs to someone else and he has nothing to do with it," the DCCA concluded that the statute created a form of omission liability that violated the requirements of due process, and, therefore, was "facially unconstitutional."[29]

The *Conley* decision rested upon the court's reading of the U.S. Supreme Court's opinion in *Lambert v. California*, which, in the view of the DCCA, stands for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[30]

Subsections (c) and (d) are intended to collectively codify the foregoing District precedents concerning omission liability.

RCC § 22E-203. VOLUNTARINESS REQUIREMENT.

1. RCC § 22E-203(a)—Voluntariness Requirement

Explanatory Note. Subsection (a) states the voluntariness requirement governing all offenses in the RCC. It establishes that the voluntary commission of an offense's conduct element is a prerequisite to liability for any crime. This provision is intended to codify the well-established prohibition against punishing a person in the absence of volitional conduct.[1] Both this prohibition and the RCC's codification of it are based on the

[23] *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).
[24] *Jones*, 308 F.2d at 310 (citations and internal quotation marks omitted).
[25] *Id.*
[26] *Conley*, 79 A.3d at 281.
[27] D.C. Code § 22-2511 (Repealed).
[28] 79 A.3d at 273.
[29] *Id*. at 286.
[30] *Id*. at 273.
[1] *See, e.g.,* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 6.1(c) (3d ed. Westlaw 2019) ("At all events, it is clear that criminal liability requires that the activity in question be voluntary."); Paul H. Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 92 (2015) ("[A] voluntary act is the

"fundamental principle of morality that a person is not to be blamed for what he has done if he could not [fairly] help doing it."[2] Absent voluntary commission of an offense's conduct element, it cannot be said that the defendant possessed a reasonable opportunity to avoid committing the charged offense,[3] or that criminal liability would be appropriate under the circumstances.[4]

Relation to Current District Law. Subsection (a) generally reflects District law. Although there is no voluntariness requirement stated in the D.C. Code, District courts have recognized the voluntariness requirement—as well as the basic principle upon which it rests—through case law.

For example, in *Conley v. United States*, the DCCA recognized that the requirement of a voluntary act is a "basic jurisprudential point" supported by a wide range of authorities.[5] The court also recognized that the same basic principle applies to omissions as well: "[n]o one, of course, can be held criminally liable for failing to do an act that he is physically incapable of performing."[6] And in *Easter v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit (in an oft-cited pre-1971 decision) observed the basic principle underlying the voluntariness requirement: "An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. Action within the definition is not enough. To be guilty of the crime a person must engage responsibly in the action."[7]

2. RCC § 22E-203(b)—Scope of Voluntariness Requirement

Explanatory Note. Subsection (b) clarifies the scope of the voluntariness requirement under the RCC. It is comprised of two substantively similar legal standards, which account for whether the government's theory of liability in a given case is based on an act or omission.

Paragraph (b)(1) is directed towards situations where a person's act provides the basis for liability. Specifically, it establishes that the conduct element of an offense is

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most fundamental requirement of criminal liability."); Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443, 443–44 (1988) ("The concept of the voluntary act lies at the very foundation of the criminal law, since 'there cannot be an act subjecting a person to . . . criminal liability without volition.'") (quoting *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981)).

[2] H.L.A. HART, *Punishment and the Elimination of Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 168, 174 (1968).

[3] *See, e.g.,* Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571 (2013) (ability to do otherwise is the "*sine qua non* of voluntariness"); *State v. Deer*, 244 P.3d 965, 968 (Wash. Ct. App. 2010) ("It is [the] volitional aspect of a person's actions that renders her morally responsible.").

[4] *See, e.g.,* LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.1(c) ("The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.").

[5] 79 A.3d 270, 279 n.37 (D.C. 2013) (citing Model Penal Code § 2.01; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 669 (3d ed. 1982); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 25, at 143–44 (15th ed. 1993)).

[6] *Conley*, 79 A.3d at 279.

[7] 361 F.2d 50, 52 (1966).

voluntarily committed when the required act was the product of conscious effort or determination[8]; or, if it was not the product of conscious effort or determination, when it was otherwise subject to the control of the actor.[9]

The "conscious effort and determination" standard stated in subparagraph (b)(1)(A) calls upon the factfinder to consider whether the requisite act was an external manifestation of the defendant's will. This is the crux of the voluntariness requirement, and in all but the most rare cases involving physical abnormalities—such as those where the requisite act was a reflex, part of an epileptic seizure, or occurred while the actor was sleeping—it is likely to be satisfied.

The "otherwise subject to the person's control" standard stated in subparagraph (b)(1)(B) constitutes an alternative, catch-all means of establishing the voluntariness requirement. It is intended to address exceptional situations[10] where, although the act most directly linked to the social harm may not be the product of conscious effort or determination, there nevertheless exists an acceptable basis for determining that the defendant, due to some earlier culpable conduct, possessed a reasonable opportunity to avoid committing the offense.[11]

Paragraph (b)(2) is directed towards situations where a person's omission provides the basis for liability. Specifically, it establishes that the conduct element of an offense is voluntarily committed where a person is physically capable of performing the required legal duty[12]; or, if the person lacked that physical capacity, then where the failure to act was otherwise subject to the control of the actor.[13]

The "physical capacity" standard stated in subparagraph (b)(2)(A) is the logical corollary of the "conscious effort and determination" standard stated in subparagraph (b)(1)(A). It establishes that just as one typically cannot be criminally liable on account of a bodily movement that is not the product of volition, so one cannot be criminally liable for failing to do an act that he or she is physically incapable of performing.

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[8] RCC § 22E-203(b)(1)(A).

[9] RCC § 22E-203(b)(1)(B).

[10] An example is a blackout-prone drinker, X, who decides to imbibe to excess in his parked car prior to driving to a social engagement. If X effectively loses consciousness while the car is parked (Time 1), and then begins driving, only to crash into a group of pedestrians while still blacked-out (Time 2), the fact that X was not acting consciously at the time of the accident (Time 2) should not preclude a determination that X's conduct was nevertheless subject to X's control, and therefore voluntary, under the circumstances.

[11] Under RCC § 22E-203(b)(1)(B), there is no specific threshold level of risk awareness that must be met at Time 1 concerning the likelihood that an act which is not the product of conscious effort or determination would occur at Time 2 in order to deem that act subject to a person's control at Time 1. However, the person's level of awareness at Time 1 must at the very least be sufficient to meet the culpability required for the charged offense. Consider, for example, the situation of a person, X, who suffers from chronic epilepsy but declines to take her medically necessary anti-seizure medication. At Time 1, X decides to drive on the highway un-medicated. Sixty minutes later, at Time 2, X suffers a seizure on the road, which leads her to crash into another driver on the road, V, who dies from the impact. X ultimately survives the accident and is charged with reckless manslaughter. To establish that X recklessly killed V, the government would have to prove that at Time 1—when X decided to get behind the wheel of her car un-medicated—X was aware of a substantial risk that she might suffer a deadly seizure while on the road, and that X's decision was a gross deviation from the standard of conduct a reasonable individual would follow under the circumstances. *See* RCC § 22E-206(c).

[12] RCC § 22E-203(b)(2)(A).

[13] RCC § 22E-203(b)(2)(B).

The "otherwise subject to the person's control" standard stated in subparagraph (b)(2)(B) recognizes the same alternative, catch-all means of establishing the voluntariness requirement applicable under subparagraph (b)(1)(B) in situations where a person's omission provides the basis for liability. It is intended to address exceptional situations[14] where, although the omission most directly linked to the social harm may not be the product of conscious effort or determination, there nevertheless exists an acceptable basis for determining that the defendant, due to some earlier culpable conduct, possessed a reasonable opportunity to avoid committing the offense.[15]

Because the existence of a reasonable opportunity to avoid committing the conduct element of an offense is the animating principle underlying all voluntariness evaluations, section 203 should be construed to exclude exceptional situations involving physical interference by a third party.[16]

Relation to Current District Law. Subsection (b) fills a gap in, but is consistent with, District law. The only District authority on the voluntariness requirement is the case law discussed in the commentary to RCC § 22E-203(a).

RCC § 22E-204. CAUSATION REQUIREMENT.

1. RCC § 22E-204(a)—Causation Requirement

[14] An example is a blackout-prone drinker, X, who decides to imbibe to excess at home a few hours before a court hearing that X knows she is legally obligated to attend. If X becomes unconscious before the hearing (Time 1), and thereafter is unable to travel to the hearing at the appointed time (Time 2), the fact that X is physically incapable of fulfilling her duty of attendance should not preclude a determination that X's conduct was nevertheless subject to her control, and therefore voluntary, under the circumstances.

[15] Under RCC § 22E-203(b)(2)(B), there is no specific threshold level of risk awareness that must be met at Time 1 concerning the likelihood that the defendant would be physically incapable of performing a required legal duty at Time 2 in order to deem that person's failure to act to be subject to his or her control at Time 1. However, the person's level of awareness at Time 1 must at the very least be sufficient to meet the culpability required for the charged offense. Consider the situation of a nurse, X, who is the sole person responsible for supervising a number of infants who are in critical condition, and demand constant attention. While on the job, at Time 1, X decides to take an extremely large dose of heroin for recreational purposes and is immediately thereafter incapacitated. Sixty minutes later, at Time 2, one of the infants, V, has a medical ventilator that suffers a routine malfunction. Although merely requiring a simple reboot, X is unable to fix the ventilator because she is still incapacitated. As a result, V dies from lung failure. X is thereafter charged with reckless manslaughter. To establish that X recklessly killed V, the government would have to prove that at Time 1—when X decided to subject herself to an extremely large dose of heroin—X was aware of a substantial risk that she might, due to her incapacitated state, be unable to fulfill her critical, life-preserving duties (e.g., addressing a ventilator malfunction), and that X's decision was a gross deviation from the standard of conduct a reasonable individual would follow under the circumstances. *See* RCC § 22E-206(c).

[16] Consider the situation of a person, X, who becomes intoxicated at a friend's home and is thereafter carried against his will into a public space by another partygoer, Y. If X is subsequently arrested for public intoxication, there would be an insufficient basis for deeming X's conduct voluntary under section 203. Here, the physical interference of Y is sufficient to deny X a reasonable opportunity to avoid engaging in the proscribed conduct. The same can also be said about the situation of a person, X, who places a controlled substance in her pocket while at home, is immediately thereafter arrested, and then transported to jail without ever being searched or asked about the contraband. If, having entered the jail (and still physically restrained), X is subjected to another charge for introducing a controlled substance into a government facility, there would be an insufficient basis for deeming X's conduct voluntary under section 203. Here, the physical interference of the police is sufficient to deny X a reasonable opportunity to avoid engaging in the proscribed conduct.

Explanatory Note. Subsection (a) establishes that causation is a basic requirement of criminal liability for any offense that requires proof of a result element under the RCC. It provides that the minimum causal nexus between a person's conduct and its attendant results is comprised of two different components: factual causation and legal causation.[1] Together, these two components provide the basis for determining whether a given social harm is fairly attributable to the defendant's conduct, in contrast to other people or forces in the world for which the defendant is not accountable. Because causation is an aspect of the objective elements of a result element offense,[2] both factual causation and legal causation must be proven beyond a reasonable doubt.[3]

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a general statement on causation, the DCCA has addressed the requirement of causation on many occasions. It is well-established in case law that causation is a basic element of criminal responsibility, which requires the government to prove—for all crimes involving result elements—that the defendant was the factual and legal cause of the harm for which he or she is charged.[4]

2. RCC § 22E-204(b)—Definition of Factual Cause

Explanatory Note. Subsection (b) provides a comprehensive definition of "factual cause." In the vast majority of cases, factual causation will be proven under paragraph (b)(1) by showing that the defendant was the logical, but-for cause of a result.[5] The inquiry required by this paragraph is essentially empirical, though also hypothetical: it asks what the world would have been like if the defendant had not performed his or her conduct.[6] In

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[1] *See, e.g., WAYNE R. LAFAVE,* 1 SUBST. CRIM. L. § 6.4(a) (3d ed. Westlaw 2019) ("It is required, for criminal liability, that the conduct of the defendant be both (1) the actual cause, and (2) the 'legal' cause (often called 'proximate' cause) of the result."); *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause.") (citing H. HART & A. HONORE, CAUSATION IN THE LAW 104 (1959)).

[2] *See* RCC § 22E-201(c) ("'Objective element' means any . . . result element); *id.* at (c)(2) (defining "result element" as "any consequence *caused* by a person's act or omission that is required establish liability for an offense.") (italics added).

[3] *See* RCC § 22E-201(a) ("No person may be convicted of an offense unless the government proves each offense element beyond a reasonable doubt."); *id.* at § (c) ("'Offense element' includes the necessary objective elements and culpability required for an offense.").

[4] *See, e.g., McKinnon v. United States*, 550 A.2d 915, 917 (D.C. 1988); *Matter of J.N.*, 406 A.2d 1275, 1287 (Newman, C.J., dissenting); D.C. Crim. Jur. Instr. § 4.230.

[5] *See, e.g., LAFAVE, supra note 1, at* 1 SUBST. CRIM. L. § 6.4(b) ("In order that conduct be the actual cause of a particular result, it is almost always sufficient that the result would not have happened in the absence of the conduct; or, putting it another way, that 'but for' the antecedent conduct the result would not have occurred."); *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (quoting 4 F. HARPER, F. JAMES, & O. GRAY, TORTS § 20.2, p. 100 (3d ed. 2007)) ("The concept of [f]actual cause 'is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it.'").

[6] This analysis is easiest where the causal chain is direct, and no intervening forces are present. For example, if D shoots at V, who is hit and dies, D is the factual cause of V's death under RCC § 22E-204(b)(1), since, but for D's conduct, V would not have died. However, even where the causal chain is less direct, and includes intervening forces—such as a human intermediary—the analysis remains the same. For example, if D initiates a gun battle with X, and X thereafter returns fire but mistakenly hits a nearby bystander, V, D is still

rare cases, however, when the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under paragraph (b)(2) by showing that the defendant's conduct was sufficient—even if not necessary—to produce the prohibited result.[7] Although in this situation it cannot be said that, but for the defendant's conduct, the result in question would not have occurred, the fact that the defendant's conduct was by itself sufficient to cause the result provides an adequate basis for treating the defendant as a factual cause.[8]

For prosecutions based on an omission, the principles codified in subsection (b) will rarely provide a useful test for assigning liability.[9] Whereas factual causation generally presumes a chain of causal forces that affirmatively change the circumstances of the world, omissions do not affirmatively change the circumstances of the world; at most, they constitute failures to interfere with the changes made by other forces.[10] That said, it is certainly possible for an omission to fall short of satisfying the principles codified in subsection (b).[11] And where this is the case, the government's inability to prove the factual causation requirement beyond a reasonable doubt precludes the imposition of liability for a result element crime under the RCC.

Relation to Current District Law. Subsection (b) broadly accords with District law. While the D.C. Code does not address factual causation, the DCCA has adopted a standard to address issues of factual causation that is substantively similar to the standard reflected in RCC § 22E-204(b). However, the definition of factual cause provided in RCC § 22E-204(b) constitutes a terminological departure—and, in cases involving multiple concurrent causes, potentially a substantive departure—from the standard currently reflected in District law. This departure improves the clarity and consistency of the RCC.

To address the issue of factual causation, the DCCA has adopted the "substantial factor" test drawn from the Restatement of Torts.[12] Under this test, "[a] defendant's actions are considered the cause-in-fact . . . if those actions 'contribute substantially to or are a

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a factual cause of V's death under RCC § 22E-204(b)(1), since, but for D's initiating a gun battle with X, X would not have returned fire, and, therefore, V would not have died.

[7] *See LAFAVE, supra note 1, at* 1 SUBST. CRIM. L. § 6.4(b) ("[If] *A* stabs *B,* inflicting a fatal wound; while at the same moment *X,* acting independently, shoots *B* in the head with a gun, also inflicting such a wound; and *B* dies from the combined effects of the two wounds[,] *A* has caused *B*'s death.")

[8] For example, where X and Y both shoot at Z in a crowded area at the same moment, and Z thereafter returns fire but mistakenly hits a nearby bystander, X and Y could be considered independently sufficient factual causes of the bystander's injury under RCC § 22E-204(b)(2).

[9] For example, a parent who fails to feed a child, thereby allowing the child to starve, or a parent who permits a child who cannot swim to jump into a pool, thereby allowing the child to drown, may be the factual cause of the child's death in each case. However, the failure of any other person nearby would also be a factual cause under these circumstances, since the intervention by anybody could have also stopped the starvation or drowning.

[10] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 88(d)(4) (Westlaw 2019).

[11] Consider the situation of a parent who fails to seek medical treatment of a child's illness under circumstances where such medical treatment could not have saved, prolonged, or otherwise improved the quality of that child's life. In this situation, it cannot be said that, but for the parent's failure to seek medical attention, the child would have avoided harm. It therefore follows that this parent, if prosecuted for a crime for which causing harm—whether serious mental injury, bodily injury, or death—is a statutorily required element, cannot be held liable under the RCC due to the absence of factual causation.

[12] *See, e.g., District of Columbia v. Carlson,* 793 A.2d 1285, 1288 (D.C. 2002); *Lacy v. District of Columbia*, 424 A.2d 317, 321 (D.C. 1980); *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003).

substantial factor in a[n] injury.'"[13] "[S]ubstantial cause," in turn, has been defined by the DCCA as "conduct which a reasonable person would regard as having produced the [relevant result]."[14]

Application of the substantial factor test to deal with all issues of factual causation is problematic, however. The test was originally developed in the context of tort law to address those "highly unusual cases" where it is "logically impossible for the government to prove but-for causation because two causes, each alone sufficient to bring about the harmful result, operate[d] together to cause it."[15] By employing the open-textured language of "substantial factor," proponents of the test thought it would provide fact finders with sufficient leeway to ensure that defendants, each of whose conduct constitute independent sufficient causes, would not escape liability.[16] However, the "substantial factor" test has been the source of significant criticism, and, ultimately, has not withstood the test of time."[17]

Insofar as the DCCA's reliance on the test is concerned, two main critiques can be made. First, application of the substantial factor test to deal with *all* issues of factual causation unnecessarily complicates the fact finder's analysis in many cases.[18] In the run-of-the-mill case, the substantial factor test produces the same results as a but-for test, but requires the factfinder to engage in an unnecessarily complex analysis. Why, one might ask, should a factfinder be required to employ a complex test that incorporates "noncausal policy considerations" to deal with standard factual causation issues when a more concrete, intuitive, and straightforward but-for framing of factual causation—such as that provided in § 22E-204(b)(1)—can easily resolve most issues?[19] "In the absence of such special causation problems, there is [simply] no need to employ the substantial factor test, because the 'but-for cause' of a harm is always a substantial factor in bringing about the harm."[20]

Second, for those few cases where application of a more expansive approach is arguably necessary—namely, where the defendant is one of multiple concurrent causes—the substantial factor test offers a highly discretionary standard to support an outcome that a bright line rule would more effectively facilitate. A simple, straightforward statement deeming independently sufficient causes to be factual causes—such as that provided in RCC § 22E-204(b)(2)—is preferable to the "spectacular vagueness"[21] of the substantial factor test. Indeed, even proponents of the substantial factor test are "uncertain about [its]

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[13] *Blaize v. United States*, 21 A.3d 78, 81 (D.C. 2011); D.C. Crim. Jur. Instr. § 4.230.
[14] *Blaize*, 21 A.3d at 82; *see also Roy v. United States*, 871 A.2d 507, 5087 (D.C. 2005) (citing *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003)).
[15] *United States v. Pitt-Des Moines, Inc*., 970 F. Supp. 1359, 1364-65 (N.D. Ill. 1997) *aff'd*, 168 F.3d 976 (7th Cir. 1999).
[16] *See, e.g.,* David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1264-66 (1978); LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4; W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 41, at 267-68 (5th ed. 1984).
[17] RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, 2002).
[18] *See, e.g.,* Eric Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 87-88 (2005); Model Penal Code § 2.03 cmt. at 259; *United States v. Neadle*, 72 F.3d 1104, 1120 (3d Cir. 1995) *amended*, 79 F.3d 14 (3d Cir. 1996) (Becker, J. dissenting).
[19] Robert Strassfeld, *Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 355 (1992); *see* Kimberly Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2201-02 (1994).
[20] *Pitt-Des Moines, Inc*., 970 F. Supp. at 1364-65.
[21] Johnson, *supra* note 18, at 89 n.190.

precise application," and have had a difficult time specify[ing] how important or how substantial a cause must be to qualify."[22]

Given the uncertain scope of the substantial factor test, it's possible—though by no means clear—that replacing it with the approach in RCC § 22E-204(b) could modestly circumscribe the scope of criminal liability under District law in some situations.[23] However, "[g]iven[24]

3. RCC § 22E-204(c)—Definition of Legal Cause

Explanatory Note. Subsection (c) provides a comprehensive definition of "legal cause." Under the proscribed definition, legal causation exists where it can be proven that the result was reasonably foreseeable in its manner of occurrence, and when the result depends on the volitional conduct of another, there is a close connection between the actor's conduct and the result. This is a normative evaluation, which requires the factfinder to assess whether it would be appropriate to hold a person criminally responsible for a social harm of which he or she is the cause in fact due to the influence of intervening forces, such as natural events, the conduct of a third party, or the conduct of the victim.[25]

The influence of these intervening forces can generally be divided into two categories. The first category, codified under paragraph (c)(1), relates to foreseeability; the focus here is on the extent to which a given result can be attributed to intervening

[22] *Burrage*, 134 S. Ct. at 892.

[23] In *Fleming v. United States,* 224 A.3d 213 (D.C. 2020) (en banc) the DCCA reversed prior case law and held that the second degree murder statute requires but-for causation. Relying on the Supreme Court's decision in *Burrage v. United States*, 571 U.S. 204 (2014), the DCCA held that the trial court erred in instructing the jury that factual causation was satisfied if the appellant's conduct was a "substantial factor" bringing about the decedent's death. The DCCA's opinion in *Fleming* was specifically related to causation under the District's second degree murder statute, and it did not purport to apply to requirements of factual causation for all criminal statutes under the D.C. Code. In a subsequent case, *Lucas v. United States*, 240A.2d 328 (D.C. 2020) the DCCA also held that the Bias-Related Crime enhancement defined under D.C. Code § 22-3701(1) requires but-for causation; the government "must prove that the accused would not have committed the underlying crime but-for prejudice against the victim based on the victim's protected characteristic."

[24] *Burrage*, 134 S. Ct. at 892.

[25] Note that in cases where a defendant acts with intent to cause a prohibited result, a finding that legal causation is absent will not exculpate the defendant entirely. Instead, it will merely limit liability to that associated with a criminal attempt rather than a completed offense. *See infra* notes 27-28.

forces—whether human[26] or natural[27]—of a remote and/or accidental nature.[28] The second category, codified under paragraph (c)(2), relates to human volition; the focus here is on whether a person's conduct is closely connected such that the person may *justly* be held liable for a given result that can be attributed to the free, deliberate, and informed conduct of a third party[29] or the victim.[30] Under paragraph (c)(2), there is no legal causation when intervening volitional conduct[31] was reasonably foreseeable, if the actor's conduct was not

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[26] For example, imagine X stabs V with intent to kill, but only manages to inflict a minor wound on V's arm before the police intercede. Thereafter, V is taken to the hospital to receive stiches, at which point the attending physician determines that, for reasons unrelated to the gash, V must also undergo a dangerous but medically necessary hernia operation. V ends up dying of complications from the hernia surgery. In this scenario, X is the factual cause of V's death: but for X's infliction of a knife wound, V would not have been subjected to the hernia operation. However, the remote nature of the intervening cause in this scenario—complications from an unrelated medical procedure—is so unforeseeable as to break the chain of legal causation. (Note, though, that X could still be convicted of attempted murder.)

[27] For example, imagine X begins shooting at V from a distance with intent to kill, but V escapes the deadly assault by running down an alley. At the end of the alley, however, V is fatally struck by lightning. In this scenario, X is the factual cause of V's death: but for X's firing of the gun, V would not have been in the location where the lightning struck. However, the accidental nature of the intervening cause in this scenario—the lightning bolt—is so unforeseeable as to break the chain of legal causation. (Note, though, that X could still be convicted of attempted murder.)

[28] Note that reasonable foreseeability is distinct from culpable negligence. For example, X may negligently create a risk of death to V, a young child standing next to the crosswalk, by speeding through a school zone right after school lets out, while unaware that he is driving in a school zone or that V is present. Should X fatally hit V with his vehicle under these circumstances, X would be liable for negligently causing V's death. If, however, X does not hit V but instead his car kicks up a small pebble onto the sidewalk, which V then fatally slips on, legal causation would likely be lacking. Here, the remote and accidental nature of V's manner of death is so unforeseeable as to break the chain of legal causation—notwithstanding the fact that X's conduct was still negligent under the circumstances.

[29] For example, imagine X and D have been in a longstanding competitive basketball rivalry, marked by regular bouts of violence by D perpetrated against his teammates after his losses. Nearing the final few seconds of a championship game, and down by one point, X is about to shoot the game winning shot against D after a game marked by many missteps by X's teammate V, at which point X realizes that D will almost certainly (and in fact appears to be preparing to) assault V once the loss is formalized. Nevertheless, D decides to disregard this risk and score the final two points necessary for the win. Immediately thereafter, D does as expected: he becomes enraged and viciously beats V on the court. In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. Under these circumstances, D's violent response to X's game winning basket was entirely foreseeable. Although D's response was foreseeable, it would be unjust to hold X criminally liable the injuries to V. X's conduct, winning a basketball game, is not inherently wrongful, and X did not desire that V or anyone else suffer injuries.

[30] For example, consider a hypothetical where A intends to end a romantic relationship with B, and B says that as a result he will commit suicide. A does not want B to commit suicide, but is practically certain that he will do so. A ends the relationship, and as a result B commits suicide. Even though B's actions were reasonably foreseeable, it would be unjust to hold A criminally liable for causing B's death. A's conduct was not inherently wrongful, and A did not desire to cause the death of another. *Compare with, United States v. Hamilton,* 182 F. Supp. 548, 549 (D.D.C 1960) (The defendant severely beat the decedent, causing him to fall into a semi-comatose state. While in the hospital, the decedent pulled out his breathing tubes, which caused death by asphyxiation. The Court found the defendant guilty of manslaughter, despite the decedent's intervening act.)

[31] Intervening volitional conduct may include both acts and omissions of others. For example, if a driver speeds through an intersection and strikes a child, initially causing minor injury. If the child's parent does not seek medical care which causes the child's injury to become much more severe, the driver may argue that the parent's omission negates legal causation as to the degree of injury.

closely connected to the result. Determining whether a person's conduct is closely connected to the result is a normative judgment that depends on analysis of the totality of the facts of a given case, including the inherent wrongfulness of the actor's conduct, whether the actor desired the prohibited result to occur, and the amount of time between the initial conduct and the intervening act. Inherent wrongfulness of the conduct, desire to cause the prohibited result[32], and short passage of time[33] are not required in order to find legal causation. However, all else being equal, inherent wrongfulness of the conduct, desire to cause the result, and short passage of time between the initial act and intervening act weigh in favor of finding legal causation.

There is no precise formula for determining the point at which intervening influences becomes so great as to break the causal chain between a defendant's conduct and the prohibited result for which he or she is being prosecuted.[34] Rather, the legal causation standard enunciated in subsection (c) simply (and necessarily) calls for an "intuitive judgment"[35] that revolves around whether "although intervening occurrences may have contributed to [a result], the defendant can still, in all fairness, be held criminally responsible for [causing it]."[36]

Relation to Current District Law. Subsection (c) codifies, clarifies, and changes District law. While the D.C. Code does not address legal causation, the DCCA has adopted a standard to address issues of legal causation that focuses on reasonable foreseeability. The definition of legal cause in RCC § 22E-204(c) is intended to incorporate and refine this aspect of District law in a manner that makes it more accessible and coherent. At the same time, RCC § 22E-204(c) also potentially expands District law by clarifying that the volitional conduct of another actor is a relevant causal influence—independent of reasonable foreseeability—to be considered by the factfinder.

It is well established in the District that "a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions."[37] Reasonable foreseeability is thus at the heart of legal

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[32] This issue may be especially likely to arise with offenses that require recklessness or negligence as to causing the result element. For example, if a person fires several gunshots in a crowded theater, and in the ensuing panic a person is trampled and suffers injuries, legal causation may be appropriate if the actor was reckless, but did not desire to cause the injury.

[33] For example, if A seriously but non-fatally injures B, and B dies days later because B fails to fully comply with his physician's complex instructions, legal causation may be appropriate despite this passage of time between the initial injury and B's failure to follow the physician's instructions.

[34] *See, e.g., Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 n.13 (1982) ("[T]he principle of proximate cause is hardly a rigorous analytic tool."); LLOYD L. WEINREB, *Comment on Basis of Criminal Liability; Culpability; Causation: Chapter 3*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 144 (1970)) (noting the difficulty of reducing the requirement of legal causation to "readily understood rules").

[35] Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 439 (1988); *see, e.g., Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 351-52 (Andrews, J., dissenting) (defining legal causation in terms of "a rough sense of justice," wherein "the law arbitrarily declines to trace a series of events beyond a certain point"); Model Penal Code § 2.03 cmt. at 260 (one advantage of "putting the issue squarely to the jury's sense of justice is that it does not attempt to force a result which the jury may resist.").

[36] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).

[37] *Blaize*, 21 A.3d at 81 (quoting *McKinnon v. United States*, 550 A.2d 915, 918 (D.C. 1988)).

causation under District law—a point reflected in the D.C. Criminal Jury Instructions on homicide which state that "A person causes the death of another person if . . . it was reasonably foreseeable that death or serious bodily injury could result from such conduct."[38] Notwithstanding the centrality of the phrase "reasonably foreseeable" in the District's law of causation, however, it is far from clear what it actually means.

District courts have made a wide range of statements on the nature of reasonable foreseeability. Relying on the requirement of reasonable foreseeability, for example, the DCCA has held that a defendant "may not be held liable for harm actually caused where the chain of events leading to the injury appears 'highly extraordinary in retrospect.'"[39] Reasonable foreseeability is also the basis of the DCCA's observation that "[a]n intervening cause will be considered a superseding legal cause that exonerates the original actor if it was so unforeseeable that the actor's . . . conduct, though still a substantial causative factor, should not result in the actor's liability."[40]

The diversity and complexity of statements regarding the nature of reasonable foreseeability perhaps explains why at least some District judges have refrained from providing jurors with any further elaboration of the concept in their instructions—notwithstanding specific requests from jurors for further clarification.[41] This is unfortunate, however, given that these statements all revolve around a basic and intuitive moral question (which is reflected in the case law): can the defendant, given all of the "intervening occurrences [that] may have contributed to" producing the result for which he or she is being prosecuted, "in all fairness[] be held criminally responsible" for that result?[42]

Paragraph (c)(1) is intended to give voice to this principle by codifying the requirement of reasonable foreseeability in terms of whether the manner in which a result occurs is, in fact, reasonably foreseeable. Thereafter, the explanatory note provides further clarity on this inquiry by highlighting that "the focus here is on the extent to which a given result can be attributed to intervening forces—whether human or natural—of a remote or accidental nature," while providing numerous illustrative examples of how such considerations operate in practice. Viewed collectively, these provisions articulate the unnecessarily legalistic and complicated DCCA case law on reasonable foreseeability in a more accessible and transparent way.

Paragraph (c)(2) addresses a different problem reflected in the District approach to legal causation: the failure of reasonable foreseeability to account for the independent causal significance of the volitional conduct of another. The following scenario is illustrative:

Basketball Rivals. X and D have been in a longstanding competitive basketball rivalry, marked by regular bouts of violence by D perpetrated against his teammates after his losses. Nearing the final few seconds of a championship game, and down by one point, X is about to shoot the game winning shot against D after a game marked by many missteps

[38] D.C. Crim. Jur. Instr. § 4.230.
[39] *Blaize*, 21 A.3d at 83; *Majeska v. District of Columbia*, 812 A.2d 948, 951 (D.C.2002) (citing *Morgan v. District of Columbia*, 468 A.2d 1306, 1318 (D.C.1983) (en banc)).
[40] *Butts,* 822 A.2d at 418 (citing Restatement (Second) of Torts § 440 (1965)).
[41] *Blaize*, 21 A.3d at 84.
[42] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting); *see, e.g., McKinnon*, 550 A.2d at 917.

by X's teammate V, at which point X realizes that D will almost certainly (and in fact appears to be preparing to) assault V once the loss is formalized. Nevertheless, D decides to disregard this risk and score the final two points necessary for the win. Immediately thereafter, D does as expected: he becomes enraged and viciously beats V on the court.

In this scenario, X is the factual cause of V's injuries: but for X's scoring the game-winning basket, D would not have gone on to assault V. But is X the legal cause of V's injuries? Intuitively, it would seem that the answer to this question should be "no" given that D freely chose to assault, while X did not in any way desire D to engage in such conduct—rather, D merely desired to win the game. Thus, after accounting for all of the "intervening occurrences [that] may have contributed to" producing V's injury—namely, D's volitional conduct—it cannot be said that "in all fairness" X should "be held criminally responsible" for V's injuries.[43] And yet, under a strict reasonable foreseeability approach it would appear that X *must* be deemed the legal cause of V's injury since D's intervening conduct was in no way a surprise—indeed, D's intervening conduct was specifically foreseen by X.

District law and practice does recognize that potentially foreseeable intervening acts may nonetheless negate legal causation. The District's criminal jury instructions, specifying when medical treatment constitutes an intervening cause state: "[A]s a matter of law, grossly negligent medical treatment is not reasonably foreseeable if it is the sole cause of death . . . ."[44] This rule, which effectively allows for grossly negligent medical treatment to break the chain of legal causation, is sensible. For example, where X inflicts a minor injury on V, only to have medical professional D give V a fatal dose of a sedative mislabeled by D as Tylenol, it's intuitive that D's gross negligence would break the chain of legal causation. But here again, the rule is not necessarily contingent upon considerations of foreseeability.[45] For the outcome would appear to be the same even if the assault took place in a small town with a single hospital with a known penchant for grossly negligent medical care.[46]

One additional aspect of District law that weighs in favor of viewing the volitional conduct of another as a distinct consideration independent of reasonable foreseeability is the law of accomplice liability. The law of accomplice liability, both inside and outside the District, constitutes the primary method for holding one actor responsible for the criminal conduct of another.[47] Yet in order to attribute criminal responsibility in this way, a mere showing of reasonable foreseeability *will not suffice*.[48] Instead, the would-be accomplice must act with a "purposive attitude towards" the other person's/principal's criminal conduct.[49] So, for example, where X sells D a baseball bat, believing that D will

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[43] *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).
[44] D.C. Crim. Jur. Instr. § 4.230.
[45] *See also* LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4(f)(4) (noting that "there may well be instances . . . in which the refusal [of medical treatment] is so extremely foolish as to be abnormal," and that "voluntary harm-doing usually suffices to break the chain of legal cause").
[46] *Id.*
[47] *See generally* Commentary on RCC § 22E-210: Accomplice Liability.
[48] *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) (*en banc*) ("We therefore conclude that it serves neither the ends of justice nor the purposes of the criminal law to permit an accomplice to be convicted under a reasonable foreseeability standard when a principal must be shown to have specifically intended the decedent's death and to have acted with premeditation and deliberation, and when such intent, premeditation, and deliberation are elements of the offense.").
[49] *Wilson-Bey*, 903 A.2d. at 831.

subsequently use it to assault V, X cannot be held criminally liable for D's conduct as an accomplice.[50] True, D's conduct may have been foreseen by X (and was surely reasonably foreseeable under the circumstances). Nevertheless, absent proof that X "designedly encouraged or facilitated"[51] D's subsequent assault of V, the law of accomplice liability will not support the attribution of criminal responsibility.

This stringent approach to dealing with the attribution of criminal responsibility is founded upon the general belief that "the way in which a person's acts produce results in the physical world is significantly different from the way in which a person's acts produce results that take the form of the volitional actions of others."[52] As such, it would be inappropriate to view criminal responsibility for the volitional actions of others as solely being a matter of reasonable foreseeability. Conceptually, this would reduce the culpable choices of others to mere "caused happenings," rather than the independently blameworthy subjects of prosecution that the criminal law assumes them to be.[53] And as a matter of practice, it would effectively negate—by rendering superfluous—the District's well-established principles of accomplice liability.[54]

Paragraph (c)(2) is intended to give voice to the above considerations by stating that—in addition to assessing reasonable foreseeability—"when the result depends on another person's volitional conduct," the fact finder must consider whether there "is a close connection between the actor's conduct and the result." Thereafter, the explanatory note provides further clarity on this inquiry by noting that whether a person's conduct is

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[50] *Id.* ("To establish a defendant's criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture] . . . . "); *see, e.g., Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014); *Gray v. United States*, 79 A.3d 326, 338 (D.C. 2013); *Joya v. United States*, 53 A.3d 309, 314 (D.C. 2012); *Ewing v. United States*, 36 A.3d 839, 846 (D.C. 2012).

[51] *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)); *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); *see also English v. United States*, 25 A.3d 46, 53 (D.C. 2011) ("The key question is whether, drawing all reasonable inferences in the prosecution's favor, an impartial jury could fairly find beyond a reasonable doubt that Anderson intentionally participated in English's reckless flight from the pursuing officer, and that he not only wanted English (and his passengers) to succeed in eluding the police (which Anderson undoubtedly did), but that he also took concrete action to make his hope a reality.").

[52] Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 327, 369-70 (1985) (other people's criminal conduct are not typically viewed "as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not [the individual] who set the stage for his action."); *see, e.g.,* H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 326 (2d ed. 1985) ("The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."); JOHN KAPLAN ET AL., CRIMINAL LAW 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions.").

[53] Kadish, 73 Cal. L. Rev. 323, at 391.

[54] As the DCCA has observed:

> A rule imposing criminal liability upon an accomplice for foreseeable consequences, without proof that the accomplice intended those consequences (while, by contrast, a principal must be shown to have the proscribed intent), is also contrary to the underlying purpose of aiding and abetting statutes, which is to "abolish the distinction between principals and accessories and [render] them all principals."

Wilson-Bey, 903 A.2d at 837 (quoting *Standefer v. United States*, 447 U.S. 10, 19, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980)).

closely related to the result requires analysis of all facts of a given case, including the inherent wrongfulness of the actor's conduct, whether the actor desired a prohibited result to occur, and the passage of time between the initial conduct and the intervening act, while providing numerous illustrative examples of how such considerations operate in practice. Viewed collectively, these provisions expand the District approach to legal causation in a manner that better coheres with District law as a whole.[55]

These provisions clarify operative causal principles governing second-degree murder.[56] Specifically, the District law governing homicides arising from gun battles dictates that where X and Y culpably shoot at one another, and Y subsequently hits either an innocent bystander or another culpable participant, that X may be held criminally responsible for Y's conduct if "it was reasonably foreseeable that death or serious bodily injury could result."[57] In *Fleming v. United States*, DCCA held that "the intervening actions of a third party do not by themselves defeat proximate cause if those actions were reasonably foreseeable to the defendant,"[58] rejecting the argument raised by appellant that an intervening volitional act categorically negates legal causation. However, the DCCA did not hold that reasonable foreseeability is the *only* relevant consideration in determining whether an actor legally caused a prohibited result. The Court specifically declined to decide whether a significant passage of time between the initial actor's conduct and the intervening act of another can negate legal causation, even when the intervening act is reasonably foreseeable.[59] The Court provided a model instruction to guide juries' decision making in accordance with the principles set forth in *Fleming.* However, the Court noted that the model instruction is only to be used in second-degree murder cases, and that the

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[55] *See, Fleming v. United States*, 224 A.3d 213, 229 (D.C. 2020) (*en banc*) (providing model jury instructions for homicide causation, which state in part "the government must prove that there is a close connection between the defendant's action and the decedent's death. You may find that a close connection exists if, at the time of the defendant's action, the defendant knew or reasonably should have known that the action might result in the death of or serious bodily injury to the decedent [or another person]. On the other hand, you may not find that a close connection exists if the series of events leading from the defendant's action to the decedent's death is highly unusual, abnormal, or extraordinary [or too lengthy]").

[56] *Compare Roy v. United States*, 871 A.2d 498, 502 (D.C. 2005) (upholding jury instruction that permitted the jury to find that the defendant, by engaging in a gun battle in a public space, was responsible for causing the death of an innocent bystander killed by a stray bullet even if it was not the defendant who fired the fatal round, provided that the death was reasonably foreseeable), *with Fleming v. United States*, 148 A.3d 1175, 1177 (D.C. 2016) (Easterly, J., dissenting) ("[E]ven assuming arming oneself with a gun and firing it could satisfy the direct causation requirement, the volitional, felonious act of someone else then shooting and killing the decedent is an 'intervening cause' that breaks this chain of criminal causation.").
The DCCA noted in *Fleming* that "[t]he causation principles we have discussed in this case are generally applicable in second-degree-murder cases, not special principles applicable in some distinctive way to gun battles." *Fleming*, 224 A.3d at 228.

[57] D.C. Crim. Jur. Instr. § 4.230; *see, e.g.*, *Roy v. United States*, 871 A.2d 498, 508 (D.C. 2005); *Bryant v. United States*, 148 A.3d 689, 2016 WL 6543533 (D.C. 2016); *McCray v. United States*, 133 A.3d 205 (D.C. 2016); *Blaize v. United States*, 21 A.3d 78 (D.C. 2011); *Blaine v. United States*, 18 A.3d 766 (D.C. 2011).

[58] *Fleming,* 224 A.3d at 226.

[59] The DCCA provided a model jury instruction which addresses "the issue of temporal attenuation," but "does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case." *Fleming,* 224 A.3d at 229. This suggests that legal causation may be negated even when an intervening act is reasonably foreseeable if too much time passes between an actor's initial conduct and the intervening act. Notably, at oral argument, "the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person's initial conduct." *Id.* at 224.

instruction leaves "open whether causation operates differently under [the] felony-murder statute."[60] The model instruction includes bracketed language suggesting that the passage of time may negate legal causation, but "does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case."[61] Although holding that an actor may be held liable for results caused by the intervening volitional act of another, the Court recognized that in a variety of situations, intervening acts may negate legal causation even when they are reasonably foreseeable. However, the DCCA did not specify when reasonably foreseeable intervening acts negate causation, or which factors are relevant in making this determination.

In contrast, the RCC clarifies that although an intervening volitional act does not *necessarily* negate legal causation, it will in cases where the actor's conduct was not closely connected to the result. The commentary further clarifies that the determination of whether it is just to hold an actor liable for the acts of another depends on analysis of the totality of facts of a given case, and identifies three particularly relevant factors.

RCC § 22E-205. CULPABLE MENTAL STATE REQUIREMENT.

Explanatory Notes. Subsection (a) states the culpable mental state requirement governing all criminal offenses in the RCC. It establishes that a culpable mental state is applicable to every result and circumstance element in an offense definition, with the exception of those result and circumstance elements that are subject to strict liability under the rule of interpretation established in RCC § 22E-207(b).[1]

In so doing, subsection (a) more broadly communicates the RCC's basic commitment to viewing culpable mental states on an element-by-element basis—a practice known as "element analysis."[2] This commitment is based on the dual recognition that: (1) "the mental ingredients of a particular crime may differ with regard to the different elements of the crime"[3]; and, therefore, (2) "clear analysis requires that the question of the

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[60] *Id*. at 229.

[61] *Id.* at 229.

[1] *See* RCC § 22E-207(b) ("A person is strictly liable for any result or circumstance in an offense: (1) That is modified by the phrase 'in fact,' or (2) When another statutory provision explicitly indicates strict liability applies to that result or circumstance.").

[2] Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983); *see, e.g.,* Model Penal Code § 2.02(1) ("Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1436–37 (1968) ("This way of putting the matter acknowledges that the required mode of culpability may not only vary from crime to crime but also from one to another element of the same offense—meaning by material element an attribute of conduct that gives it its offensive quality"); *see also* Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 577 (1988) (describing element analysis as the Model Penal Code's greatest achievement).

[3] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.1(d) (3d ed. Westlaw 2019). As LaFave illustrates:

> One might imagine a carefully drafted statutory crime worded: "Whoever sells intoxicating liquor to one whom he knows to be a policeman and whom he should know to be on duty" is guilty of a misdemeanor. Such a statute, aside from its *mens rea* aspects, covers several different [objective] elements—(1) the sale (2) of intoxicating liquor (3) to a policeman (4) who is on duty. As to elements (1) and (2), the statute evidently provides for liability

kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[4]

Under the RCC approach to element analysis, it is necessary to consider what culpable mental state (if any) applies to the result and circumstance elements in an offense definition.[5] Conduct elements are accordingly excluded from the requisite culpable mental state evaluation required by subsection (a).[6] In practice, this means that the only aspect of an actor's culpability as to his or her own present conduct[7] which is necessary to establish affirmative liability under the RCC is its voluntariness, as proscribed in RCC § 22E-203.[8] In addition, subsection (a) requires that a person "acts with" the requisite mental state as to each result and circumstance element. This generally requires a concurrence in time between the actor's conduct and requisite mental states.[9]

Subsection (a) also recognizes that in certain instances the legislature may decide to refrain from requiring proof of a culpable mental state as to a given result or circumstance element, thereby holding an actor strictly liable for it.[10] In that case, however,

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> without fault: if he in fact sells intoxicating liquor it is no defense that he either reasonably or unreasonably thinks he is making a gift rather than a sale, or thinks he is selling Coca-Cola rather than whiskey. As to element (3), however, the statute requires the seller to have actual knowledge that the purchaser is a policeman; so a reasonable or even unreasonable belief that he is a fireman would be a defense. As to element (4), a negligence type of fault is all that is required; a reasonable belief that the policeman is off duty is a defense, but an unreasonable belief is not.

Id.

[4] *United States v. Bailey*, 444 U.S. 394, 406 (1980) (quoting Model Penal Code § 2.02 cmt. at 123); *see, e.g., Carrell v. United States*, 165 A.3d 314, 321 (D.C. 2017) (*en banc*).

[5] *See also, e.g.,* RCC § 22E-206 (defining purpose, knowledge, intent, recklessness, and negligence as to results and circumstances, but not conduct).

[6] *See, e.g.,* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) (requiring proof of *mens rea* as to conduct unnecessarily "duplicates the voluntariness requirement."); Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003) ("It is normally unduly confusing, and not analytically helpful, to retain [the conduct culpability] category [in an element analysis scheme].").

[7] That is, the act, omission, or series of acts or omissions that satisfy the objective elements of an offense.

[8] *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.").

[9] See *Fleming v. United States*, 224 A.3d 213, 229–30 (D.C. 2020), cert. denied, 207 L. Ed. 2d 1059 (June 15, 2020) ("We have said that, "[i]f either the actus reus—the unlawful conduct—or the mens rea—the criminal intent—is missing at the time of the alleged offense, there can be no conviction. Reducing it to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state." Rose v. United States, 535 A.2d 849, 852 (D.C. 1987) (internal quotation marks omitted). We have recently suggested that the concept of concurrence contains exceptions and presents complications. Dawkins v. United States, 189 A.3d 223, 231 & n.11 (D.C. 2018). At least in general, though, considerations of concurrence would suggest that a defendant's acts that lead to a later death could provide the basis for a conviction for second-degree murder only if, at the time the defendant took those acts, the defendant had the mental state required for second-degree murder: intent to kill, intent to inflict serious bodily injury, or conscious disregard of the risk of death or serious bodily injury. Walker v. United States, 167 A.3d 1191, 1201 (D.C. 2017).").

[10] *See* RCC § 22E-205(c) (defining strict liability).

the legislature must explicitly communicate its intent to impose strict liability in accordance with RCC § 22E-207(b).[11]

Subsection (b) provides the definition of "culpable mental state" applicable to RCC § 22E-205(a) and throughout the RCC. The first part of this definition refers to the culpability terms employed in the RCC—purpose, knowledge, intent, recklessness, and negligence, as defined in RCC § 22E-206. Proof that the defendant brought about the result and circumstance elements required by an offense with a state of mind that satisfies any one of these terms will satisfy the culpable mental state requirement codified in subsection (a).[12]

The second part of subsection (b) establishes that the object of the phrases "with intent" and "with the purpose" also constitutes part of a "culpable mental state." This aspect of the definition is intended to clarify the nature of the culpable mental state requirement governing the RCC's various inchoate offenses (e.g., theft, burglary, and attempt),[13] the hallmark of which is the imposition of liability for unrealized criminal plans.[14]

It is helpful to think of the object of the phrases "with intent to" and "with the purpose of" as part of the culpable mental state governing these inchoate offenses since the relevant propositional content need only exist in an actor's mind. The RCC's possession of stolen property statute is illustrative.[15] The objective elements of this offense, the "purchase[]" or "possess[ion]" of "property," are subject to two distinct culpable mental

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[11] *See* RCC § 22E-207(b) ("A person is strictly liable for any result or circumstance in an offense: (1) That is modified by the phrase 'in fact,' or (2) When another statutory provision explicitly indicates strict liability applies to that result or circumstance.").

[12] That is, assuming the offense of prosecution does not require proof of a more culpable state of mind.

[13] There exist two categories of inchoate offenses: general inchoate offenses and specific inchoate offenses. *See generally* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989). Specific inchoate offenses, such as burglary and theft, require proof of some preliminary consummated harm—for example, an unlawful entry or taking—accompanied by a requirement that this conduct have been committed "with intent to" commit a more serious harm—for example, a crime inside the structure or a permanent deprivation. *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27 (4th ed. 2012).

General inchoate offenses, in contrast, accomplish the same outcome, but in a characteristically different way. They constitute "adjunct crimes"—that is, a category of offense that "cannot exist by itself, but only in connection with another crime," *Cox v. State*, 534 A.2d 1333, 1335 (Md. 1988)—that generally do not require that any harm actually have been realized. *See, e.g.,* Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007).

For example, whereas burglary and theft respectively require proof of a taking or a trespass, a criminal attempt merely requires proof of significant progress towards completion of the target offense—without regard to whether this progress was itself harmful. Like burglary and theft, however, general inchoate offenses such as criminal attempts similarly incorporate a "with intent to" requirement, that is, a requirement that the relevant conduct have been committed "with intent to" commit the target offense. *See generally* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997).

[14] *E.g.,* Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 759 (2012). For example, theft is an inchoate offense because it does not require proof that the defendant *actually* deprived the victim of property in a permanent manner; instead, proof of a taking committed "with intent to deprive" will suffice. Similarly, attempt (to commit murder) is an inchoate offense because it does not require proof that the defendant *actually* killed the victim; instead, proof that the defendant, acting "with intent to kill," engaged in significant conduct, which goes beyond mere preparation, directed towards killing the victim will suffice.

[15] RCC § 22E-2401.

states, (1) "with intent *that the property be stolen*" and (2) "with intent *to deprive the owner of the property*."[16] Here, the objects of both culpable mental states—the stolen-ness of the property and the deprivation to the owner—do not actually need to transpire to support liability.

Classifying the object of the phrases "with intent" and "with the purpose" as part of the culpable mental state governing an inchoate offense also appropriately ensures that the relevant propositional content will be subject to the burden of proof stated in RCC § 22E-201.[17]

Subsection (c) provides the definition of "strict liability" applicable to subsection (a) and throughout the RCC. It establishes that strict liability means liability as to a result element or circumstance element in the absence of a culpable mental state.[18] Implicit in this understanding of strict liability is the view that the voluntary commission of an offense, while a necessary prerequisite for criminal liability under RCC § 22E-203, does not constitute a culpable mental state, as defined in RCC § 22E-205(b).[19] Nevertheless, pure

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[16] *Id.* It should be noted that the purchase or possession of property is also subject to a "knowingly" mental state under RCC § 22E-2401.

[17] This is because subsections 201(a) and (b) require the government to prove the "objective elements" and "culpability required" for an offense beyond a reasonable doubt. RCC § 22E-201. As the object of the phrases "with intent" and "with the purpose" need not occur, the relevant propositional content (e.g., the *deprivation* in theft or the crime *committed within the dwelling* for burglary) clearly does not constitute part of that offense's "objective elements," all of which by definition must actually occur. RCC § 22E-201(c)(1) ("Conduct element" means any act or omission that is required to establish liability for an offense."); *id.* at § (c)(2)("Result element" means "any consequence caused by a person's act or omission that is required to establish liability for an offense."); *id.* at § (c)(3) ("Circumstance element" means any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense."). Consequently, it is necessary to incorporate these inchoate elements into the "culpability required" for an offense through the definition of "culpable mental state," so as to afford them the protections of proof beyond a reasonable doubt under section 201. *See* RCC § 22E-201(e) **(**"Culpability required" includes," *inter alia*, "[t]he culpable mental state requirement, as provided in RCC § 22E-205(a).").

[18] *See, e.g.,* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987) ("Strict liability imposes guilt without regard to whether the defendant knew or could reasonably have known some relevant feature of the situation."). As Kadish illustrates:

> The defendant did an act that, judged from his or her perspective, is blameless: she drove a car; she rented her home in another city; he presided over a pharmaceutical company that bought packaged drugs and cosmetics and reshipped them under its own label. But the facts were not as they thought. The driver could not see a stop sign at the intersection, because it was obscured by a bush. The homeowner's otherwise respectable tenants decided to throw a [party involving controlled substances]. The drugs and cosmetics the pharmaceutical company reshipped were mislabeled by the manufacturer and there was nothing the defendant officer could practically have done about it. These circumstances would surely be a defense to a charge of moral fault and usually, under the requirement of *mens rea* or the doctrine of reasonable mistake, they would be a legal defense as well. But . . . many jurisdictions would disallow the excuse of reasonable mistake because, it would be explained, these are instances of strict liability.

Id.

[19] Which is to say: requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability. For example, consider the situation of a person who quickly reaches for a soda on the counter, when, unbeknownst to the person, a small child darts in front of the soda prior to the person's ability to reach it. If the child suffers a facial injury in the process one can say that the person's voluntary act (factually) caused bodily injury to the child. That the relevant conduct was the product of effort or determination,

strict liability offenses,[20] which require proof of voluntariness and nothing more, are possible under the RCC if explicitly specified by the legislature.

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

Relation to Current District Law. RCC 22E-205 fills a gap in District law, which at present does not typically enumerate all the culpable mental states that must be proven for a given offense. By requiring element analysis, RCC § 22E-205 provides the basis for clearly drafting and consistently applying criminal statutes in a manner sensitive to key distinctions in culpability between objective elements. Although the District's criminal statutes generally do not reflect this kind of element analysis, the manner in which the DCCA has interpreted many criminal statutes—particularly in the past few years—accords with the most important aspects of RCC § 22E-205. District case law also recognizes the benefits of clarity and consistency to be gained from legislative adoption of element analysis.

Generally speaking, the District's criminal statutes do not reflect element analysis. Which is to say, they are not drafted in a manner that "make[s] clear what mental state (for example, strict liability, negligence, recklessness, knowledge, or purpose) is required for [each of an offense's objective elements] (for example, conduct, resulting harm, or an attendant circumstance)."[21] Instead, the District's criminal statutes most often generally state some culpable mental state requirement—whether comprised of one,[22] two,[23] three,[24] or even four[25] culpability terms—at the beginning of an offense definition, without clarifying how these culpability terms are intended to be distributed among the offense's objective elements.

The more recent of these District statutes typically employ modern culpability terms, such as purpose, knowledge, recklessness, and negligence.[26] However, many of the District's older statutes employ more ambiguous culpability terms, such as "maliciously,[27] "willfully,"[28] "wanton[ly],"[29] "reckless indifference,"[30] and "having reason to believe."[31] And some of the District's most important criminal statutes merely codify the penalty

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however, is not to say that the person was in any way blameworthy or at fault for causing the child's injury. On this view, then, a criminal offense that premised liability on the mere fact that the person's conduct was voluntary—that is, regardless of whether the person acted purposely, knowingly, recklessly, or negligently as to the relevant result and circumstance elements—is appropriately understood as a strict liability offense.

[20] "Pure" strict liability offenses, which do not require proof of a culpable mental state as to *any* of an offense's objective elements, are to be distinguished from "impure" strict liability offenses, which merely fail to require proof of a culpable mental state as to only some of an offense's objective elements. Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081-82 (1997).

[21] *Jones v. United States*, 124 A.3d 127, 130 n.3 (D.C. 2015)) (citing *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011))

[22] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318; D.C. Code § 22-3309.

[23] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-3312.01.

[24] *E.g.,* D.C. Code § 22-404; D.C. Code § 22-1101.

[25] D.C. Code § 5-1307.

[26] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-404; D.C. Code § 22-1101; D.C. Code § 5-1307.

[27] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318.

[28] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.

[29] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.

[30] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-404.01.

[31] *E.g.,* D.C. Code § 22-723; D.C. Code § 22-3214.

applicable to an offense, and, therefore, enumerate no culpable mental state at all.[32] In the absence of a legislative statement of offense elements, the common law definition of these offenses—typically comprised of an ambiguous culpable mental state requirement framed in terms very different from element analysis—is read in by the courts.[33]

When viewed as a whole, then, criminal statutes in the D.C. Code do not reflect the basic tenets of element analysis.

Historically, District courts have similarly refrained from using element analysis in their interpretation of criminal statutes. For a long time, the DCCA, when faced with clarifying the culpability required for a criminal statute, employed an approach known as "offense analysis," analyzing the appropriate culpable mental state for an offense as a whole (rather than each of its parts). Rather than ask whether any particular objective element in an offense was subject to a culpable mental state—and if so, whether it is akin to purpose, knowledge, recklessness, or negligence—the court typically sought to determine the *mens rea* governing the crime as a whole, which it characterized as one of "general intent" or "specific intent."[34] More recently, however, the DCCA has recognized how problematic this practice is for the administration of justice, and has thus sought to shift its focus away from this common law approach.

For example, in a pair of 2011 decisions, *Perry v. United States* and *Buchanan v. United States*, the DCCA observed that the terms "general intent" or "specific intent" are little more than "rote incantations" of "dubious value,"[35] which "can be too vague or misleading to be dispositive or even helpful"[36] and can lead to "outright confusion . . . when they are included in jury instructions."[37] For this reason, the District's criminal jury instructions "avoid[s]" using the terms "general intent" and "specific intent" as the terms are "more confusing than helpful to juries."[38]

Thereafter, in the DCCA's 2013 decision in *Ortberg v. United States*, the court recognized that the problem with "these terms [is that they] fail to distinguish between elements of the crime, to which different mental states may apply."[39] The better alternative, as the court goes on to explain, is a "clear analysis" which faces the "question of the kind of culpability required to establish the commission of an offense [] separately with respect to each material element of the crime."[40]

With the foregoing insights in mind, the DCCA observed in the 2015 decision of *Jones v. United States* that "courts and legislatures" should, wherever possible, "simply make clear what mental state (for example, strict liability, negligence, recklessness,

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[32] These include assault, D.C. Code § 22-404, murder, D.C. Code § 22-2101, manslaughter, D.C. Code § 22-2105, mayhem, D.C. Code § 22-406, affrays, D.C. Code § 22-1301, and threats, D.C. Code § 22-407.

[33] *See generally Buchanan v. United States*, 32 A.3d 990, 1002 (D.C. 2011) (Ruiz, J. concurring). These statutes are to be contrasted with various strict liability offenses in the D.C. Code, where it is clear that no culpable mental state was intended to govern some or all of the offense's objective elements. For example, as the DCCA observed in *McNeely v. United States*, "[s]trict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes in the past. 874 A.2d 371, 385–86 n.20 (D.C. 2005) (collecting statutes); *see also* D.C. Code Ann. § 22-3011(a).

[34] *Buchanan*, 32 A.3d at 1002.

[35] *Id.* at 1001.

[36] *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011)

[37] *Id.* at 809.

[38] D.C. Crim. Jur. Instr. § 3.100 *Defendant's State of Mind—Note*.

[39] 81 A.3d 303, 307 (D.C. 2013).

[40] *Id.* (citations, quotations, and alterations omitted).

knowledge, or purpose) is required for whatever material element is at issue (for example, conduct, resulting harm, or an attendant circumstance)."[41]

Most recently, the *en banc* DCCA in *Carrell v. United States* (2017) specifically adopted both the element analysis framework[42] and accompanying culpable mental state definitions[43] developed by the Model Penal Code (and subsequently endorsed by the U.S. Supreme Court) in resolving an ongoing conflict surrounding the culpability of criminal threats.[44]

RCC § 22E-205 establishes a legislative framework that broadly accords with all of the foregoing insights. Consistent with the DCCA's recent case law, RCC § 22E-205(a) "requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[45] Consistent with the District's varied criminal statutes, RCC § 22E-205(b) establishes that the kind of culpable mental state at issue will be one of purpose, knowledge, intent, recklessness, or negligence. And consistent with both District case law and criminal statutes, RCC § 22E-205(c) acknowledges the possibility that no culpable mental state may apply to a given objective element at all.[46]

There is, however, one potential difference between the element analysis recognized by the DCCA and that specified by RCC § 22E-205, namely, the RCC approach removes conduct from the requisite analysis of culpable mental states. This variance should help resolve an issue over which there has been extensive litigation in the District: whether and how culpable mental states relate to the conduct element of an offense.

Although the DCCA appears, at times, to envision that conduct, no less than results or circumstances, is subject to a culpable mental state analysis, the court's more recent case law demonstrates the problems and confusion to which this view can lead. For example, the DCCA has frequently defined a "general intent" crime as one requiring proof of "the intent to do the act that constitutes the crime."[47] Applying this definition to simple assault, a so-called general intent crime, suggests that the government need only prove the intent to perform the acts constituting the assault.[48] But two recent cases, *Williams v. United States* and *Buchanan v. United States*, appear to reject this view of the culpable mental state requirement governing the offense, holding that the government must prove that the

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[41] 124 A.3d 127, 130 n.3 (D.C. 2015).

[42] *Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (*en banc*) ("We adopt these ["conduct element," "result element," and "circumstance element"] classifications from the Model Penal Code § 1.13 (9) (Am. Law Inst., Proposed Official Draft 1962).")

[43] *Id.* at 323-24 ("Following the lead of the Supreme Court . . . we likewise conclude that more precise gradations of mens rea should be employed. We have previously expressed concern about the use of 'general' and 'specific' intent. We reiterate our endorsement of more particularized and standardized categorizations of *mens rea*, and, in the absence of a statutory scheme setting forth such categorizations, we, like the Supreme Court, look to the Model Penal Code terms and their definitions.")

[44] *Id.* at 324 ("Applying this hierarchy of *mens rea* levels to the *actus reus* result element of the crime of threats, we hold that the government may carry its burden of proof by establishing that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat.").

[45] For a discussion of how many of the non-conforming culpable mental states in current District statutes are comparable to purpose, knowledge, intent, recklessness, or negligence, see the Commentary on RCC § 22E-206.

[46] *See McNeely*, 874 A.2d at 385.

[47] *E.g., Dauphine v. United States*, 73 A.3d 1029, 1032 (D.C. 2013).

[48] *Anthony v. United States*, 361 A.2d 202, 206 n.5; *Ray v. United States*, 575 A.2d 1196, 1198 (D.C. 1990).

accused intended for that harm to occur.[49] The reason? The "intent to act" interpretation of simple assault, if taken literally, would—as one DCCA judge phrases it—"allow the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability," and, therefore, is actually consistent with strict liability. [50]

Whether or not a strict liability interpretation of simple assault was ever intended by the DCCA is not entirely clear.[51] What is clear, though, is that other courts have unwittingly created strict liability crimes by misconstruing an "intent to act" as amounting to something more than the voluntariness requirement, and that, more generally, the failure to distinguish between voluntary conduct and *mens rea* as to results and circumstances has produced a significant amount of confusion in the law, both inside and outside of the District.[52] Subsection (a) is intended to avoid confusion of this nature by excluding conduct—narrowly defined elsewhere in the RCC as an act or failure to act—from the requisite culpable mental state analysis.

RCC § 22E-206. DEFINITIONS AND HIERARCHY OF CULPABLE MENTAL STATES.

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[49] *Buchanan v. United States*, 32 A.3d 990 (D.C. 2011); *Williams v. United States*, 887 A.2d 1000 (D.C. 2005).

[50] *Buchanan*, 32 A.3d at 1002 (Ruiz, J. concurring). It should be noted that the culpable mental state requirement governing simple assault has continued to be a source of litigation and confusion in the District. This is reflected in *Vines v. United States* (2013), where the DCCA went out of its way to *avoid* resolving the culpable mental state of simple assault. 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013).

The defendant in *Vines* argued that prior simple assault case law "require[s] the government to prove that he had either: (a) the specific intent to cause bodily harm; or (b) the specific intent to place his victim in reasonable apprehension of bodily harm in order to sustain a conviction." *Id.* at 1179-80. In response, the DCCA noted that it "*need not* address the correctness of Vines' understanding of our case law to resolve this appeal," and that "*[e]ven assuming* Vines is correct, a reasonable juror could have inferred the intent to cause bodily harm from his extremely reckless conduct, which was almost certain to cause bodily injury to another . . . ." *Id.* (italics added); *see id.* ("*We need not decide* whether it was necessary for the government to show that Vines possessed the intent to injure May and Garrett or only the intent to commit the acts constituting the assault. Even if the greater proof was necessary, the jury could permissibly infer such intent from Vines' extremely reckless conduct, which posed a high risk of injury to those around him.") (italics added).

[51] For example, neither the DCCA nor any other common law authority has explicitly taken the position that simple assault is a strict liability crime. And the DCCA has even interpreted so-called strict liability crimes to require proof of some *mens rea* beyond just voluntary conduct. *See*, *e.g.*, *McNeely*, 874 A.2d at 387. Moreover, in other contexts, the DCCA has defined a "general intent" crime as requiring the government to prove that the accused was "aware of all those facts which make [one's] conduct criminal," *Campos v. United States*, 617 A.2d 185, 188 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962))—a definition that seems to imply that a knowledge-like *mens rea* is applicable to at least some of the objective elements in an offense such as simple assault.

[52] For relevant case law from outside the District, see, for example, *State v. Sigler*, 688 P.2d 749 (Mont. 1984) *overruled by State v. Rothacher*, 901 P.2d 82 (Mont. 1995); *Van Dyken v. Day*, 165 F.3d 37 (9th Cir. 1998); *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985); *Markley v. State*, 421 N.E.2d 20 (Ind. Ct. App. 1981); *Jennings v. State*, 806 P.2d 1299 (Wyo. 1991); *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968). And for relevant commentary, see, for example, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994); Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 722 (1983); Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1 (2007); Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 44 IND. L. REV. 1135 (2011); Larry Kupers, *Aliens Charged with Illegal Re-Entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861 (2005); J.W.C. Turner, *The Mental Element in Crime at Common Law,* 6 CAMBRIDGE L.J. 31, 34 (1936).

Explanatory Notes. Section 206 establishes a culpable mental state hierarchy comprised of four levels—purposely, knowingly/intentionally, recklessly, and negligently—separately defined in relation to result and circumstance elements. These terms "prescribe the minimal requirements" of criminal liability and "lay the basis for distinctions that may usefully be drawn" in the grading of offenses under the RCC.[1] The hierarchy these terms comprise is intended to codify, clarify, and refine the "representative modern American culpability scheme," which was originally developed by the drafters of the Model Penal Code and has subsequently been adopted by legislatures and courts around the country.[2]

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[1] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968) (discussing the culpable mental state hierarchy developed in Model Penal Code § 2.02); *see, e.g.,* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 119 (1970) (observing that the culpability concepts incorporated into Model Penal Code § 2.02 "express the significant distinctions found by the courts, and are adequate for all the distinctions which can and should be made to accomplish the purposes of a [] criminal code.").

The rationale for carefully distinguishing between distinctions in culpable mental states has been described accordingly:

> Criminal law exhibits a well-known fixation with the defendant's mind, a fixation that we do not find in other areas of law, including areas in which the mental states of the parties matter to liability. Criminal law responds differently to defendants who are only subtly different in their psychological states; we often give large punishments to some who cause harm while giving low punishments, or even no punishments, to subtly psychologically different actors who cause the very same, or even greater, harms. The reason is that subtle differences in psychological states . . . cloak large differences in something fundamental to what it is to be a human being and a citizen of a state who owes an account of his conduct to other people and other citizens: the evaluative weight that we give to others' interests in comparison to our own . . . From subtle differences in psychology, we are able to infer the presence of large differences [in the level of disregard for the legally protected interests of others that an actor's harmful or dangerous conduct manifests on a particular occasion].

Gideon Yaffe, *The Point of Mens Rea: The Case of Willful Ignorance*, 12 CRIM. L. & PHIL. 19, 25 (2018); *see, e.g.,* Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 151 (2008) ("To publicly blame a person [is] to adjudge that, rather than being motivated in his conduct by proper regard for interests that the law seeks to safeguard, the person placed insufficient value on those interests. The attitudes for which persons are blamed range in gravity from maliciousness (e.g., 'purpose' to do harm), callousness (e.g., 'knowingly' doing harm), indifference to harm, conscious disregard of harm (i.e. 'recklessness'), and inadvertent neglect (i.e. 'negligence'). In each case, however, blame is a negative judgment of the person's motivating values.").

[2] Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 692 (1983) ("Section 2.02 [of the Model Penal Code] may appropriately be considered the representative modern American culpability scheme."); *see* Model Penal Code § 2.02(2) (defining purposely, knowingly, recklessly, and negligently); *id.* at § 2.02(5) (establishing that proof of higher mental state will satisfy the lower mental state).

The influence of Model Penal Code § 2.02 has been summarized accordingly:

> Upon initial publication, the MPC formulation of culpability was hailed by most commentators as a reasonable attempt to impose some predictable structure on a notoriously unpredictable and discordant area of the law. State legislatures were even more accepting. By 1983—just 25 years after its promulgation—36 states had largely jettisoned their criminal codes in favor of the MPC. Even in the handful of states that have not

Subsection (a) provides a comprehensive definition of the term "purposely," sensitive to the kind of objective element to which the term applies. Under this definition, a person acts purposely as to a result element when that person consciously desires to cause the prohibited result.[3] Likewise, a person acts purposely as to a circumstance element when that person consciously desires that the prohibited circumstance exist.[4] It is immaterial to liability under this definition that a person also possesses an ulterior motive, which goes beyond his or her conscious desire to cause a prohibited result or that a prohibited circumstance exists.[5] However, the conscious desire required by subsection (a) must be accompanied by that person's belief that it is at least possible that the prohibited result will occur or that the prohibited circumstance exists.[6]

Subsection (b) provides a comprehensive definition of the terms "knowingly" and "intentionally," sensitive to the kind of objective element to which the term applies. Under this definition, a person acts knowingly or intentionally as to a result element when that person is aware or believes that it is practically certain that conduct[7] will cause the prohibited result.[8] Likewise, a person acts knowingly or intentionally as to a circumstance

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> adopted it in whole or in part as legislation, the MPC has still managed to find its way into the common law of those states because judges often turn to it for guidance. The MPC is now taught in virtually every law school, with one professor calling it the principal text in criminal law teaching. Whether in actual legislation, common law, or simply norms accepted by lawyers and judges, the MPC has become a standard part of the furniture of the criminal law.
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> Francis X. Shen, et. al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1317–18 (2011) (internal quotations and footnote call numbers omitted).

[3] For example, if X pulls the trigger of a loaded gun with the goal of killing V, X acts "purposely" with respect to causing the death of V.

[4] For example, if X assaults V, a uniformed police officer, because of the victim's status as a police officer, X acts "purposely" with respect to assaulting *a police officer*.

[5] For example, if X throws a rock at V, consciously desiring to inflict bodily injury upon V, the fact that X's ulterior motive is to impress bystander Y with his assertive display of violence would not in any way preclude a finding that X purposely assaulted V. WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.2(d) (3d ed. Westlaw 2019) ("It may be said that, so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have had some other intention.") (citing, e.g., *O'Neal v. United States*, 240 F.2d 700 (10th Cir. 1957); *United States v. Argueta-Rosales*, 819 F.3d 1149 (9th Cir. 2016)).

[6] For example, if X throws a rock at V who is many hundreds of feet away, consciously desiring to inflict bodily injury upon V but also believing that there is no possibility that the rock will actually hit V, then X does not act purposely with respect to injuring V. *See, e.g.,* Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1, 13 n.17 (2012); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 942-43 (2000).

[7] The reference both here and throughout RCC § 22E-206 is to whether "conduct" (in general) will cause a result, and not to whether "*that person's* conduct" (in particular) will cause a result. This is because, in some situations (e.g., accomplice liability), the defendant's culpable mental state will relate to the relationship between *another person's* conduct (e.g., the principal actor) and causing a prohibited result. *See, e.g.,* RCC §§ 22E-210 & 211: Explanatory Notes.

[8] Consider the following situation: child rights advocate X blows up a manufacturing facility that relies upon child labor, which in turn causes the death of on-duty night guard V. On these facts, it can be said that X "knowingly" killed V so long as X was practically certain that V would die in the blast. This is so, moreover, although X would prefer that V not be injured in the blast.

element when that person is aware or believes that it is practically certain that the prohibited circumstance exists.[9]

The meaning of "knowingly" and "intentionally" are equivalent as to the subjective state of mind involved. There is, however, an important communicative distinction between these two terms: whereas the term knowledge implies a basic correspondence between a person's subjective belief concerning a proposition and the truth of that proposition, the term intent does not entail this correspondence and can be used when drafting legislation that does not require the result or circumstance to actually be proven to have occurred or existed The RCC provides this terminological alternative to knowledge to facilitate the clear drafting of inchoate offenses (e.g., theft, burglary, and attempt), the hallmark of which is the imposition of liability for unrealized criminal plans.[10] In practice, the RCC utilizes the term "intentionally" only in the formulation "with intent…" to express that the following result or circumstance need not be proven to actually have resulted or existed.[11]

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[9] Consider the following situation: X purchases a car from Y on the black market, which was previously stolen from V. On these facts, it can be said that X "knowingly" buys stolen property so long as X was practically certain that the purchased car was previously stolen. This is so, moreover, although X would prefer that the car had not been stolen.

[10] *See* RCC § 22E-205(b): Explanatory Note (providing overview of general and specific inchoate crimes). Given that the consummation of an actor's criminal plans is not necessary for the imposition of inchoate liability, it would be misleading to describe the core culpable mental state requirement for inchoate offenses as one of acting "with knowledge" that a result will occur or that a circumstance exists. *See* Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998) ("Knowledge would not be the proper way to describe this mental state, because it would be odd to describe the defendant as having knowledge of a result when the result does not in fact occur."). Use of the term knowledge suggests that the actor's beliefs must be accurate, and, therefore, that the requisite result and/or circumstance modified by the phrase "with knowledge" actually needs to occur or exist. A central feature of inchoate offenses, however, is that the requisite result and/or circumstance that comprise the core culpable mental state requirement need not actually occur or exist. *E.g.,* Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 759 (2012); Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. 542, 545 (2012). For this reason, the term intent, which does not imply the accuracy of the actor's beliefs, is more appropriate for use in the inchoate context.

To illustrate, consider a hypothetical theft offense that prohibits taking property "with knowledge of a deprivation." This language suggests that proof that the defendant's conduct actually resulted in a permanent deprivation is necessary for a conviction. But if, in contrast, that theft offense instead incorporated the culpable mental state of "with intent to deprive," then there would be no indication that consummation of the deprivation is necessary for a conviction. Likewise, a hypothetical receipt of stolen property offense phrased in terms of "possessing property with knowledge that it is stolen" suggests that the property must have actually been stolen to support a conviction. But if, in contrast, that offense was instead framed in terms of "possessing property with intent that it be stolen," then there would be no indication that the property must have been stolen to support a conviction.

As these examples illustrate, use of the phrase "with intent" will establish that: (1) a subjective belief concerning the likelihood that a given result will occur or that a circumstance exists will provide the basis for liability; (2) without creating the mistaken impression that the relevant result or circumstance modified by the phrase actually needs to occur or exist. *See also* RCC § 22E-205(b): Explanatory Note (discussing "with intent" in the context of the definition of "culpable mental state").

[11] RCC § 22E-205(b) ("'Culpable mental state' means: (1) Purpose, knowledge, intent, recklessness, or negligence; and (2) The object of the phrases 'with intent' and 'with the purpose'.")

The critical distinction between purpose and knowledge/intent is the presence or absence of a positive desire.[12] Whereas the knowing/intentional actor is aware/believes that a result will occur or that a circumstance exists, the purposeful actor consciously desires to cause that result or that the circumstance exists.[13] To differentiate between these two kinds of culpability in practice, the factfinder may find it useful to consider the following counterfactual test: "Would the defendant regard [him or herself] as having failed if a particular result does not occur, or circumstance does not exist?"[14] An affirmative answer to this question is indicative of a purposeful actor.[15]

Subsection (c) provides a comprehensive definition of the term "recklessly," sensitive to the type of objective element to which the term applies. Under this definition, a person acts recklessly as to a result element when, *inter alia*, that person consciously disregards a substantial risk that conduct will cause the prohibited result.[16] Likewise, a person acts recklessly as to a circumstance element when, *inter alia*, that person consciously disregards a substantial risk that the prohibited circumstance exists.[17]

Subsection (d) provides a comprehensive definition of the term "negligently," sensitive to the kind of objective element to which the term applies. Under this definition, a person acts negligently as to a result element when, *inter alia*, that person fails to perceive a substantial risk that conduct will cause the prohibited result.[18] Likewise, a person acts

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[12] This distinction rests on a simple but widely shared moral intuition: all else being equal, consciously desiring to cause a given harm is more blameworthy than being aware that it will almost surely result from one's conduct. *See, e.g.,* Fiery Cushman, Liane Young & Marc Hauser*, The Role of Conscious Reasoning and Intuition in Moral Judgment*, 17 PSYCHOL. SCI. 1082 (2006); Matthew R. Ginther et. al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327 (2014). In practice, however, this distinction "is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient." Model Penal Code § 2.02 cmt. at 234. Rather, it is only in "certain narrow classes of crimes" that the "heightened culpability" of purpose "has been thought to merit special attention" at the liability stage. *United States v. Bailey*, 444 U.S. 394, 405 (1980). This special attention is captured by the RCC definitions of accomplice, solicitation, and conspiracy, all of which require proof of purpose in order to establish threshold liability. *See* RCC §§ 22E-210(a) (accomplice liability), 302(a) (solicitation liability), and 303(a) (conspiracy liability).

[13] Note, however, that under RCC § 22E-206(e), proof of a higher culpable mental state will establish a lower one, and, therefore, the culpable mental states of knowledge and intent may be satisfied by proof of purpose. In practical effect, this means that a conscious desire constitutes an alternative to the belief states at issue in knowledge and intent.

[14] R.A. DUFF, CRIMINAL ATTEMPTS 17 (1996).

[15] The distinction between purpose and knowledge/intent might also be framed in terms of the difference between "will[ing] that the act . . . occur [and] willing to let it occur." Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 122 (1998).

[16] For example, if X speeds through a red light *aware that it is substantially possible* that X will fatally hit V, a pedestrian stepping into the crosswalk, X acts "recklessly" with respect to causing the death of V (provided that X's conscious disregard of the risk is also a gross deviation from the ordinary standard of conduct, see *infra* notes 22-33 and accompanying text). As the italicized language in this example illustrates, the RCC definition of recklessness as to a result requires proof that that defendant subjectively perceived both the risk and its substantiality.

[17] For example, if X purchases a stolen luxury car from Y for a fraction of its market value, *aware that it is substantially possible* that the car is stolen, X acts "recklessly" with respect to whether the property being purchased is stolen (provided that X's conscious disregard of the risk is also a gross deviation from the standard of conduct a reasonable individual would follow, see *infra* notes 22-33 and accompanying text). As the italicized language in this example illustrates, the RCC definition of recklessness as to a circumstance requires proof that that defendant subjectively perceived both the risk and its substantiality.

[18] For example, if X speeds through a red light *unaware that it is substantially possible* that X will fatally hit V, a pedestrian stepping into the crosswalk, X acts "negligently" with respect to causing the death of V

negligently as to a circumstance element when, *inter alia*, that person fails to perceive a substantial risk that the prohibited circumstance exists.[19]

The RCC definitions of recklessness and negligence comprise non-intentional mental states, which extend liability to actors who disregard substantial risks of harm. Recklessness involves *conscious* risk-taking, and therefore resembles acting knowingly/intentionally, with one important distinction: the actor's requisite awareness of a risk need not rise to the level of a *practical certainty*. Rather, for recklessness, the risk consciously disregarded by the actor need only be perceived as *substantial*. Negligence, like recklessness, also involves the *disregard of a substantial risk*. For negligence, however, liability is assigned based upon the actor's *failure to perceive that risk*. In this sense, negligence constitutes an objective form of culpability (i.e. it does not require proof of a subjective desire or belief as to a result or circumstance element), which distinguishes it from every other subjective culpability term in the RCC hierarchy.[20]

The other essential component of the RCC definitions of recklessness and negligence is the gross deviation standard, which the second prong of each culpable mental state incorporates in nearly identical terms.[21] Pursuant to this standard, recklessness and negligence liability each entail proof that the person's risk-taking be gross deviations from the standard of conduct or standard of care that a reasonable individual would follow when viewed in light of the morally salient characteristics of that person's situation. The RCC definitions of recklessness and negligence describe those features as the "nature and degree" of the "risk" that has been disregarded, the "nature of and motivation for the person's conduct," and "the circumstances the person is aware of."[22]

This context-sensitive culpability analysis excludes a wide range of activities that involve *justifiable* risk-taking from falling within the scope of recklessness and negligence liability under the RCC. Risk-taking is a routine and often unavoidable aspect of life, which can be necessary to further important societal interests—as reflected in, for example, performing open-heart surgery, building a skyscraper, or operating an emergency response vehicle. Where a person's risk-taking is justifiable in this conventional sense,[23] that person

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(provided that X's failure to perceive the risk is also a gross deviation from the standard of care a reasonable individual would follow, see *infra* notes 22-33 and accompanying text).

[19] For example, if X purchases a stolen luxury car from Y for a fraction of its market value, *unaware that it is substantially possible* that the car is stolen, X acts "negligently" with respect to whether the property being purchased is stolen (provided that X's failure to perceive the risk is also a gross deviation from the standard of care a reasonable individual would follow, see *infra* notes 22-33 and accompanying text).

[20] *See, e.g.,* LAFAVE, *supra* note 5, at 1 SUBST. CRIM. L. § 5.1(c) (observing that negligence requires "objective fault in creating an unreasonable risk; but, since the actor need not realize the risk in order to be negligent, no subjective fault is required," as is the case with other culpability terms).

[21] In the context of recklessness liability, the focus is placed on the degree to which the actor's *conscious disregard of* a substantial risk deviated from the ordinary standard of conduct—whereas, in the context of negligence liability, the focus is placed on the degree to which the actor's *failure to perceive* a substantial risk deviated from the ordinary standard of care.

[22] RCC §§ 206(c)(1)(B) & (2)(B); RCC §§ 206(d)(1)(B) & (2)(B).

[23] That is, because the socially beneficial "nature of and motivation for" for the actor's conduct outweighs the "nature and degree" of the "risk" disregarded when considered in light of the circumstances the actor is aware of. *See, e.g.,* Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 957 (2000) ("To determine justifiability . . . We determine the extent of harm risked by the conduct discounted by its likelihood of occurring and weigh that against the actor's motivation for the conduct (the perceived benefits, to the individual or others, accruing from the conduct) discounted by the probability that the risky behavior will satisfy the actor's goals.").

fails to manifest the "insensitivity to the interests of other people" which characterizes deviations from the ordinary standard of conduct or care,[24] and therefore would fail to satisfy the gross deviation standard governing the RCC definitions of recklessness and negligence.

Aside from justified risk-taking, this context-sensitive culpability analysis also excludes from recklessness and negligence liability those actors whose disregard of a risk is attributable to individual or situational factors beyond their control (and thus for which they cannot fairly be blamed).[25] Because punishment "represents the moral condemnation

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This justifiability evaluation is largely *objective*. For example, in weighing the severity of the harm that might have resulted from the defendant's conduct against the extent to which the defendant's conduct might potentially have proven beneficial, the factfinder should consider the value that the community places upon particular types of activities, in contrast to the value that the defendant subjectively placed on them. Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006); *see, e.g.,* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) ("To determine whether a risk is justifiable [the requisite] balance must be based on societal values, not the actor's personal gain").

That said, one aspect of the justifiability evaluation is *subjective*: the relevant probabilities must be assessed in light of the "circumstances the person is aware of." Specifically, in determining the likelihood of both the harm and potential societal benefit of the defendant's conduct, the factfinder must examine "the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight." *Williams v. State*, 235 S.W.3d 742, 753 (Tex. Crim. App. 2007) (collecting cases in accord). And, in so doing, the factfinder is to exclude "mistaken beliefs—and mistaken estimates of the relevant probabilities—[from] the analysis." Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 50 (2009) (discussing the phrase "circumstances known to the actor" as employed in the Model Penal Code definitions of recklessness and negligence, § 2.02(c)-(d)).

To illustrate how this justifiability evaluation operates in practice, consider the following hypothetical: X, a construction worker, causes the death of V, a pedestrian running on a sidewalk immediately adjacent to the construction site, in the course of using dynamite to demolish a pre-existing structure to make room for a new sports arena. X failed to perceive a risk that anyone outside the confines of the construction site would be injured by the blast. If X is subsequently prosecuted for negligent homicide, the justifiability of his conduct (and thus whether the clear blameworthiness requirement is met) entails a comparative assessment of: (1) the cost of fatal risks to the physical security of pedestrians; (2) the benefit of constructing a new sports arena; (3) the likelihood that X's conduct would result in death to a pedestrian; and (4) the likelihood that X's conduct would further the goal of constructing a new arena. The weighting of the first two (normative) factors is based solely on the community's values (e.g., it would be immaterial that X subjectively believed the creation of sports arenas to be the highest form of human achievement—or thought little of the physical security of pedestrians). The weighting of the latter two (probabilistic) factors, in contrast, is based on an evaluation of the circumstances that X was aware of at the time of the blast.

To illustrate how the weighting of the latter two factors occurs, suppose that at the moment of the blast, 10:00pm on January 1: (1) a nighttime New Year's charity run was occurring immediately adjacent to the construction site; while (2) the dynamite employed routinely sends scraps of material flying beyond the construction site's fencing. If X was aware of both of these facts, then the probability that harm would occur would be quite high. But if, in contrast, X was unaware of both of these facts, then the likelihood of harm—again, given X's perspective—might be quite low given the situation as X perceived it.

[24] *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 502 (E.D.N.Y. 1993) (quoting Model Penal Code § 2.02 cmt. at 243); *see, e.g.,* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) ("What makes the actor's conduct justifiable is a societal judgment that the behavior is not culpable because the balance of risks and benefits was made in a manner beneficial to society.").

[25] *See, e.g., Cordoba-Hincapie*, 825 F. Supp. at 502 ("[M]oral defects can [only] properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them.") (quoting Model Penal Code § 2.02 cmt. at 243); *Williams v. State*, 235 S.W.3d 742, 751 (Tex. Crim. App. 2007) (both recklessness and negligence depend "upon a *morally*

of the community,"[26] the imposition of criminal liability can only be justified where a person's risk-taking fails to live up to the community's values—and, therefore, *deserves* to be condemned—under the circumstances.[27] What ultimately determines whether an actor's disregard of a risk blameworthy, then, is whether it reflects a level of concern or attention[28] for legally-protected interests that is *lower* than what a reasonable member of the community placed in the defendant's situation could be expected to exercise.[29] Where, in contrast, an actor's risk-taking does manifest a reasonable level of concern or attention for those legally protected interests, and his or her conduct is instead attributable to excusing influences[30]—for example, intellectual deficiencies, physical impairments,

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blameworthy failure to appreciate a substantial and unjustifiable risk"); SAMUEL PILLSBURY, JUDGING EVIL 171-172 (2012) ("Where the accused did not perceive the risks involved at the time of his conduct, culpability rests on a judgment about why the person failed to perceive. Did the failure stem from a culpable lack of concern for the victim, or should we attribute it to other factors for which the individual should not be blamed?"); Model Penal Code § 210.3, cmt. at 62 ("[I]t would be morally obtuse to appraise a crime . . . without reference to these factors").

[26] *Ruffin v. United States*, 76 A.3d 845, 859 (D.C. 2013) (quoting *United States v. Bass,* 404 U.S. 336, 348 (1971)); *see, e.g.,* Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 264 (1987) ("To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood").

[27] *See, e.g.,* Westen, *supra* note 1, at 151 ("To publicly blame a person is to . . . adjudge that, rather than being motivated in his conduct by proper regard for interests that the law seeks to safeguard, the person placed insufficient value on those interests."); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 553 (2012) ("[T]he mental states of recklessness and negligence constitute culpability, are morally significant, and contribute to the morally objectionable nature of the agent's act, thanks to what they indicate about the agent's attitude towards the legally protected interests of other people."); *cf.* Joshua Kleinfeld et. al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1703 (2017) (proof of "moral blameworthiness" should be required for all crimes).

[28] As in the case of negligence, where the person has *failed to perceive* the relevant risk. *See, e.g.,* Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind,* 67 SMU L. REV. 545, 575 (2014) ("[A]n actor should be regarded as negligent if his failure to perceive a risk he is creating or imposing results from indifference to the well-being of others, or in other words, if he would have perceived a risk he was creating or imposing had he not been indifferent to the well-being of others."); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 388 (1994).

[29] In this sense, reasonableness is not a statistical measure asking the factfinder to identify what the "average" person would have done. Rather, it is an evaluative standard, which requires the factfinder to consider what a person with both (1) the defendant's limitations and shortcomings and (2) "the correct degree of care for the interests and welfare of others" would have done under the circumstances. Douglas Husak, *Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting*, 5 CRIM. L. & PHIL. 199, 206 (2011) ("[T]he reasonable person has all of the physical and psychological attributes of the particular defendant with one important exception: the reasonable person has an appropriate degree of concern for others."); *see, e.g.,* Westen, *supra* note 1, at 151 (Insofar as culpability is concerned, the relevant question to ask about reasonableness is: "What would a person, who otherwise possessed every trait of the actor but fully respected the interests that the statute at hand seeks to protect, have thought and/or felt on the occasion at issue?"); Model Penal Code § 210.3 cmt. at 63 ("[I]t is clear that personal handicaps and some external circumstances must be taken into account" (e.g., "blindness, shock from traumatic injury, and extreme grief") to determine what the reasonable would have done); *compare id.* at 64 ("[I]t is equally plain that idiosyncratic moral values" need not be considered: "An assassin who kills a political leader because he believes it is right to do so cannot ask that he be judged by the standard of a reasonable extremist. Any other result would undermine the normative message of the criminal law.").

[30] Importantly, these influences do not need to rise to the level of a complete excuse defense to be relevant to—or ultimately preclude a showing of—the clear blameworthiness standard. To take just one example, consider the situation of sorority pledge, X, who is confronted by abusive sorority sister, Y, with the choice of either: (1) dropping a rock off the sorority's one-story balcony, thereby *risking* significant bodily injury to

immaturity, extreme emotional or mental disturbances, or external coercion[31]—then that person would likewise fail to satisfy the gross deviation standard governing the RCC definitions of recklessness and negligence.[32]

To illustrate how this situation-specific culpability analysis operates in practice, consider the situation of a driver who turns into an intersection, consciously disregarding a substantial risk that she will hit an unoccupied trailer attached to a construction vehicle that is adjacent to her. If the driver ends up destroying the trailer, her unreasonable operation of her motor vehicle will almost surely subject her to civil liability. But whether her conscious disregard of a substantial risk will subject her to criminal liability under the RCC requires further analysis as to whether her conduct constituted a gross deviation from the standard of conduct a reasonable person would follow, which accounts for the "nature and degree" of that risk, the "nature of and motivation for" her conduct, and the "circumstances [she] is aware of."

For example, in a recklessness-based prosecution for second-degree criminal damage to property,[33] the driver's liability would hinge upon three main considerations evaluated by the factfinder in light of the driver's perception of events. The first is the severity of the risk of property damage consciously disregarded by the driver.[34] The second is the extent to which the driver's decision to enter the intersection was intended to further legitimate societal objectives.[35] And the third are any individual or situational factors beyond the driver's control that reasonably hindered her ability to exercise an adequate level of concern for the unoccupied trailer owner's property rights.[36] All else being equal,

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pedestrian Z, below; or (2) immediately be punched in the face by Y. Assume that X opts to avoid the threatened assault by dropping the rock off the balcony, but that the rock causes significant bodily injury to Z. If X is thereafter prosecuted for reckless assault of Z, she would be unable to raise a "duress defense (sometimes called compulsion or coercion) to the crime in question" because it only applies where a threat of "imminent death or *serious* bodily injury" is issued (whereas, in contrast, Y's threat only entailed *significant* bodily injury). LAFAVE, *supra* note 5, at 1 SUBST. CRIM. L. § 6.8. While falling short of a complete excuse defense, however, the external coercion that X experienced would be relevant to assessing—and indeed, suggests that X likely lacks—the clear blameworthiness required by the RCC definition of recklessness.

[31] This non-exclusive list of factors is consistent with the kind of "[f]acts normally considered excusing in the criminal law." *E.g.,* Anders Kaye, *Excuses in Exile*, 48 U. MICH. J.L. REFORM 437, 442 (2015) (listing as relevant "the offender's infancy, subnormal intelligence, legal insanity, intoxication, diminished capacity, duress, entrapment, and even provocation.") (collecting authorities); *see also* Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. Rev. 161, 188 (2016) (noting that mitigation for partial or imperfect excuses is generally well established in American criminal justice policy).

[32] Whether excusing influences mitigate blame in this way is a matter of degree, contingent upon the comparative influence of individual or situational factors beyond that person's control under the circumstances.

[33] RCC § 22E-2503 ("Recklessly damages or destroys property and, in fact, the amount of damage is $25,000 or more.").

[34] That is, the "nature and degree of the risk."

[35] That is, the "motivation" of the actor's conduct." It would be relevant, for example, that the driver acted with a reasonable (even if mistaken) belief that entering the intersection would avoid a more harmful crash with an oncoming school bus or get a passenger suffering from what appeared to be a heart attack to the hospital as expeditiously as possible.

[36] That is, the "nature" of the actor's conduct. Illustrative examples of relevant factors would include: (1) an extreme emotional disturbance stemming from recent news that the driver's child was just killed in a school shooting; (2) external coercion created by a passenger who instructed the driver to step on the gas or else risk being physically beaten at the end of the trip; or (3) impairments of judgment attributable to (i) the early

the greater the value assigned to the first consideration, and the lower the value assigned to the second and third considerations, the more likely it is that the gross deviation standard incorporated into the RCC definition of recklessness has been met.

The analysis required to determine whether an actor's failure to perceive a substantial risk meets the gross deviation standard incorporated into the RCC definition of negligence is nearly identical. To illustrate, consider a slightly different hypothetical: a driver turns into the intersection with her eyes fixed on her rearview mirror, failing to perceive the substantial risk that she will (and does) fatally hit a bicyclist who is adjacent to her. If the driver is thereafter prosecuted for negligent homicide,[37] the driver's guilt would again depend upon three main considerations evaluated by the factfinder in light of the driver's perception of events. The first is the severity of the risk of death that the driver *should have been aware of* under the circumstances.[38] The second is the extent to which the driver's decision to enter the intersection (without looking rightward) was intended to further legitimate societal objectives.[39] And the third are any individual or situational factors beyond the driver's control that reasonably hindered her ability to exercise an adequate *level of attention* to the bicyclist's physical safety.[40] Here again it can be said that, all else being equal, the greater the value assigned to the first consideration, and the lower the value assigned to the second and third considerations, the more likely it is that the gross deviation standard incorporated into the RCC definition of negligence has been met.

Subsection (e) states that proof of a higher culpable mental state will always establish a lesser culpable mental state. This establishes that: (1) negligence can be satisfied by proof of recklessness, intent, knowledge, or purpose; (2) recklessness can be satisfied by proof of intent, knowledge or purpose; (3) knowledge or intent can be satisfied by proof of purpose. These rules are a product of the view that, all else being equal, purpose is more culpable than knowledge/intent, which is more culpable than recklessness, which is more culpable than negligence. In practical effect, these rules dictate that the legislature need not state alternative mental states in the definition of an offense; rather, a statement of the lowest culpable mental state sufficient to establish a given objective element is sufficient.

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stages of a heart attack, (ii) the unexpected side effects of a non-narcotic medication prescribed by a physician, or (iii) the foreseeable side effects of a narcotic that had been placed in the driver's beverage without her knowledge or consent.

[37] RCC § 22A-1103(a) ("A person commits negligent homicide when that person negligently causes the death of another person.").

[38] That is, the "nature and degree of the risk."

[39] That is, the "purpose" of the actor's conduct." It would be relevant, for example, that the driver's gaze was fixed on her rearview mirror because it appeared as though a runaway truck was barreling towards her, or because the driver's small child—seated in the backseat—appeared to be choking on a small toy, which could be fatal unless immediately removed.

[40] That is, the "nature" of the actor's conduct. Illustrative examples of relevant factors would include: (1) an extreme emotional disturbance stemming from a recent near-fatal accident the driver had suffered by a runaway truck; (2) external coercion created by a passenger who has instructed the driver to keep her eyes on the rearview mirror, or else be physically beaten at the end of the trip; or (3) impairments of judgment attributable to (i) the early stages of a heart attack, (ii) the unexpected side effects of a non-narcotic medication prescribed by a physician, or (iii) the foreseeable side effects of a narcotic that had been placed in the driver's beverage without her knowledge or consent.

Subsection (f) establishes that the culpable mental states defined in section 206 are to be afforded the same meaning when used in other parts of speech. This principle of construction is necessary to avoid any confusion that might otherwise result from the following conflict: although subsections (a)-(d) define the culpable mental states of "purposely," "knowingly," "intentionally," "recklessly," and "negligently," the RCC routinely employs these same terms in different parts of speech (e.g., "purpose," "knowledge" "intent," "recklessness," and "negligent") in both statutory text and accompanying commentary. Pursuant to subsection (f), these grammatical differences in the articulation of culpability terms do not have any substantive import for the interpretation and application of RCC statutes and commentary.

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

Relation to Current District Law. RCC § 22E-206 codifies, clarifies, fill in gaps, changes, and enhances the proportionality of the District law governing culpable mental state evaluations. The District's current approach to dealing with culpable mental states evaluations is an amalgamation of statutory and decisional law, which is often unclear, frequently inconsistent, and almost always piecemeal. In contrast, the culpable mental state definitions and hierarchy incorporated into Section 206 establishes a clear and comprehensive legislative framework for specifying the state of mind necessary to establish liability for every criminal offense in the RCC.

On a legislative level, the standard District approach to drafting the culpable mental state requirement governing an offense is to generally state one,[41] or sometimes more (e.g., two,[42] three,[43] or even four[44]), undefined culpability terms at the beginning of an offense definition. Some of these undefined terms reflect the contemporary culpability concepts of purpose, knowledge, intent, recklessness, and negligence.[45] However, many of the District's older statutes employ more outdated (and particularly ambiguous) culpability terms, such as "maliciously,[46] "willfully,"[47] "wanton[ly],"[48] "reckless indifference,"[49] and "having reason to believe."[50] In other instances, the District's criminal statutes enumerate no culpable mental state at all, such that courts must read one in pursuant to common law interpretive principles.[51]

The legislative vagueness resulting from these drafting practices has the practical effect of delegating a portion of the D.C. Council's lawmaking authority—namely, its authority to make criminal justice policy by specifying the culpability required for an offense—to the District's local judiciary.[52] Yet the manner in which the District's local

[41] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318; D.C. Code § 22-3309.
[42] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-3312.01.
[43] *E.g.,* D.C. Code § 22-404; D.C. Code § 22-1101.
[44] D.C. Code § 5-1307.
[45] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-404; D.C. Code § 22-1101; D.C. Code § 5-1307.
[46] *E.g.,* D.C. Code § 22-303; D.C. Code § 22-3318.
[47] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.
[48] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-3312.01.
[49] *E.g.,* D.C. Code § 22-934; D.C. Code § 22-404.01.
[50] *E.g.,* D.C. Code § 22-723; D.C. Code § 22-3214.
[51] These include assault, D.C. Code § 22-404, murder, D.C. Code § 22-2101, manslaughter, D.C. Code § 22-2105, mayhem, D.C. Code § 22-406, affrays, D.C. Code § 22-1301, and threats, D.C. Code § 22-407.
[52] That is, courts must apply criminal statutes to individual cases, so when a local District prosecution calls into question a *mens rea* issue left unresolved by a criminal statute, the judges on the D.C. Superior Court and D.C. Court of Appeals have no choice but to exercise the traditionally legislative function of culpability

judiciary has carried out this delegation has been and continues to be problematic. Apart from the challenge to democratic representation that arises when unelected officials determine what the law should be (a fact well-recognized by the judiciary[53]), the judges who sit on the D.C. Superior Court and D.C. Court of Appeals have struggled to develop a body of culpability policies that are clear, consistent, or comprehensive.[54] The voluminous appellate case law surrounding the culpable mental states governing some of the District's most routinely charged offenses—for example, threats[55] and simple assault[56]—and foundational theories of liability—for example, criminal attempts[57] and complicity[58]—is illustrative. Notwithstanding decades of decisional law, the culpable mental state requirements governing these offenses and theories of liability are still ambiguous and the subject of significant dispute.[59] Which, in practice, means that some of the most basic and fundamental culpability policy questions in the District remain unresolved.

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definition and fill in the resulting gap through the process of common law decision-making. *See, e.g.,* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) (noting that legal discretion "is like the hole of a doughnut": it "does not exist except as an area left open by a surrounding belt of restriction.") In some cases, legislative history may guide the courts in their exercise of this authority; however, oftentimes the ambiguities will be so large and/or legislative intent so inscrutable, that judicial lawmaking is inevitable.

[53] *Ruffin v. United States*, 76 A.3d 845, 859 (D.C. 2013) (quoting *United States v. Bass,* 404 U.S. 336, 348 (1971)); ("Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define crimes.").

[54] *See also* Kahan, *supra* note 54, at 470 ("[J]udges frequently lack sufficient consensus to make the law uniform . . . ."); *id.* at 495 ("Frequent disagreements are inevitable when [many] judges . . . are all independently empowered to identify the best readings of ambiguous criminal statutes."); *United States v. Harriss*, 347 U.S. 612, 635 (1954) (noting that appellate courts can always change an interpretation of a criminal statute).

[55] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year."); D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").

[56] *See* D.C. Code § 22-404(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[57] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished . . . .").

[58] D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").

[59] For a summary of the confusion surrounding the *mens rea* of threats, see Judge Schwelb's dissent in *Carrell v. United States*, 80 A.3d 163, 171 (D.C. 2013), *reh'g en banc granted, opinion vacated*, No. 12-CM-523, 2015 WL 5725539 (D.C. June 15, 2015), and *on reh'g en banc,* 165 A.3d 314 (D.C. 2017). For a summary of the confusion surrounding the *mens rea* of assault, see Judge Ruiz's concurrence in *Buchanan v. United States*, 32 A.3d 990, 1002 (D.C. 2011). For a summary of the confusion surrounding the *mens rea* of attempt, see Judge Beckwith's concurrence in *Jones v. United States*, 124 A.3d 127, 128 (D.C. 2015). And for a summary of the confusion surrounding the *mens rea* of complicity, see *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (*en banc*).

What explains this state of affairs? To some extent, it's a product of the fact that older DCCA opinions, to which subsequent courts are bound, rely upon the confusing common law approach to culpability, offense analysis. Such an approach is—as the DCCA's recent opinions in *Buchanan*,[60] *Ortberg*,[61] and *Jones*[62] helpfully illustrate—a notoriously unreliable means of articulating the culpable mental state requirement governing an offense. At the same time, however, it also reflects the limitations inherent in the common law method of policymaking. Because any court is limited by the facts before it, even a definitive element analysis-based resolution of a culpable mental state issue (e.g., the DCCA's recent *en banc* opinions in *Wilson-Bey*[63] and *Carrell*[64]) can only accomplish so much. And, in any event, relying on multiple rounds of appellate litigation to define the culpable mental state requirement governing individual criminal offenses is a highly inefficient means of making basic and fundamental policy decisions.

To resolve these issues, the RCC incorporates a culpable mental state hierarchy comprised of four mental levels—purposely, knowingly/intentionally, recklessly, and negligently—comprehensively defined in a manner sensitive to the form of objective element to which they apply. As a matter of substantive culpability policy, this hierarchy largely captures the central mental state concepts reflected in current District law, while improving their overall level of clarity and filling in important gaps in mental state definition in a proportionate manner. By codifying this hierarchy, the RCC provides the D.C. Council with a critical tool for clearly and comprehensively stating the culpable mental state requirement governing each and every criminal offense *by statute*, thereby ameliorating the need for the District's judiciary to promulgate culpability policy through common law decision-making.[65]

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[60] *Buchanan*, 32 A.3d at 1002 (Ruiz, J. concurring) ("There is no opportunity better than the present to reiterate the dubious value of rote incantations of the traditional labels of 'general' and 'specific' intent to the different *mens rea* elements of a wide array of criminal offenses.").

[61] *Ortberg v. United States* 81 A.3d 303, 307 (D.C. 2013) (recognizing that the problem with "general intent" and "specific intent" is that they "fail to distinguish between elements of the crime, to which different mental states may apply," whereas a "clear analysis" faces the "question of the kind of culpability required to establish the commission of an offense [] separately with respect to each material element of the crime") (citations, quotations, and alterations omitted).

[62] *Jones v. United* States, 124 A.3d 127, 130 n.3 (D.C. 2015) (instead of offense analysis, "courts and legislatures" should, wherever possible, "simply make clear what mental state (for example, strict liability, negligence, recklessness, knowledge, or purpose) is required for whatever material element is at issue (for example, conduct, resulting harm, or an attendant circumstance)."

[63] *Compare, e.g., Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*) (clarifying the *mens rea* of complicity) *with Tann v. United States*, 127 A.3d 400 (D.C. 2015) (majority and dissenting opinions debating the meaning of *Wilson-Bey*).

[64] *Compare Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017) (*en banc*) ("Applying this hierarchy of *mens rea* levels to the *actus reus* result element of the crime of threats, we hold that the government may carry its burden of proof by establishing that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat.") *with id.* ("[D]eclin[ing] to decide whether a lesser threshold *mens rea* for the second element of the crime of threats—recklessness—would suffice," and "defer[ing] resolution of this issue for multiple reasons . . . .").

[65] By enhancing the clarity, consistency, and comprehensiveness of the District's criminal statutes in this way, RCC § 22E-206 will almost certainly provide "substantially improved analytical tools for practicing lawyers and courts to use in understanding what must be proven by the prosecution [] beyond a reasonable doubt." Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 232 (1997). In so doing, however, RCC § 22E-206 should also "increase the simplicity" of the

RCC §§ 22E-206(a) and (b): Relation to Current District Law on Purpose, Knowledge, and Intent. Subsections (a) and (b) codify, clarify, and fill gaps in District law.

The culpable mental states of "purpose," "knowledge," and "intent" appear in a variety of District statutes; however, virtually none of these statutes explicitly define them.[66] Nor, for that matter, has the DCCA clearly defined them. Based on DCCA case law, however, it is relatively clear that the desire and belief states reflected in the definitions set forth in subsections (a) and (b) will satisfy the requirement of a "specific intent," which is sufficient to establish liability for nearly all of the most serious offenses under District law.[67]

District authority relevant to subsections (a) and (b) revolves around DCCA case law on the "heightened *mens rea*" of a specific intent, which the statutory terms of purpose, knowledge, and/or intent frequently indicate.[68] At the same time, however, the DCCA has never clearly defined the meaning of the phrase "specific intent"—indeed, as one DCCA judge has observed, the phrase itself is little more than a "rote incantation[]" of "dubious value" which obscures "the different *mens rea* elements of a wide array of criminal offenses."[69] Ambiguities aside, however, it seems relatively clear from the relevant case law that proof of any of the desire or belief states reflected in subsections (a) and (b) as to a result or circumstance element should satisfy the requirement of a "specific intent," and, therefore, provide an adequate basis for capturing the culpable mental states applicable to relevant District offenses.

That one who consciously desires to cause a result or that a circumstance exists necessarily acts with the requisite "specific intent" is implicit in the fact that this kind of "purposive attitude" is, as the DCCA has recognized, the most culpable of mental states, sufficient to ground a conviction for accomplice liability.[70] This point has also been made more explicitly in the context of the District's enhanced assault offenses. With respect to assault with intent to kill, for example, the court in *Logan v. United States* observed that "[a] specific intent to kill exists when a person acts with the *purpose* . . . of causing the

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District's criminal law, afford the District's residents a greater level of "fair notice," and "reduce litigation by reducing ambiguities in offense definitions." Robinson & Grall, *supra* note 2, at 704.

[66] *E.g.,* D.C. Code § 22-404.01; D.C. Code § 22-1101; D.C. Code § 5-1307. *But see* D.C. Code § 22-2201(B) ("'[K]nowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination."); D.C. Code § 22-3101 ("'Knowingly' means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."); *but see also* D.C. Code § 22-3225.01 ("'Malice' means an intentional or deliberate infliction of injury, by furnishing or disclosing information with knowledge that the information is false, or furnishing or disclosing information with reckless disregard for a strong likelihood that the information is false and that injury will occur as a result.").

[67] This is not to say, however, that the element-sensitive definition of the term intent in RCC § 22E-206(b) is the equivalent of the term intent as utilized in the phrase "specific intent" (or, for that matter, "general intent").

[68] *See, e.g., Perry v. United States*, 36 A.3d 799 (D.C. 2011).

[69] *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring).

[70] *See, e.g., Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*).

death of another,"[71] which in turn seems to entail a desire.[72] Likewise, with respect to assault with intent to rape, the court in *United States v. Huff* observed that the government must present proof of "an intent to persist in [sexually assaultive] force even in the face of and *for the purpose of* overcoming the victim's resistance."[73]

It's important to note that District law on the specific intent requirement seems to include more than just purposeful conduct, however. In *Logan*, for example, the DCCA notes that where the accused possesses the "conscious intention of causing the death of another," he or she also possesses the "specific intent" to kill.[74] Although the court never clarifies what this "conscious intention" entails, the court later equates the *mens rea* of "a specific intent to kill" with "actually . . . fores[eeing] that death [will] result from [one's] act."[75]

Other DCCA case law concerning "specific intent" also supports that it is satisfied by proof of knowledge. For example, in *Peoples v. United States*, the DCCA sustained various convictions for malicious disfigurement in a case where "the evidence disclosed that appellant deliberately set fire to [a home], using a flammable liquid accelerant, in the early morning hours while those inside were sleeping."[76] The court deemed it "reasonable to infer that appellant *knew* that the people inside the house *would sustain grievous burn injuries* if they escaped alive," circumstances which "evidence[d] appellant's *intent* sufficiently to permit the jury to find that appellant had the requisite *specific intent* to support his convictions of malicious disfigurement."[77]

Similarly, in *Curtis v. United States*, the court upheld a malicious disfigurement conviction where the accused had "brandish[ed] a bottle of draining fluid, and hurled its contents down in his direction, dousing him on the neck and soaking his shirt."[78] Both the court and counsel for the accused deemed it obvious that *if* "appellant was *aware* that the particular fluid would cause harmful burns to human skin, proof of specific intent to

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[71] *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984).

[72] As the DCCA later observed in *Arthur v. United States*:

> The government did have to prove that Arthur had a specific intent to kill . . . There was, however, ample evidence of that intent, both in his behavior and in the comment, "I hope she's dead," which he made (twice) when he first started to leave the room before discovering that his victim was still alive.

602 A.2d 174, 179 n.7 (D.C. 1992).

[73] 442 F.2d 885, 890 (D.C. Cir. 1971).

[74] 483 A.2d at 671.

[75] *Id.* (quoting *United States v. Wharton*, 433 F.2d 451, 456 (D.C. Cir. 1970)). For example, the *Logan* court's recognition that "[a] specific intent to kill exists when a person acts with the . . . conscious intention of causing [a particular result]" relies upon LaFave's *Substantive Criminal Law* treatise. *See Logan*, 483 A.2d at 671. However, that same treatise clarifies that "a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he *consciously desires* that result, whatever the likelihood of that result happening from his conduct; and (2) when he *knows* that that result is *practically certain* to follow from his conduct, whatever his desire may be as to that result." LAFAVE, *supra* note 5, at 1 SUBST. CRIM. L. § 5.2.

[76] 640 A.2d 1047, 1055-56 (D.C. 1994).

[77] *Id.*

[78] 568 A.2d 1074, 1075 (D.C. 1990).

disfigure the person at whom it was thrown [would exist]"—the only question was *whether* the accused indeed possessed this awareness. [79]

Another noteworthy aspect of DCCA case law is the recognition that a common indicator of a specific intent requirement—use of the phrase "with intent"—is also the marker of "an inchoate offense," which "can occur without completion of the objective."[80] So, for example, with respect to the crime of assault with intent to kill, "the government is not required to show that the accused actually wounded the victim" in order to prove that an assault was committed with the intent to kill.[81] The same is also true with respect to "[p]ossession of narcotics with intent to distribute them," which does not require proof that "the objective" of distribution was completed.[82] And it is likewise true with respect to "burglary," which merely requires proof that the unlawful entry was "accompanied by an intent to steal once therein"—without regard to whether "the intended theft [was] consummated."[83]

The corollary to this general recognition is that a person need not be "aware" of a circumstance to establish the specific intent requirement at issue in various inchoate crimes; instead, a mere "belief" can suffice. So, for example, the DCCA held in *Seeney v. United States* that a person acts with the "intent to commit the crime of attempted possession of a controlled substance" when that person "believes" he or she is dealing with a controlled substance.[84] Which is to say, as the DCCA further clarified in *Fields v. United States*, that proof of "the defendant's *belief* that he was dealing in controlled substances," rather than proof that the person was *aware* that the substances implicated are in fact controlled substances, will suffice to establish an attempt conviction.[85]

It's important to qualify the above analysis with a two-fold acknowledgement that: (1) the correspondence between the culpable mental states of purpose, knowledge, and intent as defined in subsections (a) and (b) and what is labeled a specific intent offense in District law is not absolute; and, therefore (2) a simple translation from current District case law to these RCC culpable mental states simply is not possible. To take just one example, consider that there exists both DCCA and U.S. Supreme Court precedent indicating that the culpable mental state of knowledge is actually most akin to a "general intent" standard. The DCCA's recent *en banc* decision in *Carrell v. United States* (2017) is illustrative. In one of the District's strongest statements to date regarding the need for *mens rea* modernization, seven of the DCCA's appellate judges specifically adopted both

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[79] *Id.*

[80] *Owens v. United States*, 688 A.2d 399, 403 (D.C. 1996); *see, e.g., United States v. Fox*, 433 F.2d 1235, 1236 (D.C. Cir. 1970); *McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994); *Monroe v. United States*, 598 A.2d 439, 442 (D.C. 1991); *Warrick v. United Stat*es, 528 A.2d 438, 442 (D.C. 1987); *Cash v. United States*, 700 A.2d 1208, 1212 (D.C. 1997); *Hebron v. United States*, 804 A.2d 270, 273–74 (D.C. 2002); *Price v. United States*, 985 A.2d 434, 437 (D.C. 2009).

[81] *Nixon v. United States*, 730 A.2d 145, 148-49 (D.C. 1999). For this reason, "a lethal intent can be demonstrated without showing that the assailant succeeded in wounding his intended victim." *Bedney v. United States*, 471 A.2d 1022, 1024 (D.C. 1984). Likewise, with respect to the offense of assault with intent to rob, the DCCA has held that a defendant who, after searching the victim at gunpoint, leaves the victim with his valuables can still have the requisite specific intent. *See Dowtin v. United States*, 330 A.2d 749, 750 (D.C. 1975).

[82] *Owens*, 688 A.2d at 403.

[83] *United States v. Fox*, 433 F.2d 1235, 1236 (D.C. Cir. 1970).

[84] 563 A.2d 1081, 1082 (D.C. 1989) (citing *Blackledge v. United States*, 447 A.2d 46, 48 (D.C. 1982)).

[85] 952 A.2d 859, 865 (D.C. 2008).

the element analysis framework[86] and accompanying culpable mental state definitions[87] of purpose and knowledge developed by the Model Penal Code (and subsequently endorsed by the U.S. Supreme Court) in resolving an ongoing conflict surrounding the culpability of criminal threats.[88] In so doing, however, the majority opinion—citing to U.S. Supreme Court case law—also indicated that knowledge may at least "loosely" correspond to a general intent standard.[89] The lack of an easy translation from the old offense analysis categories of general and specific intent to the Model Penal Code framework recognized by the DCCA only bolsters the need for legislative specification of new culpable mental states.

The definitions of purpose, knowledge, and intent contained in subsections (a) and (b) provide the possibility of maintaining the culpable mental state distinctions reflected in the foregoing authorities, while also affording greater clarity and specificity to District law. Practically, these new definitions may also provide a possible means of simplifying District law, particularly in the context of inchoate offenses.

Illustrative is the District's receiving stolen property (RSP) statute, which currently employs a confusing and cumbersome approach to communicating that defendants caught in sting operations fall within the scope of the statute.[90] Specifically, the RSP statute allows for a conviction to rest upon proof that the person "knew" or had "reason to believe" he or she was possessing "stolen property."[91] Thereafter, the statute clarifies "that the term 'stolen property' includes property that is not in fact stolen,"[92] and that "[i]t shall not be a

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[86] *Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (*en banc*) ("We adopt these ["conduct element," "result element," and "circumstance element"] classifications from the Model Penal Code § 1.13 (9) (Am. Law Inst., Proposed Official Draft 1962).")

[87] *Id.* at 323-24 ("Following the lead of the Supreme Court . . . we likewise conclude that more precise gradations of mens rea should be employed. We have previously expressed concern about the use of 'general' and 'specific' intent. We reiterate our endorsement of more particularized and standardized categorizations of *mens rea*, and, in the absence of a statutory scheme setting forth such categorizations, we, like the Supreme Court, look to the Model Penal Code terms and their definitions.")

[88] *Id.* at 324 ("Applying this hierarchy of *mens rea* levels to the *actus reus* result element of the crime of threats, we hold that the government may carry its burden of proof by establishing that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat.").

[89] *Carrell*, 165 A.3d at 322 n.22 ("It is not entirely clear what the [*Elonis*] Court meant by this, but, read in the context of *Carter*, it appears the Court was distinguishing between "general intent" and "specific intent," [], which the Court had previously likened to "knowledge" and "purpose," respectively, *Bailey*, 444 U.S. at 405, 100 S.Ct. 624 ("In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent.")).")

[90] The District's trafficking in stolen property (TSP) statute reflects the same issues. That statute reads, in relevant part:

> (b) A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen.
>
> (c) It shall not be a defense to a prosecution under this section, alone or in conjunction with § 22-1803, that the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be.

D.C. Code § 22-3231.

[91] D.C. Code § 22-3232(a).

[92] D.C. Code § 22-3232(d).

defense . . . [that] the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be."[93]

The foregoing provisions were collectively intended to make RSP an inchoate offense, applicable to actors who merely believe the property they possess to be stolen—even if the property isn't actually stolen.[94] To understand this much, however, one needs to read labyrinthine provisions of D.C. Code § 22-3232 in light of the statute's legislative history and applicable DCCA case law. Under the definition of intent as to a circumstance under subsection (b)(2), in contrast, the District's current multi-pronged approach can be replaced with a single clause communicating the relevant point, namely, that RSP involves receiving property "with intent that the property be stolen."[95]

RCC §§ 22E-206(c) and (c): Relation to Current District Law on Recklessness and Negligence. Subsections (c) and (d) codify, clarify, and fill gaps in District law.

The culpable mental states of "recklessness" and "negligence" appear in a variety of District statutes, though no statute defines either term.[96] In the absence of a statutory definition, other District authorities—namely, DCCA case law and the D.C. Criminal Jury Instructions—have provided interpretations of identical or comparable terms in a manner that is broadly consistent with RCC §§ 22E-206(c) and (d). That said, these provisions, when viewed in light of the accompanying explanatory note, provide substantially more detail than does existing District authority. This additional detail improves the clarity, consistency, and proportionality of the RCC.

A central component of District law on recklessness is the District's cruelty to children statute, D.C. Code § 22-1101, which prohibits, *inter alia*, "recklessly . . . [m]altreat[ing] a child."[97] Notably, the statute does not define this key culpable mental

[93] D.C. Code § 22-3232(b).

[94] *See Owens v. United States*, 90 A.3d 1118, 1121 (D.C. 2014). "[A]ctual knowledge," as the Council notes, is not required for an RSP conviction. D.C. COUNCIL, REPORT ON BILL 4–133 at 54 (Feb. 12, 1981). The same report also notes (with respect to the similarly worded TSP statute) that "it is intended that the offender's knowledge or belief may be inferred from the circumstances of the offense and it is not required that the offender know for a fact that the property is stolen. Rather, it is sufficient if the offender had 'reason to believe' that the property is stolen." *Id.* at 49.

[95] RCC § 22E-2401 (revised RSP statute, incorporating the phrase "with intent that the property be stolen").

[96] *See, e.g.,* D.C. Code § 22-1101; D.C. Code § 22-404; D.C. Code § 5-1307.

[97] D.C. Code § 22-1101(b)(1). For earlier District authority on recklessness, see, for example, *Thompson v. United States*, 690 A.2d 479, 483 (D.C. 1997). For other District statutes employing a culpable mental state of recklessness, see, for example: D.C. Code § 22–404 (a)(2) (prescribing penalties for "[w]hoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or *recklessly* causes significant bodily injury to another" (emphasis added)); D.C. Code § 22–1006.01 (a)(5) (establishing penalties to punish "any person who knowingly or *recklessly* permits [animal fighting] . . . to be done on any premises under his or her ownership or control, or who aids or abets that act" (emphasis added)); D.C. Code § 22–1833(1) (making it "unlawful for an individual or a business to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person, knowing, or in *reckless* disregard of the fact that . . . [c]oercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act" (emphasis added)); D.C. Code § 22–1834(a) (making it unlawful to recruit or maintain by any means a person "who will be caused as a result to engage in a commercial sex act knowing or in *reckless* disregard of the fact that the person has not attained the age of 18 years" (emphasis added)); D.C. Code § 22–1314.02(a) (making it generally unlawful for a person "to willfully or *recklessly* interfere with access to or from a medical facility or to willfully or *recklessly* disrupt the normal functioning of such facility," such as by "[t]hreatening to inflict injury on the owners, agents, patients, employees, or property of the medical facility" (emphasis

state. In lieu of a statutory definition, the fourth edition of the D.C. Criminal Jury Instructions (1996) originally recommended that the term "recklessly" be interpreted in general accordance with the Model Penal Code's definition of recklessness.[98] Then, in *Jones v. United States*, the DCCA had the opportunity to address the issue, determining that the required recklessness could be satisfied by proof that the accused "was aware of and disregarded the grave risk of bodily harm created by his conduct"[99]—a definition the *Jones* court deemed generally consistent with the Model Penal Code definition of "recklessly."[100]

Building on the *Jones* decision, the DCCA, in *Tarpeh v. United States*, applied a similar understanding of recklessness to interpret the requirement of "reckless indifference" in the context of the District's Criminal Neglect of a Vulnerable Adult statute, D.C. Code § 22–934.[101] Observing that "Model Penal Code § 2.02(2)(c) [] states that a 'person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct,'" the *Tarpeh* court opted to "[a]pply th[e]se concepts to 'reckless indifference'" in a manner consistent with *Jones*.[102] Specifically, the DCCA held that "the trier of fact," to prove reckless indifference, "must show not only that the actor did not care about the consequences of his or her action, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action."[103]

Most recently, Judge Thompson, writing separately in *Carrell v. United States* (2017),[104] advocated for adopting the Model Penal Code definition of recklessness as the threshold *mens rea* for the District's criminal threats offense(s).[105] In so doing, she observes that:

> "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Dorsey v. United*

added)); D.C. Code § 22–1321 (a)(1) (making it unlawful, "[i]n any place open to the general public, and in the communal areas of multi-unit housing, . . . for a person to . . . [i]ntentionally or *recklessly* act in such a manner as to cause another person to be in reasonable fear that a person . . . is likely to be harmed or taken" (emphasis added)); D.C. Code 22–2803 (a)(1) (providing that a person "commits the offense of carjacking if, by any means, that person knowingly or *recklessly* by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, . . . shall take from another person immediate actual possession of a person's motor vehicle" (emphasis added)); D.C. Code § 22–3312.02 (a)(4) (making it unlawful to, *inter alia*, burn a cross or other religious symbol or to display a Nazi swastika or noose on any private premises "where it is probable that a reasonable person would perceive that the intent is . . . [t]o cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with *reckless* disregard for that probability" (emphasis added)).

[98] D.C. Crim. Jur. Instr. § 4.120 cmt. (quoting Model Penal Code § 2.02(2)(c)); *see Jones v. United States*, 813 A.2d 220, 225 (D.C. 2002) (quoting and citing to *id*.).

[99] 813 A.2d at 225.

[100] *Id.* (quoting Model Penal Code § 2.02(2)(c)).

[101] 62 A.3d 1266, 1270 (D.C. 2013).

[102] *Id.*

[103] *Id.*

[104] 165 A.3d 314 (D.C. 2017) (*en banc*).

[105] *Id.* at 330 ("I write separately to explain why I believe we should hold that recklessness is enough to satisfy the *mens rea* element (at least of § 22–407, if not § 22–1810).").

> *States*, 902 A.2d 107, 113 (D.C. 2006) (internal quotation marks omitted) (quoting *Jones v. United States*, 813 A.2d 220, 225 (D.C. 2002) (quoting Model Penal Code § 2.02 (2)(c) (Am. Law Inst. 1985))). "Recklessly means that the defendant was aware of and disregarded the grave risk . . . created by his conduct." *Jones*, 813 A.2d at 225. The Supreme Court has observed that "subjective recklessness as used in the criminal law is a familiar and workable standard[.]" *Farmer v. Brennan*, 511 U.S. 825, 839, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see also id.* at 837, 114 S.Ct. 1970 (Recklessness exists "when a person disregards a risk of harm of which he is aware." (citations omitted)).[106]

The DCCA's approach to negligence appears similar to its approach to recklessness, except awareness of the risk is not necessary. Few District statutes require this particular culpable mental state; however, the DCCA has interpreted the District's broadly worded manslaughter statute to incorporate the offense of involuntary manslaughter, which is governed by the mental state of "culpable (criminal) negligence."[107] Case law establishes that this culpable mental state, in turn, entails proof that the actor's conduct created "extreme danger to life or of serious bodily injury," which amounts to "a gross deviation from a reasonable standard of care."[108] Such requirements are to be distinguished, as the DCCA has further explained, from "simple or civil negligence," which is merely "a failure to exercise that degree of care rendered appropriate by the particular circumstances in which a man or woman of ordinary prudence in the same situation and with equal experience would not have omitted."[109] (Note, however, that the District's vehicular homicide statute, § 50-2203.01, appears to incorporate this civil negligence standard.[110])

The definition of recklessness reflected in subsections (c)(1) and (2) is intended to generally capture the above District authorities on recklessness and reckless indifference. At the same time, however, it is also intended to allow future factfinders to proceed in a clearer and more consistent fashion. For example, the extent to which a risk is grave, an actor's disregard of the risk is culpable, or whether it can be said that an actor did not care about the consequences of his or her action, necessarily hinge upon a variety of fact-specific considerations pertaining to whether the actor's conduct constituted a gross

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[106] *Carrell,* 165 A.3d. at330–31.
[107] *Faunteroy v. United States*, 413 A.2d 1294, 1298–99 (D.C. 1980).
[108] *Comber*, 584 A.2d at 48.
[109] *Faunteroy*, 413 A.2d at 1298-99.
[110] The relevant statutory provision reads:

> Any person who, by the operation of any vehicle in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, including a pedestrian in a marked crosswalk, or unmarked crosswalk at an intersection, shall be guilty of a felony, and shall be punished by imprisonment for not more than 5 years or by a fine of not more than the amount set forth in § 22-3571.01 or both.

D.C. Code Ann. § 50-2203.01. The phrase "careless, reckless, or negligent manner" has in turn been interpreted to mean operating a "vehicle without the exercise of that degree of care that a person of ordinary prudence would exercise under the same or similar circumstances . . . . It is a failure to exercise ordinary care." *Butts v. United States*, 822 A.2d 407, 416 (D.C. 2003).

deviation from the ordinary standard of conduct. These include, among other factors, the circumstances the actor is aware of, the reasons why the actor consciously disregarded the risk, and the extent to which any aspects of the actor's situation reasonably hindered the actor's ability to exercise an appropriate level of concern for the interests of others. The gross deviation standard and accompanying evaluative framework stated in RCC §§ 22E-(c)(1)(B) and (2)(B) appropriately accounts for these considerations.

The definition of negligence reflected in subsections (d)(1) and (2) is broadly consistent with the above District authority on involuntary manslaughter.[111] Consistent with the analysis of recklessness *supra*, however, this definition—when viewed in light of the gross deviation standard and accompanying evaluative framework stated in RCC §§ 22E-(d)(1)(B) and (2)(B)—is also intended to provide future factfinders with the basis for identifying it in a clearer and more consistent fashion.

RCC § 22E-206(e): Relation to Current District Law on Culpable Mental State Hierarchy. Subsection (e) generally accords with District law governing the relationship between culpable mental states.

Although no District authority has squarely addressed the principle reflected in subsection (e), many of the District's more recent statutes suggest what this provision explicitly states: where knowledge/intent will suffice to establish an objective element, so will purpose; where recklessness will suffice, so will knowledge/intent or purpose; and where negligence will suffice, so will recklessness, knowledge/intent, or purpose. This is reflected in the legislature's occasional practice of noting hierarchically superior mental states alongside the lowest mental state.[112] Under the RCC, in contrast, the legislature need not state alternative mental states in the definition of an offense; rather, a codified statement of the lowest culpable mental state sufficient to establish a given objective element is sufficient.

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

1. RCC § 22E-207(a)—Distribution of Enumerated Culpable Mental States

Explanatory Note. Subsection (a) states the rule of interpretation governing the distribution of enumerated culpable mental states under the RCC. It establishes that any enumerated culpable mental state applies to all ensuing results and circumstances (with the exception of those subject to strict liability under RCC § 22E-207(b)), until another culpable mental state is enumerated, in which case the subsequently specified culpable mental state should be distributed in a similar fashion.[1]

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[111] Note, however, that the reference to "*extreme* danger to life or of serious bodily injury" in the DCCA's definition of the negligence governing involuntary manslaughter is likely distinct from the mere "substantial risk" referenced in the RCC's definition of negligence under RCC §§ 22E-206(d)(1)-(2).

[112] D.C. Code § 22-404.01 (knowledge or purpose as to causing serious bodily injury); D.C. Code § 22-404 (intent, knowledge, or recklessness as to causing serious bodily injury); D.C. Code § 22-1101 (intent, knowledge, or recklessness as to causing mistreatment); D.C. Code § 5-1307 (intent, knowledge, recklessness, or negligence as to causing interference).

[1] In so doing, this rule of interpretation clarifies the objective elements in an offense to which the legislature intends for a specified culpable mental state to apply. *See, e.g., Flores-Figueroa v. United States*, 556 U.S.

To illustrate how this rule of interpretation operates, consider an offense that prohibits "knowingly causing bodily injury to a child." Here, the enumerated culpable mental state of knowingly *could* be interpreted as solely applying to the result element of causing bodily injury. Or it *could* be read to apply to both that result and the requisite circumstance element, namely, that the person to whom bodily injury was caused *have been a child*. Under subsection (a), the latter reading would be the correct one since both of these objective elements follow (i.e. are modified by) the culpable mental state of knowingly.[2]

Subsection (a) facilitates consistency in the law by providing a precise rule for distributing all culpable mental states among the results and circumstances of an offense. However, it also provides the legislature with an important drafting shortcut. Whenever the legislature wishes to apply the same culpability term to consecutive results and circumstances, it need only state that term once with the expectation that it will be distributed appropriately under subsection (a). There is no need for the legislature to repeat the same culpable mental state in an offense under the RCC.[3]

Relation to Current District Law. Subsection (a) fills a gap in District law. The D.C. Code lacks a fixed rule of interpretation for distributing culpability terms, or for interpreting criminal statutes more generally. In the absence of a rule of this nature, the DCCA tends to employ a highly discretionary and context sensitive approach to interpreting criminal statutes.[4] On at least one occasion, however, the court has deemed a rule of distribution such as that reflected in subsection (a) to reflect the "most straightforward reading of the [mental state] language" employed in a criminal statute.[5]

2. RCC § 22E-207(b)—Identification of Elements Subject to Strict Liability

Explanatory Note. Subsection (b) states the rule of interpretation governing the identification of strict liability under the RCC. It establishes that a result or circumstance is subject to strict liability if one of two conditions is met. First, under paragraph (b)(1), a result or circumstance is subject to strict liability if it is modified by the phrase "in fact."[6]

646, 650 (2009) ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."); *Id.* at 652 ("[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with [a culpable mental state such as] the word 'knowingly' as applying that word to each element."); *United States v. X–Citement Video, Inc.,* 513 U.S. 64, 79 (1994) (Stevens, J., concurring) (describing this rule as the "normal, commonsense reading of a subsection of a criminal statute").

[2] If, however, the offense definition prohibited "knowingly causing injury to a person, negligent as to whether the person is a child," then, pursuant to subsection (a), the culpable mental state of knowledge would apply only to the result, while the culpable mental state of negligence—which is subsequently specified—would govern the requisite circumstance.

[3] As might otherwise be required to clarify the culpable mental states to which various objective elements are subject in the absence of subsection (a).

[4] *See, e.g., In re D.F.*, 70 A.3d 240 (D.C. 2013); *Holloway v. United States*, 951 A.2d 59 (D.C. 2008); *Pelote v. Dist. of Columbia*, 21 A.3d 599 (D.C. 2011); *Luck v. Dist. of Columbia*, 617 A.2d 509, 515 (D.C. 1992).

[5] *Perry v. United States*, 36 A.3d 799, 816 (D.C. 2011).

[6] Note that two objective elements in an offense definition may be subject to strict liability by repeating the phrase "in fact." Consider, for example, an offense definition that reads: "Knowingly causing bodily injury to a person, who is, in fact, a child, with what is, in fact, a knife." Here, both circumstance elements—that

Second, under paragraph (b)(2), a result or circumstance is subject to strict liability if—notwithstanding the absence of the "in fact" modifier—another statutory provision explicitly indicates strict liability applies to that result or circumstance.

Here is an illustrative example of how each aspect of this provision operate. An offense definition that prohibits "knowingly causing bodily injury to a person who is, in fact, a child" should, pursuant to paragraph (b)(1), be understood to apply strict liability to the requisite circumstance element, namely, that the person to whom bodily injury was caused was a child.[7] In contrast, an offense definition that prohibits "knowingly causing bodily injury to a child" and thereafter explicitly states that "a defendant shall be held strictly liable with respect to whether the victim harmed was a child," should, pursuant to paragraph (b)(2), be given its intended effect. Although the rule of distribution in subsection (a) indicates that the culpable mental state of "knowingly" travels to all subsequent results and circumstances, the explicit expression of legislative intent reflected in the latter portion of the offense definition is sufficiently clear to overcome this rule.

Subsection (b) facilitates consistency in the law by providing a fixed methodology for appropriately recognizing strict liability elements. However, it also provides the legislature with important drafting shortcuts. Whenever the legislature intends to apply strict liability to a single result or circumstance, use of the phrase "in fact" is a simple and efficient means of communicating this point. When, however, the legislature intends to apply strict liability to more than one (or even all) of the results and circumstances in an offense, an explicit statement to that effect may be more efficient than continually repeating the phrase "in fact" throughout an offense definition.[8]

Relation to Current District Law. Subsection (b) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a standard way to specify offense elements that are subject to strict liability, even though elements and offenses subject to strict liability offenses exist in the District.[9] However, the DCCA does not lightly infer the absence of a culpable mental state; rather, it must be "clear the legislature intended to create a strict liability offense."[10] And, in the absence of an "obvious [legislative] purpose" to

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the victim be a child and that the bodily injury be inflicted with a knife—are subject to strict liability under paragraph (b)(1).

[7] While an enumerated culpable mental state "skips" over an objective element modified by "in fact," it nevertheless continues to "travel" and apply to subsequent objective element under RCC § 22E-207(a). For example, an offense definition that reads: "Knowingly causing bodily injury to a person, who is, in fact, a child, with a knife. Under the rules of interpretation, the mental state of "knowingly" would apply to both the result of "causing bodily injury," and the circumstance of "with a knife."

[8] So, for example, when the legislature intends to create a pure strict liability offense it might state something to the effect of "no culpable mental state applies to any objective element in this offense." Another means of applying strict liability to multiple objective elements in an offense is to draft an offense definition using "in fact" followed by a colon and a list of objective elements. This usage of "in fact" followed by a colon clearly communicates that strict liability applies to the ensuing list of objective elements.

[9] As the DCCA observed in *McNeely v. United States*, "Strict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes in the past." 874 A.2d 371, 385–86 (D.C. 2005) (collecting statutes); *see also In re E.F.*, 740 A.2d 547, 550-51 (D.C. 1999) (discussing D.C. Code § 22-3011(a)).

[10] *Conley v. United States*, 79 A.3d 270, 289 n.91 (D.C. 2013) (quoting *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).

impose strict liability, "the common law presumption in favor of imposing a *mens rea* requirement where a statute is otherwise silent" operates.[11]

3. RCC § 22E-207(c)—Determination of When Recklessness Is Implied

Explanatory Note. Subsection (c) states a default rule, which addresses any interpretive ambiguities concerning culpable mental states that remain after consideration of the previous rules set forth in section 207.[12] Specifically, this rule establishes that an offense definition which fails to clarify the culpable mental state (or strict liability) applicable to a given result or circumstance should be interpreted as applying a default of recklessness to that element.[13]

Here are two illustrative examples of the kinds of situations where this default rule might apply. First, an offense definition might not specify any culpable mental state at all, such that the rule of distribution stated in subsection (a) is inapplicable, while, at the same time, failing to clarify that strict liability is applicable under subsection (b). Consider, for example, a hypothetical theft of government property offense that reads: "No person shall take government property without consent." Second, an offense definition might specify a culpable mental state but do so after some objective elements have already been enumerated, and which are neither governed by an explicitly specified culpable mental state nor clearly subject to strict liability. Consider, for example, a hypothetical aggravated theft of government property offense that reads: "No person shall take government property without consent and knowingly sell it to another." In each of these situations, the default rule reflected in subsection (c) establishes that the relevant objective elements are subject to a culpable mental state of recklessness.[14]

Subsection (c) facilitates consistency in the law by providing a precise rule for determining how to resolve situations of interpretive ambiguity regarding culpable mental states. It may also provide, however, what amounts to a drafting shortcut for the legislature in those situations where the legislature intends to apply recklessness to multiple objective elements (as reflected in the two examples noted above).

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[11] *McNeely*, 874 A.2d at 379–80. "[W]here the legislature is acting in its capacity to regulate public welfare," however, mere "silence can be construed as a legislative choice to dispense with the *mens rea* requirement." *Id.* at 388.

[12] *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("'[M]ere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it,'" which "rule of construction reflects the basic principle that 'wrongdoing must be conscious to be criminal.'") (quoting *Morissette v. United States*, 342 U.S. 246, 249 (1952)); *United States v. X–Citement Video, Inc.,* 513 U.S. 64, 79 (1994) (Stevens, J., concurring) (courts have for a long time opted to "interpret criminal statutes to include broadly applicable [*mens rea*] requirements, even where the statute by its terms does not contain them").

[13] *See, e.g.,* Model Penal Code § 2.02(3), cmt. at 127 (recklessness default rule reflects "the common law position"); Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983) ("recklessness is generally accepted as the theoretical norm" for criminal liability); *Elonis*, 135 S. Ct. at 2015 (Alito, J. concurring) (recklessness provides sound basis for punishment and offers most appropriate default rule for courts to employ "without stepping over the line that separates interpretation from amendment").

[14] Specifically, the objective elements of a "taking," that the object taken be "government property," and that the taking occur "without consent" would all be subject to recklessness.

Relation to Current District Law. Subsection (c) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a fixed rule of interpretation for implying culpable mental state terms. In the absence of a rule of this nature, the DCCA employs "an interpretive presumption that *mens rea* is required," notwithstanding statutory silence to the contrary, so long as the implication of a culpable mental state would not be contrary to legislative intent.[15] As the DCCA has recognized, "[t]he presumption is based on the common understanding of malum in se offenses, which traditionally are 'generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand.'"[16]

RCC § 22E-208. PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE.

Explanatory Notes. Section 208 establishes general principles of liability governing issues of accident, mistake, and ignorance throughout the RCC.[1]

Subsection (a) addresses the overarching effect of accidents, mistakes, and ignorance on offense liability. It broadly clarifies that a person's accident, mistake, or ignorance as to a matter of fact or law will typically relieve that person of liability when (but only when) it precludes the person from acting with the culpable mental state required for a result or circumstance element.[2] This means that the relationship between the culpable mental state requirement governing an offense and accident, mistake, and ignorance is typically one of logical relevance: any accident, mistake or ignorance is relevant when (but only when) it prevents the government from meeting its affirmative burden of proof with respect to a culpable mental state applicable to a result or

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[15] *Conley*, 79 A.3dat 289 (citing *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).
[16] *McNeely*, 874 A.2d at 388 (quoting *Morissette v. United States*, 342 U.S 246, 251 (1952)). For a sustained argument by one judge on the DCCA in support of a recklessness default in the context of the District's criminal threats statute, see *Carrell v. United States*, 165 A.3d 314, 330-39 (D.C. 2017) (Thompson, J., concurring in part and dissenting in part).

[1] Accidents typically relate to the culpable mental state governing the result element(s) of an offense. *See* Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-07 (1990) ("An accident occurs when one brings about a result without desiring or foreseeing it"). In contrast, mistakes implicate the culpable mental state governing the circumstance element(s) of an offense. *See* Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 73 (1996) ("Mistakes occur in the realm of perception; they involve false beliefs"). According to this distinction, "[o]ne makes a 'mistake' as to another's age or property, the obscene nature of a publication, or other circumstance elements, but one 'accidentally' injures another, pollutes a stream, or interferes with a law enforcement officer." Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 732 (1983). Ignorance, like mistake, implicates the culpable mental state governing the circumstance element(s) of an offense, *id.*; however, whereas mistake "suggests a wrong belief about the matter," "'[i]gnorance' implies a total want of knowledge—a blank mind—regarding the matter under consideration." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.01 n.2 (6th ed. 2012).
[2] *See, e.g.,* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.6(a) (3d ed. Westlaw 2019) ("Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense."); DRESSLER, *supra* note 1, at § 12.02 ("[B]ecause of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime. In such circumstances, the defendant must be acquitted because the prosecutor has failed to prove an express element of the offense.").

circumstance element.[3] In this sense, accident, mistake and ignorance do not—generally speaking[4]—constitute defenses, but rather, simply describe conditions that may preclude the government from establishing liability.

Subsection (b) clarifies the nature of the correspondence between mistake and the culpable mental state requirement applicable to circumstance elements using the terminology most commonly associated with mistake claims.[5] The courts, when presented with the claim that a given mistake as to a matter of fact or law negates the culpability required for an offense, have historically found it helpful to evaluate the overarching reasonableness of that mistake. Consistent with this evaluation, paragraphs (b)(1) and (2) jointly clarify that any mistake—whether reasonable or unreasonable—has the capacity to negate the existence of the purpose, knowledge, or intent required for a circumstance element. Paragraph (b)(3) thereafter states the rule applicable to an area of mistake law where the traditional reasonableness analysis breaks down—the nature of the mistake that will negate the existence of recklessness as to a circumstance element. In this context, any reasonable mistake will preclude the government from meeting its burden of proof; however, an unreasonable mistake will only negate the requisite recklessness if the person was not reckless making the mistake.[6] Along similar lines, paragraph (b)(4) clarifies that while any reasonable mistake will also categorically negate negligence as to a circumstance element, an unreasonable mistake will only preclude the government from meeting its burden of proof if the defendant was not negligent in making the mistake.[7]

To illustrate the reciprocal nature of the relationship between mistake claims and the culpable mental state requirement governing a circumstance element, consider the situation of a person who: (1) takes a piece of property owned by someone else, motivated by a mistaken belief that the property was abandoned; and (2) is thereafter prosecuted under a statute that reads: "No person shall unlawfully use the property of another." Under these circumstances, the nature of the mistaken belief as to abandonment that will preclude the government from meeting its affirmative burden of proof is part and parcel with the culpable mental state (if any) the court deems to govern the circumstance element, "of another."

For example, if the statute is interpreted to require proof of knowledge as to whether the property was "of another," then any mistake as to the property's ownership status by the defendant will preclude the government from meeting its burden of proof

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[3] Note, however, that RCC § 22E-208(d) addresses a particular situation where, although an actor's ignorance negates the culpable mental state of knowledge as to a particular circumstance, that culpable mental state is nevertheless imputed on policy grounds.

[4] *But see* RCC § 208(c)(2) (noting the possibility that a person's "mistake or ignorance" can "satisf[y] the requirements for a general excuse defense").

[5] *See, e.g.,* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 5.6(a) ("No area of the substantive criminal law has traditionally been surrounded by more confusion.").

[6] Which is to say, the person was either: (1) unaware of a substantial risk that the requisite circumstance existed in light of the mistake (i.e. merely negligent); or (2) did not grossly deviate from the standard of conduct a reasonable individual would follow in forming the mistaken belief. RCC § 22E-206(c)(2) (defining "recklessly" as to circumstances); *see infra* note 13 and accompanying text (providing illustration).

[7] Which is to say, the person did not "grossly deviate from the standard of care" in forming the mistaken belief under the circumstances. RCC § 22E-206(d)(2) (defining "negligently" as to circumstances); *see infra* note 14 and accompanying text (providing illustration). All the more so, reckless mistakes, which are necessarily negligent mistakes (and also gross deviations from the standard of conduct), cannot negate the culpable mental state of negligence.

under the RCC. The reason? If the defendant wholeheartedly believed—whether reasonably or unreasonably—that the property was abandoned, then he cannot, by definition, have been "practically certain" that the property was someone else's, per the RCC definition of knowledge.[8]

If, in contrast, the statute is interpreted to require proof of recklessness or negligence as to whether the property was "of another," then only a reasonable mistake as to the property's ownership status by the defendant will *categorically preclude* the government from meeting its burden of proof. This is because unreasonable conduct is at the heart of both recklessness and negligence, which, as defined under the RCC, each entail the disregard a "substantial risk" in a manner that is "gross deviation from the standard of conduct or care that a reasonable individual would follow" under the circumstances.[9]

With that in mind, determining whether an unreasonably mistaken belief that the property was abandoned will preclude the government from carrying its burden of proof against the defendant for either recklessness or negligence requires a more contextual analysis, which takes into account both: (1) the precise nature of the mistake; and (2) which of these two non-intentional mental states is at issue.

For example, in a recklessness prosecution, two different kinds of unreasonable mistakes regarding the ownership status of the property at issue will negate the culpability required under RCC § 22E-206(c). The first is an unreasonable mistake that is *unequivocally held*,[10] and therefore precludes the government from establishing that the defendant "consciously disregard[ed] a substantial risk" that the property was owned by someone else.[11] The second is an unreasonable mistake that—even if *equivocally* held[12]—is *insufficiently culpable* to meet the gross deviation standard incorporated into the RCC definition of recklessness.[13]

In a negligence prosecution, in contrast, only the latter type of unreasonable mistake will preclude the government from meeting its burden of proof. Which is to say: an unreasonable mistake concerning the property's ownership statute can negate a requirement of negligence as to whether the property was "of another," but only if the defendant's failure to accurately assess whether the property was abandoned is *insufficiently culpable* to meet the comparable gross deviation standard incorporated into the RCC definition of negligence.[14]

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[8] RCC § 22E-206(b)(2). The same analysis would apply if the statute was construed to require "intent," which, like "knowledge," requires a practically certain belief as to the existence of a circumstance. *See* Commentary on RCC § 22E-206(b): Explanatory Notes (explaining semantic difference between knowledge and intent under the RCC).

[9] RCC § 22E-206(c); *id.* at (d).

[10] For example, if, because of the unreasonable mistake, the person was *100% confident* that the property was abandoned, then the government could not prove that the defendant "consciously disregard[ed] a substantial risk" as to the ownership status of the property, per the RCC definition of recklessness. RCC § 22E-206(c)(2)(A). But if, in contrast, the person was only *70% confident* that the property was abandoned by virtue of the mistake, then the government might still be able to prove that the defendant "consciously disregard[ed] a substantial risk" as to the ownership status of the property, per the RCC definition of recklessness. RCC § 22E-206(c)(2)(A).

[11] RCC § 22E-206(c)(2)(A).

[12] *See supra* note 10.

[13] RCC § 22E-206(c)(2)(B).

[14] RCC § 22E-206(d)(2)(B).

Subsection (c) addresses the general effect of a specific kind of mistake or ignorance on offense liability—a mistake or ignorance as to the illegality of one's conduct. The prefatory clause to this provision sets forth the general presumption, "familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."[15] Under "unusual circumstances," however, "that maxim" must give way to other general culpability principles.[16] Paragraphs (c)(1) and (c)(2) respectively address two relevant sets of such circumstances.

In the first situation, addressed by paragraph (c)(1), the statute for which the defendant is being prosecuted requires proof of a culpable mental state (e.g., knowledge, intent, recklessness, or negligence) as to the illegality of one's conduct.[17] Under these

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[15] *Conley v. United States*, 79 A.3d 270, 281 (D.C. 2013) (quoting *Barlow v. United States,* 32 U.S. (7 Pet.) 404, 411, 8 L.Ed. 728 (1833)); *see, e.g., McFadden v. United States*, 135 S. Ct. 2298, 2304, 192 L. Ed. 2d 260 (2015) ("[I]gnorance of the law is typically no defense to criminal prosecution"); *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."). Consistent with this general principle, "a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules . . . would [] be guilty of knowingly distributing 'a controlled substance.'" *McFadden*, 135 S. Ct. at 2304. Under these circumstances, the fact that the defendant is ignorant as to the particular law setting forth the definition of the crime in question does not provide grounds for an excuse.

The latter situation is to be contrasted with a prosecution for an offense comprised of a circumstance element the satisfaction of which hinges upon a legal judgment extrinsic to the definition of that offense. The following trespass statute is illustrative: "No person shall knowingly enter the property of another without license or privilege." If a person is prosecuted under this statute for unlawfully entering the property of another motivated by a mistaken claim of right, the person's inaccurate assessment of his or her property rights *would* constitute a defense under the circumstances. For although that person's mistake may be rooted in his or her ignorance of the law governing access to property, it nevertheless precludes the government from proving the culpable mental state applicable to a circumstance element in the offense—namely, that the defendant *knew* that he or she was entering another person's property *without a license or privilege*. *See, e.g.,* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 5.6(d) ("[T]he crime of larceny is not committed if the defendant, because of a mistaken understanding of the law of property, believed that the property taken belonged to him[.]").

[16] *Conley*, 79 A.3d at 281 (quoting *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir.1998)(Posner, J., dissenting).

[17] To the extent culpability as to illegality is ever required by the RCC, it will typically be incorporated into an offense definition. The RCC's possession of stolen property statute is illustrative; it requires proof that the defendant "purchase[d]" or "possess[ed]" property with, *inter alia*, an "intent that the property be stolen." RCC § 22E-2401. The latter culpable mental state could presumably be negated by a mistake as to what constitutes theft under District law, such as, for example, where defendant X purchases stolen property from seller Y while operating under a mistaken belief that the manner in which the property was taken did not amount to theft in the District. Importantly, this is to be contrasted with *a mistaken belief that purchasing stolen property is not a crime* in the District, which would *not* negate the "intent that the property be stolen" culpable mental state requirement (and therefore would not constitute a defense to possession of stolen property). *See, e.g., Liparota v. United States*, 471 U.S. 419, 425 n.9 (1985) ("In the case of a receipt-of-stolen-goods statute, the legal element is that the goods were stolen . . . It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal . . . It *is,* however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen."); *Morissette v. United States,* 342 U.S. 246 (1952) (holding that it is a defense to a charge of "knowingly converting" federal property that one did not know that what one was doing was a conversion).

It is also possible, however, that a culpability as to illegality element will be implied through some other general provision. For example, RCC § 22E-202(c) limits omission liability to situations where a person "is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists." According to this limitation, a defendant's reasonable

circumstances, the defendant's mistake or ignorance as to the prohibited nature of his or her conduct must be subjected to the same logical relevance analysis set forth in subsection (a), namely, did the mistake or ignorance "negate[] th[e] culpable mental state" applicable to the required circumstance element of illegality?

In the second situation, addressed by paragraph (c)(2), "[t]he person's mistake or ignorance satisfies the requirements of a general defense…." This catch-all provision allows for the possibility that mistake or ignorance as to the illegality of one's conduct might, under limited circumstances, constitute a true "excuse" in the sense of exculpating a defendant who otherwise satisfies the affirmative elements of an offense.[18]

Subsection (d) establishes a generally applicable principle of imputation[19] to deal with the situation of an actor who deliberately ignores a prohibited circumstance, otherwise suspected to exist, in order to avoid criminal liability.[20] If this actor is later prosecuted for a crime that requires proof of knowledge as to that circumstance under RCC § 22E-206(b)(2), the actor may be able to point to a level of ignorance sufficient to preclude the government from establishing the requisite awareness as to a practical certainty.[21] Nevertheless, under these specific conditions, that actor is—given his or her initial suspicions and later purposeful avoidance—just as blameworthy as a person who possessed a degree of awareness sufficient to satisfy the RCC definition of knowledge.[22] In light of

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ignorance as to whether he or she was obligated to engage in some act required by the criminal law—for example, exiting a vehicle that contains a firearm—could constitute a defense in a prosecution premised on omission liability. *See Conley*, 79 A.3d at 281 (striking down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm on the rationale that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.") (citing *Lambert v. People of the State of California*, 355 U.S. 225 (1957)).

[18] *See, e.g.,* LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 5.6(a) (While "it may be correctly said that ignorance of the law is no excuse [], there are exceptions when the defendant reasonably believes his conduct is not proscribed by law and that belief is attributable to an official statement of the law or to the failure of the state to give fair notice of the proscription."); *Bsharah v. United States*, 646 A.2d 993, 1000 (D.C. 1994) (recognizing the possibility that a general excuse defense based on mistake or ignorance as to illegality might be "available to a defendant who 'reasonably' relied on a conclusion or statement of law 'issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field'") (quoting *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) and citing Model Penal Code § 2.04(3)(b)").

[19] *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 611 (1984) ("Typically, the set of elements defining a crime comprise what may be called the paradigm of liability for that offense: An actor is criminally liable if and only if the state proves all these elements. The paradigm of an offense, however, does not always determine criminal liability . . . . [Some] exceptions inculpate actors who do not satisfy the paradigm for the offense charged. Such inculpating exceptions may be termed instances of "imputed" elements of an offense.").

[20] Many different labels are applied to describe this problem, including connivance, willful blindness, willful ignorance, conscious avoidance, and deliberate ignorance. *See, e.g.*, ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 867 (3d ed. 1982); Rollin M. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 956-57 (1978). The RCC uses the phrase "deliberate ignorance" throughout for purposes of clarity and consistency.

[21] *E.g.,* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157, 159 (2d ed. 1961); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196-97 (1990).

[22] Conversely, outside of this narrow context, an actor is unlikely to be just as blameworthy as a person who possesses a degree of awareness sufficient to satisfy the RCC definition of knowledge. For example, consider the situation of a parent driving carpool who declines to check his child's backpack after smelling what might

this moral equivalency,[23] subsection (d) authorizes the factfinder to impute knowledge as to a circumstance where the government proves beyond a reasonable doubt that: (1) the actor was at least reckless as to whether the prohibited circumstance existed; and (2) the actor avoided confirming or failed to investigate the existence of the circumstance with the purpose of avoiding criminal liability.[24]

Subsection (e) cross references terms defined elsewhere in the RCC.

Relation to Current District Law. RCC § 22E-208 codifies, clarifies, fill in gaps, and changes current District law.

While the D.C. Code does not address accident, mistake, or ignorance, the DCCA applies an approach to these issues that is substantively consistent with the principles reflected in subsections (a) and (b). Consistent with DCCA case law, the RCC views the overarching relevance of an accident, mistake, or ignorance to liability to be a product of whether it precludes the government from proving an offense's culpable mental state requirement beyond a reasonable doubt. Importantly, however, the RCC approach to these issues will fundamentally change District law in two significant ways. First, the RCC will, by clarifying the culpable mental state governing each objective element of every offense, practically end use of the judicially developed concepts of general intent and specific intent crimes at the heart of the DCCA case law on accident, mistake, and ignorance. Second, this clarification of culpable mental state requirements, when viewed in light of subsections (a) and (b), will ensure that it is the legislature, not the judiciary, that makes all policy decisions concerning the relevance of accident, mistake, or ignorance to liability. These departures are intended to improve the clarity, consistency, and completeness of District law.

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be a controlled substance for any (or all) of the following reasons: (1) he wants to respect his child's privacy; (2) he doesn't want to lose the child's hard-earned trust; and/or (3) he simply doesn't want to know whether his child is, in fact, using controlled substances. Under these circumstances, where the parent's deliberate avoidance is not motivated by a desire to avoid criminal liability, it cannot be said that he is as blameworthy as one who knowingly transports controlled substances. *See United States v. Heredia*, 483 F.3d 913, 924, 928 (9th Cir. 2007) (Absent proof of a "motivation to avoid criminal responsibility," deliberate ignorance doctrine would effectively create "[a] criminal duty to investigate the wrongdoing of others to avoid wrongdoing of one's own," which is a "novelty in the criminal law." For example, "[s]hall someone who thinks his mother is carrying a stash of marijuana in her suitcase be obligated, when he helps her with it, to rummage through her things?" Or [s]hall all of us who give a ride to child's friend search her purse or his backpack?").

[23] "The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge." *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 131 S. Ct. 2060, 2069, 179 L. Ed. 2d 1167 (2011) (citing J. Ll. J. Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 302 (1954)). And that remains the strongest justification for the imputation of knowledge for deliberately ignorant actors today. *See, e.g.,* Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29 (1994); Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023 (2014).

[24] Note that the defendant's purpose of avoiding criminal liability need not be the only, or even the primary, motivation for engaging in the conduct. At the very least, though, it must be a substantial motivating factor. Consider, for example, a bartender who fails to check a young-looking female's ID: (1) for the primary purpose of making it easier to sexually assault her after the bar closes; and (2) for the lesser, but still substantially motivating reason of avoiding liability for serving a minor in the event the bar is raided. Under these circumstances, the bartender's non-primary purpose of avoiding liability for serving a minor in the event the bar is raided is sufficient to deem him deliberately ignorant given its substantially motivating nature.

The approach to dealing with culpability as to the criminality of one's conduct incorporated into subsection (c) is similarly in accordance with DCCA case law. This general provision codifies the presumption, well established in the District, that mistake or ignorance as to a matter of *penal* law is not a defense to criminal liability. That said, DCCA case law also recognizes that in certain limited circumstances this presumption must cede to other generally applicable principles of criminal law. Subsection (c) articulates these potential exceptions in a manner that improves the clarity, consistency, and completeness of District law.

Subsection (d) codifies a rule of imputation applicable to the situation of an actor who deliberately ignores a prohibited circumstance, which he or she otherwise suspects to exist, in order to avoid criminal liability. The D.C. Code is silent on how to deal with these situations of deliberate ignorance; however, the DCCA has generally recognized the applicability of a rule of knowledge imputation through case law. Yet reported decisions addressing this doctrine are scant, and those that do exist provide limited direction on the approach envisioned by the DCCA. Subsection (d) fills this gap in the law by providing a clear and comprehensive approach to dealing with the deliberately ignorant actor.

RCC §§ 22E-208(a) and (b): Relation to Current District Law on Accident, Mistake, and Ignorance. Subsections (a) and (b) codify, clarify, fill in gaps, and change current District law governing accident, mistake, and ignorance.

Under current District law, "[d]efenses of accident and mistake of fact (or non-penal law) have potential application to any case in which they could rebut proof of a required mental element."[25] The same approach appears to be similarly applicable to ignorance as to a matter of fact (or non-penal law), which can rebut proof of a required mental element, though it should be noted that ignorance of this nature appears to be generally assimilated into the District's law of mistake.[26]

To determine when this kind of rebuttal is possible for mistakes, the DCCA typically relies upon the distinction between specific intent crimes and general intent crimes. For specific intent crimes, the DCCA posits that any honestly held mistake as to a relevant matter of fact or law will constitute a defense to the crime charged, regardless of whether the mistake is reasonable or unreasonable.[27] For general intent crimes, however, the DCCA has repeatedly held that only an honestly held and reasonable mistake as to a relevant matter of fact or law will constitute a defense to the crime charged.[28] With respect to claims of accident, in contrast, DCCA case law seems to primarily focus on general intent crimes, to which accidents may constitute a defense.[29] It seems clear, however, that accidents also constitute a defense to specific intent crimes, which entail a higher *mens rea*.

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[25] D.C. Crim. Jur. Instr. § 9.600 (collecting relevant cases). As the DCCA recently observed: "The mistake of fact doctrine shields the accused from criminal liability if his or her mistake rebuts the mental state included in the offense." *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013).

[26] *See, e.g., Simms v. District of Columbia*, 612 A.2d 215, 219 (D.C. 1992).

[27] *See, e.g., Hawkins v. United States*, 103 A.3d 199, 201 (D.C. 2014); *In re Mitrano*, 952 A.2d 901, 905 (D.C. 2008).

[28] *See, e.g., Simms v. District of Columbia*, 612 A.2d 215, 218 (D.C. 1992); *Goddard v. United States*, 557 A.2d 1315, 1316 (D.C. 1989); *Williams v. United States*, 337 A.2d 772, 774–75 (D.C. 1975).

[29] For example, the commentary to the District's criminal jury instructions states that:

The outward clarity and simplicity of the foregoing framework obscures a range of issues, many of which the DCCA has itself recognized. At the heart of the problem is the "venerable common law classification" system it relies upon, offense analysis, which "has been the source of a good deal of confusion."[30] The reasons for this confusion are well known: the central culpability terms that comprise the system, "general intent" and "specific intent," are little more than "rote incantations" of "dubious value,"[31] which can "be too vague or misleading to be dispositive or even helpful."[32] Each term envisions a singular "umbrella culpability requirement that applie[s] in a general way to the offense as a whole."[33] Both, therefore, "fail[] to distinguish between elements of the crime, to which different mental states may apply."[34]

The District's reliance on these ambiguous distinctions to address mistake and accident claims has brought with it the standard litany of consequences associated with offense analysis. The first three problems are primarily relevant to the District's law of mistake.

First, reliance on the distinctions between general intent and specific intent crimes in this context allows for judicial policymaking, given that there is no reliable mechanism, legislative or judicial, for consistently communicating this classification.[35] Second, absent a reliable mechanism for consistently distinguishing between general intent and specific intent crimes, it can be difficult to predict, *ex ante*, how a District court will exercise its

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> For offenses that have been understood to be "general intent" crimes, the Committee has settled on describing the required state of mind as the defendant having acted "voluntarily and on purpose, not by mistake or accident." When a "specific intent" is required, the Committee has described the element as the defendant "intended to" cause the required result.

D.C. Crim. Jur. Instr. § 3.100: Defendant's State of Mind—Note. *See, e.g., Ortberg*, 81 A.3d at 308; *Wheeler v. United States*, 977 A.2d 973, 993 (D.C. 2009); *Kozlovska v. United States,* 30 A.3d 799, 801 (D.C. 2011); *Carter v. United States*, 531 A.2d 956, 964 (D.C. 1987).

[30] *Ortberg*, 81 A.3d at 307 (quoting *United States v. Bailey,* 444 U.S. 394, 403 (1980)).

[31] *Buchanan v. United States*, 32 A.3d 990, 1001 (D.C. 2011) (Ruiz, J. concurring).

[32] *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011).

[33] PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).

[34] *Ortberg*, 81 A.3d at 307.

[35] To take just one example, D.C. Code § 22–3302(a)(1) provides, in relevant part:

> Any person who, without lawful authority, shall enter, or attempt to enter, any private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, . . . shall be deemed guilty of a misdemeanor.

The text of this statute clarifies that "the government must prove (1) entry that is (2) unauthorized—because it is without lawful authority and against the will of owner or lawful occupant." *Ortberg*, 81 A.3d at 309. "What is less clear," however, "is the mental state or culpable state of mind that must be proved" given that [t]he statute does not expressly address this subject." *Id.* Nor is there any "legislative history on this provision." *Id.* Nevertheless, District courts have concluded that the "only state of mind that the government must prove is appellant's general intent to be on the premises contrary to the will of the lawful owner," *Artisst v. United States,* 554 A.2d 327, 330 (D.C.1989), and, therefore, that only "a reasonable, good faith belief [as to consent] is a valid defense." *Ortberg*, 81 A.3d at 309. But this is little more than a judicial policy decision, rooted in neither statutory text nor legislative history.

policy discretion over a mistake issue of first impression.[36] And third, judicial reliance on binary, categorical rules concerning whether a mistake is reasonable or unreasonable precludes District judges from accounting for the different kinds of mistakes that might arise—for example, reckless versus negligent mistakes.[37]

The fourth problem has less to do with the classifications of general intent and specific intent themselves than it does with the offense-level analysis of culpability that undergirds them. It is therefore similarly applicable to the District's law of accident. Viewing claims of mistake or accident through the lens of offense analysis has, on occasion, led Superior Court judges to treat issues of mistake and accident as true defenses, when, in fact, they are simply conditions that preclude the government from meeting its burden of proof with respect the culpability required for an offense.[38] In practical effect, this risks improperly shifting the burden of proof concerning an element of an offense onto the accused—something the DCCA has cautioned against in the context of both accident and mistake claims.[39]

All of the foregoing problems should be remedied by subsections (a) and (b) when viewed in light of the element analysis more broadly incorporated into the RCC. Instead of relying on the ambiguous and unpredictable distinctions of general intent and specific intent crimes to address issues of mistake or accident as "defenses," District courts will only need to consider whether—consistent with RCC § 22E-208(a) and (b)—the government is able to meet its affirmative burden of proof as to the culpable mental state requirement governing each offense.

More specifically, if the accident or mistake precludes the government from meeting its burden then it is, by virtue of an offense definition, an appropriate basis for exoneration. But if, in contrast, it does not preclude the government from meeting its burden, then—again, by virtue of an offense definition—that accident or mistake is appropriately ignored. In either case, however, the ultimate policy decision will reside with the legislature, contingent upon the legislature's decision concerning which culpable mental state, if any, to apply to each objective element of an offense.

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[36] To that end, the commentary on the District's criminal jury instructions states that: "[N]o general pattern instruction on these defenses could adequately provide for the range of contexts in which they arise, without resorting to a confusing array of alternative selections." D.C. Crim. Jur. Instr. § 9.600: Defenses of Accident and Mistake—Note.

[37] As one commentator observes:

> A "reckless mistake" is one in which the actor does not know with a substantial certainty that the element exists, but is aware of "a substantial … risk that the … element exists." A "negligent mistake" is one in which the actor is not, but should be aware of a substantial risk that the element exists and such unawareness is "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

PAUL H. ROBINSON, 1 CRIM. L. DEF. § 62 (Westlaw 2017).

[38] The DCCA has recently observed this much, noting in the context of trespass that "the existence of a reasonable, good faith belief is a valid defense precisely because it precludes the government from proving what it must—that a defendant knew or should have known that his entry was against the will of the lawful occupant." *Ortberg*, 81 A.3d at 308–09.

[39] *See, e.g., Clark v. United States*, 593 A.2d 186, 194 (D.C. 1991); *Simms*, 612 A.2d at 219; *Carter*, 531 at 964.

RCC § 22E-208(c): Relation to Current District Law on Culpability as to Criminality. Subsection (c) is in accordance with District law governing the relationship between mistake or ignorance as to a matter of penal law and criminal liability.

It is well established under DCCA case law that, in general, neither ignorance nor mistake as to a matter of *penal* law is a defense.[40] As the DCCA has recently observed, "[it] is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."[41] In practice, this means that (for example) "a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules [would] be guilty of knowingly distributing 'a controlled substance.'"[42] Under these circumstances, the ignorance of the law maxim *precludes* a defendant from prevailing on a claim that his or her lack of knowledge concerning the definition of the crime in question should constitute a defense.[43]

At the same time, however, the DCCA has also recognized that under "unusual circumstances" this maxim must give way to other general legal principles.[44] Most obvious is the principle that the government must prove all offense elements beyond a reasonable

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[40] *See, e.g., Bsharah v. United States*, 646 A.2d 993, 1000 (D.C. 1994) (quoting *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984) ("It is [] solidly established that "[g]eneral intent is not negated by a mistaken belief about the applicability of a penal law."); *Abney v. United States*, 616 A.2d 856, 857-58, 863 (D.C. 1992).

[41] *Conley v. United States*, 79 A.3d 270, 281 (D.C. 2013) (quoting *Barlow v. United States,* 32 U.S. (7 Pet.) 404, 411, 8 L.Ed. 728 (1833)); *see, e.g., McFadden v. United States*, 135 S. Ct. 2298, 2304, 192 L. Ed. 2d 260 (2015) ("[I]gnorance of the law is typically no defense to criminal prosecution"); *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

[42] *McFadden*, 135 S. Ct. at 2304.

[43] Ignorance or mistake as to a matter of *penal law* is to be contrasted with ignorance or mistake as to a matter of *non-penal law*. The latter form of mistake/ignorance arises in prosecutions for an offense comprised of a circumstance element the satisfaction of which hinges upon a legal judgment extrinsic to the definition of that offense. Consider, for example, the District's taking property without right (TPWR) offense, which applies to a person who takes and carries away the "property of another" and does so "without right to do so." D.C. Code § 22-3216. To determine whether the circumstance element, "property of another," is satisfied hinges upon a determination that the property taken does not qualify as abandoned under civil law. And to determine whether the circumstance element, "without right to do so," is satisfied hinges upon a determination that the defendant lacks a claim of right to take the property under civil law. Notwithstanding the legal nature of these circumstance elements, however, DCCA case law appears to indicate that a person who makes a reasonable mistake (or possesses reasonable ignorance) as to either—i.e. as to whether property has actually been abandoned or a claim of right actually exists—cannot be convicted of the offense because it would negate the culpable mental state requirement governing the offense. *See, e.g., Hawkins v. United States*, 103 A.3d 199, 201 (D.C. 2014) (reasonable mistake as to abandonment constitutes a defense to general intent crimes, such as taking property without right); *Simms v. D.C.,* 612 A.2d 215, 219 (D.C. 1992) (defendant may raise reasonable mistake defense "based on a defendant's belief that property was abandoned by its owner" to disprove *mens rea* of vehicular tampering, which only applies where the automobile was owned by another person"); *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013) ("[T]he requisite criminal intent for unlawful entry" cannot be established "[w]hen a person enters a place with . . . a *bona fide belief* in his or her right to enter.") (italics added) (quoting *Darab v. United States,* 623 A.2d 127, 136 (D.C.1993); *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984) ("bona fide belief defense" applies to "*a reasonable mistake as to a non-penal property* law which, if not a mistake, would justify remaining on the property. . . .") (italics added).

[44] *Conley*, 79 A.3d at 281.

doubt.[45] On rare occasion, for example, the District's criminal offenses appear to explicitly incorporate a knowledge-of-the-law requirement (i.e. apply a culpable mental state of knowingly to the illegality of one's conduct). To illustrate, consider a penalty provision in the District's campaign finance statute, which subjects to a five year (maximum) criminal penalty any person who "knowingly violates" any of the relevant prohibitions.[46] In a prosecution premised on this provision, a person's mistake or ignorance as to the scope of this criminal law presumably *would* "excuse" because: (1) the government must prove the elements of an offense beyond a reasonable doubt; (2) knowledge of the law is an element of the offense; and, therefore, (3) the person's mistake or ignorance would preclude the government from establishing the requisite knowledge.[47]

Another "bedrock principle[] of American criminal law" that may supersede the "ignorance of the law will not excuse any person" maxim has been articulated by the DCCA as follows: "It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted *was* a crime . . . ."[48] The DCCA's recent opinion in *Conley v. United States* is illustrative. In that case, the court struck down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm[49] on the basis that it "criminalize[d] entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle[]—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise."[50] The *Conley* decision rested upon the court's reading of the U.S. Supreme Court's opinion in *Lambert v. California*, which, in the view of the DCCA, stands for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[51] In practical effect, then, the *Conley* decision amounts to an implicit constitutional requirement of negligence as to illegality in cases of omission liability.

Beyond mere negation of (exceedingly rare) culpability as to illegality requirements, District law appears to recognize the possibility that a person's mistake or ignorance as to a matter of penal law can excuse in the traditional sense—i.e. where the government meets the affirmative requirements of liability—under certain narrow sets of

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[45] *See, e.g., Conley v. United States*, 79 A.3d 270, 278 (D.C. 2013) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)); *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

[46] *See, e.g.,* D.C. Code § 1-1163.35(c) ("Any person who knowingly violates any of the provisions of Parts A through E of this subchapter shall be subject to criminal prosecution and, upon conviction, shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not longer than 5 years, or both."); *see also Trice v. United States*, 525 A.2d 176, 179 (D.C. 1987). ("The crime of bail jumping, under D.C. Code § 23-1327(a)[], has four elements. The trier of fact must find (1) that the defendant was released pending trial or sentencing, (2) that he was required to appear in court on a specified date or at a specified time, (3) that he failed to appear, and (4) *that his failure was willful.*") (italics added); *Jenkins v. United States*, 415 A.2d 545, 547 (D.C. 1980) (holding that where there was testimony that "certain words had been said to appellant which could have given rise to a good faith and reasonable belief that his case had been dismissed[,]" that story, "if believed by the jury, would constitute a valid defense to a charge of 'willfully' failing to appear").

[47] *Conley*, 79 A.3d at 278 (quoting *Patterson*, 432 U.S. at 210 (1977)); *Rose*, 535 A.2d at 852.

[48] *Conley*, 79 A.3d at 281 (quoting *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir.1998)(Posner, J., dissenting).

[49] D.C. Code § 22-2511 (Repealed).

[50] 79 A.3d at 273.

[51] *Id*. at 273.

circumstances. The DCCA's decision in *Bsharah v. United States* is illustrative.[52] In that case, the DCCA recognized that a more conventional excuse for a mistake or ignorance as to illegality might be "available to a defendant who 'reasonably' relied on a [mistaken] conclusion or statement of law 'issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field.'"[53] The details of the case illustrate the basis for, and potential contours of, this kind of narrow excuse defense.

At trial, the defendants, White and Bsharah, argued that their convictions for carrying a pistol without a license, possession of an unregistered firearm, and possession of unregistered ammunition should be vacated because, *inter alia*, "they had been advised by the station manager at the Virginia Square subway station that they could lawfully carry their guns in the District of Columbia."[54] "The trial judge, however, refused to allow them to argue this point to the jury and refused to give an instruction on mistake of law as a defense to the charges."[55] Thereafter, on appeal, White and Bsharah asked the DCCA to carve out a narrow exception to the general ignorance of the law will not excuse maxim on the basis that "they reasonably relied upon the advice of the Metro station manager."[56]

In resolving their argument, the DCCA observed the substantial precedent supporting this kind of exception. Not only had "[t]he defense advanced by White and Bsharah" been recognized by the U.S. Court of Appeals for the D.C. Circuit in 1976,[57] but, preceding that decision, had "originated in two Supreme Court cases."[58] Specifically:

> In *Raley v. Ohio,* 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), the defendants were convicted of contempt for refusing to answer certain questions put to them by a state investigating commission, even though they had relied on prior assurances by the chairman of the same commission that they were entitled to assert their Fifth Amendment privilege against self-incrimination. Unknown to the chairman, his advice was contrary to state law. Nevertheless, the Supreme Court reversed the convictions because of the chairman's erroneous assurance to the defendants that they could lawfully refuse to answer . . . A few years later, in *Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), the Court reversed the convictions of a group of picketers who had been demonstrating across the street from a courthouse, contrary to state law, because the local chief of police had given them permission to picket at that location . . . .[59]

Ultimately, however, the DCCA concluded that the defendants were not entitled to any relief, having deemed the "instant case" distinguishable from existing authorities in two key ways: (1) "the Metro station manager had no authority, real or apparent, to give

[52] 646 A.2d 993, 1000 (D.C. 1994).
[53] *Id.* at 1000 (quoting *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) and citing Model Penal Code § 2.04(3)(b).)
[54] *Id.* at 999.
[55] *Id.*
[56] *Id.* at 1000.
[57] *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976)
[58] *Bsharah*, 646 A.2d at 1000.
[59] *Id.*

these appellants any advice whatever about the District of Columbia firearms laws"; and (2) "appellants' reliance on the station manager's advice was inherently unreasonable."[60] Nevertheless, the clear import of the *Bsharah* decision is that had the defendants' claims been *indistinguishable* from the relevant authorities, then their mistake of penal law defense could have provided the basis for avoiding liability.

In accordance with the above case law, RCC § 22E-208(c) both codifies and synthesizes District law relevant to culpability as to criminality as follows. The prefatory clause in subsection (c) articulates the general ignorance of the law will not excuse maxim through a presumption that "[a] person remains liable for an offense although he or she is mistaken or ignorant as to the illegality of his or her conduct." The balance of the provision thereafter recognizes the possibility of two different kinds of exceptions to this general presumption.

The first exception, addressed in paragraph (c)(1), is where defendant is being prosecuted under a statute that requires proof of a culpable mental state (e.g., knowledge, intent, recklessness, or negligence) as to the illegality of one's conduct.[61] In these circumstances, the defendant's mistake or ignorance as to the prohibited nature of his or her conduct must be subjected to the same logical relevance analysis set forth in RCC § 22E-208(a), namely, did the mistake or ignorance "negate[] th[e] culpable mental state" applicable to the required circumstance of illegality?

The second exception, addressed in paragraph (c)(2), is where "[t]he person's mistake or ignorance satisfies the requirements of a general defense."[62] This catch-all provision allows for the possibility that mistake or ignorance as to the illegality of one's conduct might, under limited circumstances, constitute a true "excuse" in the sense of exculpating a defendant who otherwise satisfies the affirmative elements of an offense.

RCC § 22E-208(d): Relation to Current District Law on Deliberate Ignorance. Subsection (d) is generally in accordance with, but fills a gap in, District law governing deliberate ignorance.

The DCCA has only issued one opinion directly addressing the issue of deliberate ignorance, *Owens v. United States*, and it is a case that is primarily concerned with the culpability required for the District's RSP statute.[63] That statute penalizes a person who "buys, receives, possesses, or obtains control of stolen property, knowing or *having reason to believe* that the property was stolen."[64]

At issue in *Owens* was whether the italicized "having reason to believe" language embodies an objective, negligence-like standard, or, alternatively, a subjective standard akin to knowledge. The DCCA ultimately concluded that "the mental state for RSP is a subjective one" akin to knowledge[65]; however, the *Owens* court also recognized—quoting from the U.S. Court of Appeals for the D.C. Circuit's (CADC) decision in *United States v. Gallo*[66]—that although "[g]uilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant," it may nevertheless "be

[60] *Id.* at 1001.
[61] RCC § 22E-208(c)(1).
[62] RCC § 22E-208(c)(2).
[63] 90 A.3d 1118, 1122-23 (D.C. 2014).
[64] D.C. Code § 22-3232(a).
[65] *Owens*, 90 A.3d at 1121.
[66] 543 F.2d 361, 369 n.6 (D.C. Cir. 1976).

satisfied by proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him."[67]

"Following these principles," the DCCA went on to explain that when the government proceeds, not "on a theory of actual knowledge," but rather on the basis that "the defendant had 'reason to believe' the property was stolen," Superior Court judges should provide an instruction that incorporates the above-quoted language on deliberate ignorance from *Gallo*.[68]

No other DCCA case expressly applies the doctrine of deliberate ignorance; however, the Court of Appeals has, over the years, made a variety of passing observations—in both the criminal[69] and civil[70] contexts—which generally suggest that deliberate ignorance doctrine is indeed a generally applicable principle in the District.

Section (d) fills in the foregoing gap in District law in a manner that is broadly consistent with the *Owens* decision.[71]

RCC § 22E-209. PRINCIPLES OF LIABILITY GOVERNING INTOXICATION.

Explanatory Notes. Section 209 establishes general principles of liability governing the relationship between intoxication and the culpable mental state requirement applicable to individual offenses under the RCC.[1]

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[67] *Owens*, 90 A.3d at 1122.

[68] *Id.* More specifically, Superior Court judges are supposed to provide an instruction that reads, in relevant part:

> [RSP] requires that the defendant either knew or had reason to believe that the property was stolen. This state of mind is a subjective one, focusing on the defendant's actual state of mind, and not simply on what a reasonable person might have thought. In determining whether the government has met its burden of proving the defendant's subjective state of mind, you may consider what a reasonable person would have believed under the facts and circumstances as you find them. But guilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant. It may, nonetheless, be satisfied by proof beyond a reasonable doubt that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.

Id.

[69] *See Santos v. District of Columbia*, 940 A.2d 113, 117 n.21 (D.C. 2007).

[70] *See In re Cater*, 887 A.2d 1, 26 (D.C. 2005); *In re Owusu*, 886 A.2d 536, 542 (D.C. 2005).

[71] *See also, e.g., United States v. Alston-Graves*, 435 F.3d 331, 341 (D.C. Cir. 2006) (willful blindness instruction should not be given unless there is evidence that the defendant "purposely contrived to avoid learning all the facts *in order to have a defense in the event of a subsequent prosecution*.") (quoting *United States v. Espinoza,* 244 F.3d 1234, 1242 (10th Cir. 2001) (quoting *United States v. Hanzlicek,* 187 F.3d 1228, 1233 (10th Cir. 1999)) (internal quotation mark omitted); *accord United States v. Heredia,* 429 F.3d 820, 824 (9th Cir. 2005); *United States v. Puche,* 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis,* 277 F.3d 1026, 1032 (8th Cir. 2002).

[1] This relationship is to be distinguished from the relationship between intoxication and the availability of an affirmative defense akin to insanity, which would be raised by a claim that "although [the defendant] had the requisite *mens rea* to commit the offense and was conscious when he was acting, the intoxicants rendered him temporarily insane." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 24.01[D] (6th ed. 2012). Section 209 is not intended to have any impact on the resolution of general defense claims of this nature.

Nor is section 209 intended to have any impact on the meaning, interpretation, or application of intoxication as an *objective element*. For example, some criminal offenses prohibit engaging in certain forms of conduct while in an intoxicated state. *See, e.g.,* D.C. Code § 50-2206.11 ("No person shall operate or be

Subsection (a) states the general effect of intoxication—defined in paragraph (d)(1) as a disturbance of mental or physical capacities resulting from the introduction of substances into one's body[2]—on offense liability. It broadly clarifies that a person's intoxicated state will relieve that person of liability when (but only when) it precludes the person from acting with the culpable mental state required for a result or circumstance element.[3] This means that the relationship between the culpable mental state requirement governing an offense and intoxication is typically one of logical relevance: intoxication is relevant when (but only when) it prevents the government from meeting its affirmative burden of proof with respect to a culpable mental state required for a result or circumstance element.[4] In this sense, intoxication does not—generally speaking[5]—constitute a defense, but rather, simply describes conditions that may preclude the government from establishing liability.[6]

Subsection (b) clarifies the nature of the correspondence between intoxication and culpable mental states under the RCC. It provides a set of general rules that may serve as a useful guide for the courts in determining when intoxication is capable of negating the existence of a culpable mental state. First, these rules generally establish that intoxication negates the existence of any subjective culpable mental state—namely, purpose, knowledge, intent, and the conscious disregard component of recklessness[7]—when, due to a person's intoxicated state, that person does not act with the necessary desire or level of awareness that must be proven as to a given result or circumstance element.[8] Second, these

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in physical control of any vehicle in the District: (1) While the person is *intoxicated*; or (2) While the person is under the *influence of alcohol or any drug or any combination thereof*.") (italics added). The general culpability principles stated in section 209 should not be construed as altering the government's burden of proof for the intoxication-related objective element(s) that comprise these offense definitions. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5(a) (3d ed. Westlaw 2019) ("One who is charged with having committed a crime may claim in his defense that, at the time, he was intoxicated[] and so is not guilty. If the crime in question is that of driving while intoxicated, or of being drunk in a public place, he will not get very far with the defense, for with such crimes intoxication, far from being a defense, is an element of the crime.").

[2] RCC § 22E-209(d)(1); *see, e.g.,* Model Penal Code § 2.08(5)(a) (defining intoxication).

[3] *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 9.5(a) n.7 ("Intoxication is a defense to crime if it negatives a required element of the crime; and this is so whether the intoxication is voluntary or involuntary.").

[4] Note, however, that RCC § 22E-209(c) addresses a particular situation where, although an actor's intoxication negates the culpable mental state of recklessness, that culpable mental state is nevertheless imputed on policy grounds.

[5] *But see* DRESSLER, *supra* note 1, at § 24.01[D] ("[U]nder very limited circumstances an intoxication [] defense is recognized when an actor becomes 'temporarily insane' as the result of the introduction of drugs, alcohol, or other foreign substances into the body."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 9.5(a) ("Where the intoxication was 'involuntary,' it may be a defense in the same circumstances as would insanity.")

[6] *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2019) ("[W]hen an actor's intoxication negates a culpable state of mind required by an offense definition," this raises "a 'failure of proof' defense where the defendant has a defense because the prosecution is unable to prove all the required elements of the offense.").

[7] RCC §§ 22E-206(a), (b), (c)(1)(A), and (c)(2)(A).

[8] *See* RCC §§ 22E-209(b)(1), (2), and (3)(A). In general, there are two basic categories of intoxication under the RCC framework: intoxication that is self-induced, and intoxication that is non self-induced (i.e. involuntary intoxication). *See* RCC § 22E-209(d)(2) (defining self-induced intoxication). The difference between these two forms of intoxication is immaterial for purposes of evaluating the culpable mental states of purpose, knowledge, and intent. However, the distinction matters for purposes of evaluating the conscious disregard component of the RCC definition of recklessness. *See* RCC §§ 22E-206(c)(1)(A) and (2)(A) (requiring proof that the accused "consciously disregards a substantial risk"). Whereas a person's non self-

rules further clarify that intoxication may also negate the objective component of recklessness and the objective culpable mental state of negligence when, due to a person's intoxicated state, that person's disregard of a risk is not a gross deviation from the ordinary standard of conduct or care under the circumstances proscribed by the RCC definitions of recklessness and negligence.[9]

One critical circumstance, for purposes of evaluating the relationship between intoxication and the degree to which a person's deviated from the standard of conduct or care under this context-sensitive culpability analysis, is the origin of a person's intoxicated state.[10] The most important distinction to be made relates to whether intoxication is "self-induced," which is defined in paragraph (d)(2) as the knowing introduction into the body of a substance when at least negligent as to the tendency of the substance to be intoxicating and not acting pursuant to medical advice or circumstances that would establish a justification or excuse defense.[11] In general, *self-induced* intoxication will support a finding that the person grossly deviated from the ordinary standard of care or conduct under the RCC, and in many instances will serve to establish a gross deviation.[12] In contrast, intoxication that is *not self-induced* generally *will not* support a finding that a person's conduct grossly deviated from the ordinary standard of care or conduct.[13] Ultimately,

induced state of intoxication necessarily negates recklessness when it precludes that person from acting with the requisite awareness of a substantial risk, a person's self-induced state of intoxication can provide the basis for imputing the requisite awareness of a substantial risk to a person who otherwise lacks it under the conditions specified in subsection (c). *See* RCC § 22E-209(b)(3) ("Except as otherwise provided in subsection (c)," which recognizes imputation of recklessness for self-induced intoxication).

[9] That is, the "nature and degree" of the risk, the "nature of and motivation for the person's conduct," and the "circumstances the person is aware of." RCC §§ 206(c)(1)(B), (c)(2)(B), (d)(1)(B), (d)(2)(B), and accompanying Explanatory Notes.

[10] Which is to say, the nature of a person's intoxicated state is part and parcel with the "nature [] of the person's conduct" under RCC §§ 206(c)(1)(B), (c)(2)(B), (d)(1)(B), and (d)(2)(B).

[11] RCC § 22E-209(d)(2); *see also* Model Penal Code § 2.08(5)(a) (defining self-induced intoxication). The RCC uses the phrase "self-induced intoxication," rather than "voluntary intoxication," to avoid any confusion with the voluntariness requirement proscribed in RCC § 22E-203. The RCC also uses the defined culpable mental state term "negligently" to more clearly indicate the kind of culpability needed sa to the tendency of the substances to cause intoxication.

[12] Illustrative is the situation of X, who knowingly drinks a significant amount of alcohol at a rowdy fraternity party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which repeatedly shatter the windows of nearby homes and ultimately causes $30,000 dollars in damage. If X is subsequently charged with recklessly damaging property, X's self-induced state of intoxication at the moment he began hitting golf balls only bolsters a finding that X's conduct manifests a culpable failure to afford the homeowners' property interests a reasonable level of concern. Therefore, X's disregard of the risk—when viewed in light of the circumstances, including his intoxication—*would* satisfy the gross deviation standard governing the RCC definition of recklessness.

[13] Illustrative is the situation of X, who is unknowingly drugged by someone at house party, thereafter leaves in her vehicle, and then subsequently falls asleep at the wheel, thereby fatally crashing into another driver, V. If X is charged with negligent homicide, X's involuntary state of intoxication strongly suggests that her failure to perceive a substantial risk of death to V does not, in fact, manifest a culpable failure to attend to V's personal safety under the circumstances. Instead, X's conduct appears to be entirely attributable to the influence of sleep inducing drugs, the consumption of which X bears no responsibility. Therefore, X's disregard of the risk—when viewed in light of the circumstances, including her intoxication—*would not* meet the gross deviation standard applicable to the RCC definition of negligence.

though, these are only general presumptions, each of which is subject to possible exception based upon the facts of a given case.[14]

Subsection (c) establishes a principle of imputation to deal with the culpability issues that self-induced intoxication raises for proof of the subjective component of

[14] For example, in rare situations it is possible for a person's self-induced intoxication to be consistent with the ordinary standard of care or conduct. This is perhaps clearest where a person's state of self-induced intoxication is unusual and pathological—i.e. "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code § 2.08(5)(c). The following hypothetical is illustrative. X consumes a single alcoholic beverage at an office holiday party, and immediately thereafter departs to the metro. While waiting for the train, X begins to experience an extremely high level of intoxication—unbeknownst to X, the drink has interacted with an allergy medication she is taking, thereby producing a level of intoxication ten times greater than what X normally experiences from that amount of alcohol. As a result, X has a difficult time standing straight, and ends up stumbling in another train-goer, V, who X fatally knocks onto the tracks just as the train is approaching.

If X is subsequently charged with either reckless manslaughter or negligent homicide on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances—suggests that the gross deviation standard governing the RCC definitions of recklessness and negligence is not satisfied. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for recklessly or negligently killing V under the RCC if X grossly deviated from the ordinary standard of care or conduct. And given that X's minimally-culpable decision to consume a single alcoholic beverage while on her allergy medication is the sole reason X fatally stumbled into V, it simply cannot be said that X grossly deviated from the ordinary standard of care or conduct (i.e. that necessary to support a homicide conviction) under the facts presented.

It is also possible, under narrow circumstances, for a person's self-induced intoxication to be more with the ordinary standard of care or conduct even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death.

If X is subsequently charged with either reckless manslaughter or negligent homicide on these facts, her self-induced state of intoxication—when viewed in light of the surrounding circumstances—suggests that the gross deviation standard governing the RCC definitions of recklessness and negligence is not satisfied. It may be true that X, but for her intoxicated state, would have been more careful/aware of V's proximity. Nevertheless, X is only liable for recklessly or negligently killing V under the RCC if X's gross deviated from the ordinary standard of care or conduct. And given that X's minimally-culpable decision to consume a large amount of alcohol in the safety of her own home is the sole reason X fatally stumbled into V, it simply cannot be said that X grossly deviated from the ordinary standard of care or conduct (i.e. that necessary to support a homicide conviction) under the facts presented.

Finally, it is important to note that while non self-induced intoxication will typically make a person's conduct consistent with the ordinary standard of care or conduct, this is not a categorical rule—and thus, it is certainly possible for a person to be convicted of a crime of recklessness and negligence while under its influence. The reason? A person's intoxicated state (whatever its origin) may simply have no bearing on why that person failed to exercise an adequate level of concern or attention for the legally protected interests of others. To illustrate, consider the situation of X, who has a regular practice of texting while driving in school zones, and is also mis-prescribed a slightly intoxicating medication for daily use. One morning, while driving under the influence of that medication, X fatally strikes V, a student-pedestrian walking through a crosswalk. At the time of the accident, X was entirely unaware of V's presence because X was reading a text message on his phone (rather than looking in front of himself).

If X is subsequently charged with negligent homicide on these facts, X's non self-induced state of intoxication would not preclude a conviction. So long as D's failure to perceive the substantial risk of death to V is attributable to his lack of concern for the safety and wellbeing of student-pedestrians like V (in contrast to the influence of the mis-prescribed medication), then D's conduct would be a sufficient deviation from the ordinary standard of care to satisfy the RCC definition of negligence.

recklessness. A person who becomes intoxicated in this manner and then goes on to commit a crime of recklessness may argue that, due to that person's intoxicated state, he or she did not "*consciously disregard*[] a substantial risk" that a prohibited result would occur or that a prohibited circumstance existed.[15] Nevertheless, given the commonly known risks associated with intoxicants, as well as the fact that the person has in effect culpably created the conditions of his or her own defense, it would be inappropriate to allow for intoxication to exonerate under these circumstances.[16] Consistent with these policy considerations, subsection (c) authorizes the factfinder to impute the requisite recklessness as to a result or circumstance element where the government proves beyond a reasonable doubt that: (1) but for the person's intoxicated state he or she would have been aware of a substantial risk as to that result or circumstance; (2) the person's intoxicated state is self-induced; and (3) the person acted negligently as to the requisite result or circumstance.[17]

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[15] RCC § 22E-206(c)(1)(A) & (2)(A). It should be noted, however, that it is entirely possible for an actor to be under the influence of self-induced intoxication, yet consciously disregard a substantial risk, in which case it would *not* be necessary to rely upon subsection (c) to establish the first prong of the RCC definition of recklessness.

[16] To illustrate, consider again the situation of X, who knowingly drinks a significant amount of alcohol at a rowdy fraternity party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which repeatedly shatter the windows of nearby homes and ultimately causes $30,000 dollars in damage. *See supra* note 12 (analyzing same hypothetical). Assume that X, due to his intoxicated state, was completely unaware that—at the moment he began hitting golf balls—there was a substantial risk that property damage would result from his conduct. If X is subsequently prosecuted for second-degree criminal damage to property on these facts, X's lack of awareness could, as a matter of logical relevance, preclude the government from securing a conviction under a recklessness theory of liability. *See* RCC § 22E-2503 ("Recklessly damages or destroys property and, in fact, the amount of damage is $25,000 or more."). But this would be problematic as a matter of policy/fairness: if the reason why X lacks the requisite awareness is because of his prior culpable decision to get recklessly drunk at the fraternity party, then X's self-induced state of intoxication offers an inappropriate basis for exculpation. *See, e.g.,* Gideon Yaffe, *Intoxication, Recklessness, and Negligence,* 9 OHIO ST. J. CRIM. L. 545, 573 (2012) ("[I]f the defendant's act of becoming intoxicated is unjustified . . . and the defendant is aware of the relevant risked harms when he chooses to become intoxicated, then his act of becoming intoxicated is itself reckless."); Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 31 (1985) ("Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind *as to causing himself to engage in the conduct constituting the offense*, the state should be punish him for causing the ultimate justified or excused conduct.") (italics added).

[17] According to the same logic, the general provisions governing the relationship between intoxication and the culpable mental states of purpose, knowledge, and intent (i.e. RCC § 22E-209(b)(1) and (2)) should be construed to preserve liability in situations involving a person's self-induced intoxication, which is intended to create the conditions for an absent-element defense. If, under these circumstances, the actor possesses the statutorily-required purpose, knowledge, or intent at the point in which he or she begins consuming intoxicating substances, then the fact that he or she subsequently lacks the requisite desire or state of awareness at the precise moment the conduct constituting the offense is completed should not preclude a finding that the person satisfied the offense's culpable mental state requirement. *See* Robinson, *supra* note 16, at 35 (Observing that, in these kinds of situations, "[t]he actor's liability for the offense may be based on his conduct at the time he becomes voluntary intoxicated and his accompanying state of mind as to the elements of the subsequent offense.").

The following situation is illustrative. X desires to have sex with V, who is happily married and has previously expressed V's firm lack of romantic interest in X on multiple occasions. Soon after the last rejection, X realizes that the only way he'll ever have sex with Y is by force; however, X also realizes that he lacks the temperament necessary to follow through on this criminal intent. To address the perceived

Relation to Current District Law. Section 209 codifies, clarifies, fills in gaps, changes, and enhances the proportionality of the District law governing the relationship between intoxication and the culpable mental state requirement governing an individual offense.

As a legislative matter, the D.C. Code is almost entirely silent[18] on when an actor's intoxicated state can or should preclude the government from being able to establish that he or she possessed the state of mind necessary for a conviction.[19] The absence of relevant intoxication legislation has effectively delegated this critical and frequently occurring liability issue to the District's judiciary. However, the judges on the D.C. Superior Court and D.C. Court of Appeals have relied on the ambiguous and confusing distinction between general and specific intent crimes to address the relationship between intoxication and the government's affirmative burden of proof. This has resulted in a body of common law intoxication policies that are frequently confusing, often inconsistent, and almost always piecemeal (as is the case in every other jurisdiction that has relied on offense analysis to develop its law of intoxication).[20] RCC § 22E-209 replaces this judicially created, offense analysis-based approach with a clear and consistent legislative framework for analyzing the relationship between intoxication and culpable mental states on an element-by-element basis.

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deficiency (and strengthen his resolve), X purchases a large amount of Phencyclidine (PCP) and cocaine, which X subsequently consumes a few hours before a party that he knows V will be attending by herself. Later on that evening, while at the party, X asks Y to step into an empty bedroom for a brief discussion, at which point X proceeds to pin Y's hands behind her back and engage in non-consensual, forceful intercourse. However, due to his extreme state of intoxication, at the time of intercourse X honestly perceives the sexual interaction with Y to be a consensual, passionate expression of long-suppressed mutual affection. X is subsequently prosecuted for first-degree sexual assault on a theory of liability requiring knowledge. *See* RCC § 22E-1301(a).

On these facts, X's lack of awareness concerning the non-consensual, forceful nature of the intercourse at the moment it occurred should *not* preclude a finding of guilt, provided the prosecution can establish that X was practically certain that—at the moment he became intoxicated—the forceful sexual act he intended to facilitate would be non-consensual. *See* Robinson, *supra* note 16, at 51 ("If an actor's intoxication negates a required culpability element at the time of the offense, such element is nonetheless established if the actor satisfied such element immediately preceding or during the time that he was becoming intoxicated or at any time thereafter until commission of the offense, and the harm or evil he intended, contemplated, or risked is brought about by the actor's subsequent conduct during intoxication.").

[18] One noteworthy example is the District's medical marijuana statute, D.C. Code § 7-1671.03, which establishes that "[t]he use of medical marijuana as authorized by this chapter and the rules issued pursuant to § 7-1671.13 does not create a defense to any crime and does not negate the mens rea element for any crime except to the extent of the voluntary-intoxication defense recognized in District of Columbia law."

[19] This issue, which lies at the intersection of intoxication and the culpable mental state requirement governing individual offenses, is to be distinguished from the relationship between intoxication and affirmative defenses (e.g., insanity), which is not addressed by RCC § 22E-209. *See generally, e.g.*, *McNeil v. United States*, 933 A.2d 354 (D.C. 2007); *Bethea v. United States*, 365 A.2d 64, 72 (D.C. 1976).

[20] *See generally, e.g.,* DRESSLER, *supra* note 1, at § 24.03; Miguel Angel Mendez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407 (1995); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2019); Model Penal Code § 2.08 cmt. at 354-59; NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970) (hereinafter "Working Papers").

Under District case law, "a person may not voluntarily become intoxicated and use that condition, generally, as a defense to criminal behavior."[21] Rather, an actor's voluntary intoxication, to the extent it is legally relevant, must create a "reasonable doubt about whether [the defendant] could or did form the intent to [commit the charged crime]."[22] To be entitled to a jury instruction on voluntary intoxication as a defense, the evidence "must reveal such a degree of complete drunkenness that a person is incapable of forming the necessary intent essential to the commission of the crime charged."[23] However, evidence of a defendant's intoxicated state may still be introduced even when it falls short of the standard for a voluntary intoxication jury instruction so long as it negates intent.[24]

To determine when voluntary intoxication can effectively negate intent, District courts typically distinguish between "general intent" crimes, which do not require "an intent that is susceptible to negation through a showing of voluntary intoxication"[25] and "specific intent" crimes, which are susceptible to this kind of negation.[26] According to this dichotomy, an intoxication defense may be raised where a specific intent crime is charged, as reflected in DCCA case law on the availability of an intoxication defense for crimes such as attempted burglary,[27] first degree murder,[28] robbery,[29] and assault with intent to kill.[30] But an intoxication defense is not available where a general intent crime is charged, as reflected in DCCA case law rejecting the viability of an intoxication defense to crimes

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[21] *McNeil*, 933 A.2d at 363. The case law discussed in this section generally refers to voluntary (or self-induced) intoxication without saying much about involuntary intoxication. In *Easter v. District of Columbia*, the CADC observed: "Where the accused becomes intoxicated without his consent, through force or fraud of another person, his condition is that of involuntary drunkenness and a criminal act committed by him while in such state may be defended by whatever the circumstances justify." 209 A.2d 625, 627 (D.C. 1965) (citing *Choate v. State*, 197 P. 1060 (Okl. 1921)). And in *Salzman v. United States*, the CADC observed that "where a person has been involuntarily made intoxicated by the actions of others" he or she "may raise involuntariness as a defense to criminal prosecution." 405 F.2d 358, 364 (D.C. Cir. 1968).

[22] D.C. Crim. Jur. Instr. § 9.404; *see, e.g., Harris v. United States*, 375 A.2d 505, 508 (D.C. 1977).

[23] *Bell v. United States*, 950 A.2d 56, 65 (D.C. 2008) (quotations and citations omitted); *see, e.g.*, *Wilson-Bey v. United States*, 903 A.2d 818, 844-45 (D.C. 2006) (*en banc*); *Smith v. United States*, 309 A.2d 58, 59 (D.C. 1973); *Jones v. Holt*, 893 F. Supp. 2d 185, 198 (D.D.C. 2012). In other words, a jury may only be instructed on the issue of voluntary intoxication upon "evidence that the defendant has reached a point of incapacitating intoxication." *Washington v. United States*, 689 A.2d 568, 573 (D.C. 1997); *see Heideman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958).

[24] *See, e.g., Bell*, 950 A.2d at 65 n.5; *Washington*, 689 A.2d at 574; *Riddick v. United States*, 806 A.2d 631, 640–41 (D.C. 2002). Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 959, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[25] *Parker*, 359 F.2d at 1012-13; *see, e.g., Washington*, 689 A.2d at 573.

[26] *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In other words, "[i]ntoxication . . . is material only to negate specific intent." *Id.* (citing *Parker*, 359 F.2d at 1012).

[27] *See Hebble v. United States*, 257 A.2d 483 (D.C. 1969).

[28] *See Harris*, 375 A.2d at 505.

[29] *See Bell*, 950 A.2d at 74.

[30] *See Washington*, 689 A.2d at 573.

such as second-degree murder,[31] manslaughter,[32] MDP,[33] assault,[34] and first-degree sex abuse.[35]

The outward clarity and simplicity of this intoxication framework obscures a range of issues, many of which the DCCA has itself generally recognized. At the heart of the problem is the "venerable common law classification" system it relies upon, offense analysis, which "has been the source of a good deal of confusion."[36] The reasons for this confusion are well known: the central culpability terms that comprise the system, "general intent" and "specific intent," are little more than "rote incantations" of "dubious value,"[37] which can "be too vague or misleading to be dispositive or even helpful."[38] Each term envisions a singular "umbrella culpability requirement that applie[s] in a general way to the offense as a whole."[39] Both, therefore, "fail[] to distinguish between elements of the crime, to which different mental states may apply."[40]

The District's reliance on these ambiguous distinctions between general and specific intent to address the relationship between intoxication and the culpable mental state requirement applicable to individual offenses has brought with it the standard litany of problems associated with offense analysis.

First, reliance on the distinction between general intent and specific intent crimes to address issues of intoxication allows for judicial policymaking, given that there is no reliable mechanism, legislative or judicial, for consistently communicating this classification.[41]

Second, absent a reliable mechanism for consistently distinguishing between general intent and specific intent crimes, it can be difficult to predict, *ex ante*, how a District court will exercise its policy discretion over an intoxication issue of first impression.[42]

Third, judicial reliance on binary, categorical rules concerning whether intoxication constitutes a defense precludes District judges from accounting for those offenses subject

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[31] *See Wheeler*, 832 A.2d at 1273.
[32] *See Bishop v. United States*, 107 F.2d 297, 301 (D.C. Cir. 1939).
[33] *See Carter*, 531 A.2d at 961.
[34] *See Parker*, 359 F.2d at 1013.
[35] *See Kyle*, 759 A.2d at 200.
[36] *Ortberg*, 81 A.3d at 307 (quoting *United States v. Bailey,* 444 U.S. 394, 403 (1980)).
[37] *Buchanan v. United States*, 32 A.3d 990, 1001 (D.C. 2011) (Ruiz, J. concurring).
[38] *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011).
[39] PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).
[40] *Ortberg*, 81 A.3d at 307.
[41] Though some courts have at times spoken as though there exists some intrinsic meaning to the terms general and specific intent, in reality they are little more than "shorthand devices best and most precisely invoked to contrast offenses that, as a matter of policy, may be punished despite the actor's voluntary intoxication . . . with offenses that, also as a matter of policy, may not be punished in light of such intoxication." *People v. Whitfield*, 7 Cal. 4th 437, 463 (1994) (Mosk, J., concurring in part and dissenting in part); *see supra* nos. 32-36 and accompanying text. For illustrative examples of this form of judicial policymaking in the District, see, for example, *Parker*, 359 F.2d at 1013; *Carter*, 531 A.2d at 961.
[42] Relatedly, even when the DCCA has already determined whether a particular offense is one of specific intent or general intent, a new ruling on the culpability required for the offense outside the intoxication context—even if intended to merely clarify, rather than make new law—has the tendency to reopen litigation over that classification within the intoxication context. *See Wheeler v. United States*, 832 A.2d 1271, 1274 (D.C. 2003) (discussing *Comber v. United States,* 584 A.2d 26 (D.C. 1990) (*en banc*)).

to different culpable mental states, some (but not all) of which might be negated by voluntary intoxication.[43]

Fourth, judicial reliance on the general intent-specific intent dichotomy for resolving intoxication issues may have the pernicious effect of lowering the *mens rea* for criminal offenses *in general* so as to avoid the availability of an intoxication defense for particular offenses.[44]

Fifth, judicial reliance on the general intent classification as the basis for excluding evidence of voluntary intoxication leads to inherent contradictions in the case law for so-called general intent offenses that require proof of knowledge as to one or more objective elements.[45]

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[43] An illustrative example of this kind of offense is the District's current murder of a police officer (MPO) statute, D.C. Code § 22-2106. The conduct prohibited by MPO includes a result element, *killing*, and a circumstance element, the victim's status as *a police officer*. However, the statute applies a different culpable mental state to each of these objective elements. Roughly speaking, the result element of killing appears to be subject to a mental state of purpose—"deliberate and premeditated malice"—while the circumstance element regarding the victim's status as a police officer appears to be subject to a mental state of negligence—"reason to know." D.C. Code § 22-2106. As a result, evidence of an actor's voluntary intoxication is plausibly relevant to disproving the existence of the subjective culpability required for the former result element, while such evidence likely cannot disprove the existence of the objective culpability required for the latter circumstance element.

[44] Here's how this phenomenon operates. Initially, courts may deem an offense to be one of "general intent" so as to preclude a voluntary intoxication defense. However, because "theory appears to dictate that intoxication is relevant to negate any subjective mental element," judges feel compelled, for consistency's sake, to "strip the statute defining an defining an offense of subjective mental elements." Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1, 44 (2007). The ongoing confusion surrounding the *mens rea* of assault under District law provides an illustrative example of this phenomenon—as recognized by Judge Ruiz's concurrence in *Buchanan v. United States*, 32 A.3d 990, 997 (D.C. 2011).

That confusion seems to be rooted in an oft-cited U.S. Court of Appeals for the D.C. Circuit (CADC) decision, *Parker v. United States* (1966), addressing whether voluntary intoxication is a defense to assault with a dangerous weapon ("ADW"). 359 F.2d at 1009. The *Parker* court ultimately determined that this District statute does not "require[] an intent that is susceptible to negation through a showing of voluntary intoxication," *Id.* at 1013, a conclusion that, as Judge Ruiz observes, "appears to rest upon the unstated premise that simple assault is a 'general intent' crime." *Buchanan*, 32 A.3d at 997. In order to justify this result in a principled fashion, however, the CADC seems to have been led to hold that ADW simply cannot require proof of subjective culpability. *Id.* at 1012. The CADC's interpretation of the *mens rea* (or lack thereof) applicable to ADW has thereafter been applied by District courts outside of the ADW context to the offense of simple assault. Relying upon "what [was] arguably an over-extension of [the CADC's] opinion in *Parker*," *Buchanan*, 32 A.3d at 1001 n.7, these cases held that because assault is a general intent crime, "there need be no subjective intention to bring about an injury." *Anthony v. United States*, 361 A.2d 202, 206 n.5 (D.C. 1976). In contrast, more recent DCCA cases indicate that the government is requirement to prove that the defendant not only intended to do the acts constituting the assault—akin to a strict liability standard—but also intended to cause (i.e. purposely or knowingly caused) the resulting bodily injury. *See, e.g., Williams v. United States*, 887 A.2d 1000, 1003 (D.C. 2005); *Buchanan*, 32 A.3d at 992.

[45] To determine when voluntary intoxication can negate the culpable mental state requirement governing a given offense, District courts typically ask whether that offense is a "general intent" crime, which does not require "an intent that is susceptible to negation through a showing of voluntary intoxication." *Parker*, 359 F.2d at 1012-13; *see, e.g., Washington*, 689 A.2d at 573. However, at times the DCCA has labeled crimes that require proof of knowledge—a culpable mental state that clearly can be negated by voluntary intoxication—as implicating a "general intent." Consider the crime of carrying a pistol without a license, D.C. Code § 22-4504(a) ("No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon."). Whereas the DCCA "ha[s] repeatedly held [this to be] a general intent crime,"

Sixth, and perhaps most problematic of all, the categorical bar on a voluntary intoxication defense for general intent crimes risks convicting those who are not clearly blameworthy of very serious offenses (e.g., murder).[46]

The intoxication framework in RCC § 22E-209 addresses the above problems through a clear and comprehensive policy framework that is broadly consistent with the DCCA's determinations as to the availability of an intoxication defense. The RCC, like District law, views the overarching relevance of intoxication to be a product of whether it

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Bieder v. United States, 707 A.2d 781, 783 (D.C. 1998), it is also well-established by the DCCA that "a person cannot have the requisite intent to . . . carry[] a pistol without a license . . . unless he or she *knows* that the object he or she is carrying is, in fact, a pistol." *Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992). Possessing knowledge of the nature of an object, no less than intending to cause harm, is a form of subjective culpability that an actor's voluntary intoxication can certainly negate. *See generally* RCC § 22E-209(b)(2) and accompanying Explanatory Notes.

For other so-called general intent crimes, which the DCCA has interpreted to require proof of knowledge as to a circumstance include distribution of narcotics, see *Lampkins v. United States*, 973 A.2d 171, 174 (D.C. 2009), and UUV, see *Carter*, 531 A.2d at 964 n.13.

[46] The intersection between the District's voluntary intoxication principles and the District's depraved heart form of second-degree murder is illustrative. *See* D.C. Code § 22-2103 ("Whoever with malice aforethought . . . kills another, is guilty of murder in the second degree."); *see also* D.C. Code § 22-2104 (second degree murder subject to possible life in prison). Although this version of second-degree murder requires proof that "the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury," *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (*en banc*), the DCCA has deemed depraved heart murder to be a general intent crime, to which an intoxication defense may not be raised. *Wheeler v. United States*, 832 A.2d 1271 (D.C. 2003); *see Davidson v. United States*, 137 A.3d 973 (D.C. 2016) (no intoxication defense available for depraved heart version of voluntary manslaughter either); *see also King v. United States,* 372 F.2d 383, 388 (D.C. Cir. 1967) ("[T]he rule that negatives voluntary intoxication as a defense to crimes . . . like manslaughter in effect holds men responsible for their fateful drinking, without regard to the extent of control at the moment of homicide.") (quoted in *Davidson*, 137 A.3d at 975). This categorical denial of an intoxication defense seems to create a material risk that a minimally culpable actor could be convicted of second-degree murder.

To illustrate, consider the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story District home. Soon thereafter, X's sister, V, makes an unannounced visit to X's home, lets herself in, and then announces that she's going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V's proximity, thereby causing V to fall to her death. Under these circumstances, X seems to be minimally culpable (if culpable at all). For if—as this hypothetical assumes—the sole reason X fatally stumbled into V is because of her earlier decision to consume a large amount of alcohol in the safety of her own home, then X's conduct simply does not manifest any lack of concern for the personal safety of V (or anyone else, for that matter).

And yet, should X find herself in D.C. Superior Court charged with depraved heart murder, she might have a difficult time mounting a meaningful defense given that—as appears to be the case under current District law—evidence of her voluntary intoxication could *not* be presented to negate the "general intent" at issue in this crime. *Compare Carter v. United States*, 531 A.2d 956, 959, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996). For example, the government's affirmative case might focus on the fact that an ordinary, reasonable (presumably sober) person in X's position would have possessed the subjective awareness required to establish depraved heart murder—whereas X might have difficulty persuading the factfinder that she lacked this subjective awareness without being able to point to her voluntarily intoxicated state. *See, e.g.,* Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 200 (1996) (arguing that such an approach, in effect, creates a permissive, but unrebuttable presumption of *mens rea* in situations of self-induced intoxication); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 955 (1999) (arguing that "retain[ing] a *mens rea* requirement in the definition of the crime, but keep[ing] the defendant from introducing evidence to rebut its presence would, in effect, "rid[] the law of a culpability requirement").

precludes the government from proving an offense's culpable mental state requirements beyond a reasonable doubt.[47] At the same time, however, the RCC—again consistent with District law—recognizes a policy-based exception to this principle.[48] Under DCCA case law, this exception depends upon whether a crime is one of general intent, in which case an intoxication defense may not be raised.[49] Under the RCC, in contrast, the subjective awareness required for the culpable mental state of recklessness may be imputed based upon the self-induced intoxication of the actor.

Substantively, there is significant overlap between these two frameworks. Subsections (a), (b), and (c) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, but generally may not be adduced to disprove recklessness or negligence.[50] This roughly corresponds with the common law framework currently employed by the DCCA: the DCCA *typically* associates specific intent crimes—to which an intoxication defense may be raised—with offenses requiring proof of purpose or knowledge,[51] while *typically* associating general intent crimes—to which an intoxication defense may not be raised—with offenses requiring proof of recklessness or negligence.[52]

Importantly, however, this overlap is by no means complete. For example, there are at least a few non-conforming offenses, which do not reflect the above pattern: namely, those offenses that the DCCA has classified as "general intent" crimes, yet also has interpreted to require proof of one or more purpose or knowledge-like mental states.[53] For these non-conforming offenses, adoption of RCC § 22E-209 *could*—but would not *necessarily*—change the availability of an intoxication defense as it currently exists under District law.[54]

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[47] As the District's criminal jury instructions phrase the question facing the fact-finder:

> If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .

D.C. Crim. Jur. Instr. § 9.404.

[48] *See, e.g., Davidson v. United States*, 137 A.3d 973 (D.C. 2016); *Carter*, 531 A.2d at 959.

[49] *See* sources cited *supra* notes 10 and 16-20.

[50] Note, however, that intoxication that is not self-induced may negate the culpable mental state of recklessness under RCC § 22E-209(a). *See* RCC § 22E-209(b)(3).

[51] *See, e.g.*, *McNeil*, 933 A.2d at 363 (quoting *Proctor v. United States,* 85 U.S.App. D.C. 341, 342 (1949)); *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984); *Jones v. United States*, 124 A.3d 127, 130 (D.C. 2015).

[52] *See, e.g., Carter*, 531 A.2d at 962; *Wheeler*, 832 A.2d at 1275; *Ortberg v. United States*, 81 A.3d 303, 306 (D.C. 2013).

[53] Potential non-conforming offenses include: (1) D.C. Code § 22-3215, Unlawful Use of Motor Vehicles, see *Carter*, 531 A.2d at 962 n.13; (2) D.C. Code § 22-3216, Taking Property Without Right, see *Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995); and (3) D.C. Code § 48-904.01(a)(1) Drug Distribution, see *Lampkins v. United States*, 973 A.2d 171, 174 (D.C. 2009).

[54] For example, this outcome can be avoided by applying a mental state of recklessly to the revised version of any non-conforming offense in lieu of the purpose or knowledge-like mental state applicable under current law to that offense. Alternatively, offense-specific exceptions to the principles set forth in RCC § 22E-209 could be made through an individual offense definition. Either way, the effect of this general intoxication provision depends on how each specific offense is revised.

In addition, the RCC approach leaves open the possibility that a person's self-induced intoxication[55] could, under narrow circumstances, be relevant to defending against a recklessness or negligence charge.[56] The rationale is that when, due to a person's self-induced state of intoxication, that person's disregard of a risk is not a gross deviation from the ordinary standard of conduct or care, then it would be disproportionate to impose a criminal conviction for a recklessness or negligence crime.[57] The fact that current District law appears to impose a categorical bar on the presentation of evidence of self-induced intoxication to disprove the existence of comparable mental states, in contrast, creates a risk of imposing liability for serious crimes on minimally culpable (or even non-culpable) actors.[58] RCC § 22E-209 effectively removes this categorical bar in the interests of proportionality.

Adoption of RCC § 22E-209 would also change District law in two other general ways. First, it would effectively resolve many unsettled questions of law. For example, there are hundreds of offenses in the D.C. Code that the DCCA has not classified as either "general intent" or "specific intent" crimes for purposes of the District's law of intoxication (or otherwise).[59] Absent a general intoxication provision, the availability of an intoxication defense for each of these offenses will remain unknown and uncertain, left to the DCCA for resolution on an *ad hoc* basis. Under RCC § 22E-209, in contrast, these issues will be resolved for every offense incorporated into the RCC.

Second, RCC § 22E-209 requires courts to assess the relationship between intoxication and liability on an element-by-element basis. This is in contrast to current District law, which approaches the relationship between intoxication and liability on an offense-by-offense basis—as shown in the DCCA's offense-specific general intent and specific intent rules. Supplanting this offense-level analysis of intoxication issues with an element-level analysis would constitute a break with the DCCA's *method* of determining liability in cases of intoxication—substantive outcomes aside.

Thus, to address the availability of an intoxication defense under the RCC, it will no longer be necessary to rely on the ambiguous and unpredictable distinctions made by

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[55] The phrase "self-induced intoxication," employed in the RCC, mirrors the phrase "voluntary intoxication," as employed in current District law.

[56] *See* RCC § 22E-209(c)-(d) and accompanying Explanatory Notes.

[57] As the Commentary accompanying the RCC definitions of recklessness and negligence observe:

> Because punishment represents the moral condemnation of the community, the imposition of criminal liability can only be justified where a person's risk-taking fails to live up to the community's values—and, therefore, *deserves* to be condemned—under the circumstances. What ultimately renders an actor's disregard of a risk blameworthy, then, is whether it reflects a level of concern or attention for legally-protected interests that is *lower* than what a reasonable member of the community placed in the defendant's situation could be expected to exercise.

RCC §§ 22E-206(c)-(d): Explanatory Notes (internal quotations and footnote call numbers omitted). For illustrations of situations where an actor's self-induced intoxication can negate blameworthiness, see *supra* note 14.

[58] For an illustration of how this could occur, see *supra* note 46.

[59] CCRC staff analysis has identified over 700 criminal statutes scattered throughout the D.C. Code, the majority of which have never been charged in recent years and are of a quasi-regulatory nature. While there are dozens of DCCA opinions determining whether particular offenses are general or specific intent, these judicial determinations address only a small fraction of District crimes.

District courts over the past century as to whether certain offenses are general intent or specific intent crimes. Instead, District courts will only need to consider whether the government is able to meet its affirmative burden of proof as to the culpable mental state requirement governing each offense based upon the standard rules of liability set forth in RCC § 22E-206, or, alternatively, based upon the rule of recklessness imputation set forth in RCC § 22E-209(c). In either case, the ultimate policy decision as to the effect of intoxication will be a legislative decision that is consistently applied and clearly communicated for each revised offense.[60]

RCC § 22E-210. ACCOMPLICE LIABILITY.

Explanatory Notes. Section 210 establishes general principles of accomplice liability applicable throughout the RCC.

The prefatory clause of subsection (a) establishes that accomplice liability is a means of holding one person liable for "the commission of an offense by another." This clarifies that accomplice liability is derivative in nature.[1] That is, a person is not guilty of an independent offense of "aiding and abetting" under the RCC.[2] Rather, an accomplice's liability is derived from the liability of the principal actor.[3]

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[60] RCC § 22E-209(d) defines two important terms in the RCC's intoxication framework, "intoxication," *id.* at § (d)(1), and "self-induced intoxication," *id.* at § (d)(2). These definitions fill gaps in District law, which does not appear to have developed definitions—either through legislation or case law—for these terms in the culpability context.

Current District law has defined "intoxication" and related terminology in contexts where a person's intoxicated state constitutes an objective element of an offense. *See, e.g.,* D.C. Code § 50-2206.01 (defining intoxication and other related terms for traffic offenses); D.C. Code § 50-2206.11 ("No person shall operate or be in physical control of any vehicle in the District: (1) While the person is *intoxicated*; or (2) While the person is under the *influence of alcohol or any drug or any combination thereof*.") (italics added). However, this terminology serves materially distinct functions in these latter contexts, and, therefore, does not provide an appropriate foundation for general culpability definitions.

Conversely, the intoxication-related general culpability definitions incorporated into RCC § 22E-209 should not influence these latter contexts, where a person's intoxicated state constitutes an objective element of an offense. For this reason, the accompanying Explanatory Notes clearly states that these RCC definitions are not intended to have any effect on the meaning of the same or comparable terms when they arise as an objective element in an offense definition.

[1] *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.02 (A)(2) (6th ed. 2012); GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 8.5 (2000); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 337 (1985).

[2] It should be noted, however, that the same conduct and accompanying state of mind which support derivative liability under section 210 may also provide the basis for non-derivative liability under some other provision in the RCC. The relationship between accomplice liability and the general inchoate crime of conspiracy is illustrative. If A purposely agrees to aid P in the commission of a robbery, and that agreement to aid either materializes or simply solidifies P's resolve to commit the robbery (even in the absence of such assistance), then A is responsible for P's robbery under section 210. On these same facts, however, A also appears to satisfy the requirements for the general inchoate crime of conspiracy (to commit robbery) under section 303. *See* RCC § 22E-303.

[3] Throughout this commentary, reference is made to "accomplices" and "principals." These labels are primarily employed for explanatory purposes. That is, they provide a useful means of distinguishing between: (1) legal actors who culpably commit the physical acts that constitute an offense (principals); and (2) legal actors who culpably aid or encourage those physical acts (accomplices). *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.2 (3d ed. Westlaw 2019). For the most part, the difference between an accomplice and the principal will be immaterial for liability purposes under the RCC. *But see* RCC § 22E-210(b) (rule of culpable mental state elevation governing circumstance elements of target offense). And in

The derivative nature of accomplice liability has two main implications. First, an accomplice may only be held criminally responsible under section 210 upon proof that the principal actor in fact committed "an offense." This reference to "an offense" includes general inchoate crimes, such as a criminal attempt, solicitation, or conspiracy, all of which may serve as the basis for accomplice liability.[4] Second, an accomplice may be both prosecuted and—contingent upon such proof—punished under section 210 as if he or she were the principal offender.[5]

Paragraphs (a)(1) and (a)(2) establish two alternative means of satisfying the conduct requirement of accomplice liability: by rendering assistance and by offering encouragement.[6] The assistance prong extends to both direct participation in the

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any event, because section 210 authorizes a defendant to be convicted of an offense based on conduct committed by another person, the RCC effectively eliminates the "obscure and technical distinctions between principals and accessories," which historically "derail[ed] prosecutions for reasons unrelated to the merits" at common law. *Brooks v. United States*, 599 A.2d 1094, 1098–99 (D.C. 1991) ("If the defendant were charged as a principal [at common law], he could not be convicted upon proof that he was an accessory. Likewise, one charged only as an accessory could not be convicted if the evidence established that he was instead a principal."); *see, e.g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.1 (Under the "modern approach" to accomplice liability, "a person guilty by accountability is guilty of the substantive crime itself and punishable accordingly."); *compare* D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").

[4] In practice, this means that accomplice liability can be based on purposely assisting or encouraging an unsuccessful principal who makes enough progress towards his or her criminal objective to satisfy the requirements of an attempt, solicitation, or conspiracy. The following situation is illustrative. A purposely assists P with the planning of a bank robbery that P is to commit by himself, while also volunteering to serve as P's get away driver. However, as P enters the bank (with A waiting in the parking lot), the police—who have been alerted to the plan by a third party—intervene, arresting P just as he begins to remove a weapon from his coat. On these facts, P satisfies the requirements of liability for the general inchoate crime of attempted robbery. *See* RCC § 22E-301(a) (attempt liability based on intent to commit target offense and dangerous proximity to completion). For this reason, A is—given his purposeful assistance—also liable for attempted robbery on a complicity theory of liability.

This outcome, which involves *aiding an attempt*, is to be distinguished from the outcome in situations that involve *attempts to aid*. Under the RCC, an unsuccessful accomplice who tries, but ultimately fails, to provide the principal with *any aid or encouragement at all* is not subject to liability under section 210, regardless of the principal's ultimate success (and concomitant criminal liability). *See infra* notes 17-18 and accompanying text (addressing treatment of unsuccessful accomplices under the RCC).

[5] This is not to say that sentencing courts *ought* to impose the same sentences upon accomplices and principals as a matter of judicial sentencing discretion. Accomplices are often materially less blameworthy than principals, and, where this is the case, there exists strong support for imposing proportionately less severe sentences that account for relevant distinctions in culpability. *See, e.g.,* Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1222 & n.108 (2017) (highlighting "continuous, graduated judgments of relative blameworthiness expressed in both public opinion surveys and scholarly literature" on the punishment of accomplices); *see also* D.C. VOLUNTARY SENTENCING GUIDELINES § 5.2.3(4) (listing, as a mitigating factor, that "[t]he offense was principally accomplished by another, and the defendant manifested extreme caution or sincere concern for the safety and well-being of a victim").

[6] The categories of assistance and encouragement frequently overlap since knowledge that aid will be given can influence the principal's decision to go forward. Kadish, *supra* note 1, at 342-43. However, there remains an important analytic difference between the two: whereas assistance is subject to criminal liability because of the accomplice's *material contribution* to the principal's *execution* of a crime, encouragement is

commission of a crime and any support rendered in the earlier, planning stages.[7] Typically, the assistance prong will be satisfied by conduct of an affirmative nature[8]; however, an omission to act also provides a viable basis for accomplice liability, provided that the defendant is under a legal duty to act[9] and the other requirements of liability are met.[10] The encouragement prong speaks to the promotion of an offense by psychological influence.[11] It extends to various forms of influence, including (but not limited to) the rational or emotional support afforded by a command, request, or agreement, advice or counsel, and instigation, incitement, or provocation.[12]

To satisfy the conduct requirement of accomplice liability under paragraphs (a)(1) and (a)(2), it is not necessary that the principal actor have been subjectively aware of the effect of the accomplice's assistance or encouragement. However, the accomplice's conduct must have actually assisted or encouraged the principal in some non-trivial way.[13]

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subject to criminal liability because of the accomplice's *psychological contribution* to the principal's *decision* to commit a crime. *Id.*

[7] *E.g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[8] Illustrative examples of affirmative acts of assistance in support of a bank robbery include: (1) furnishing the principal with the means of committing a bank robbery (e.g., by providing guns, money, supplies or other instrumentalities); or (2) helping the principal with the preparation or execution of the crime (e.g., planning out the details, serving as a lookout, driving the getaway car, signaling the approach of the security guard, or preventing a warning from reaching the security guard). *E,g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[9] *See generally* RCC § 22E-202(c) (proscribing general principles of omission liability).

[10] For example, if A, a corrupt police officer, purposely fails to stop a bank robbery committed by P, based upon P's promise to provide A with a portion of the proceeds, A may be deemed an accomplice to the robbery. Similarly, if A, a parent, purposely fails to prevent the sexual assault of her young child by P, A's boyfriend, based upon P's promise to marry A for allowing it to happen, A may be deemed an accomplice to the sexual assault. *E,g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[11] The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P's reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V lodged against A a few days earlier. If P proceeds to kill V, A is guilty of murder as P's accomplice under section 210 based on A's purposeful encouragement.

[12] These pathways of influence may, in turn, be communicated directly or by an intermediary, through words or gestures, via threats or promises, and occur either before or at the actual time the crime is being committed. It is therefore, immaterial, for purposes of accomplice liability, whether the encouragement is communicated orally, in writing, or through other means of expression. *E,g.,* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

[13] *See, e.g.,* Eric A. Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 110–11 (2005) (The "words used to define the scope of accomplice liability"—namely, assistance and encouragement—"contain an implicit requirement that the defendant's words or actions contribute somehow to the criminal venture."). However, an accomplice's contribution to a criminal venture need not be substantial or even causally necessary to satisfy the assistance or encouragement prongs under RCC § 22E-210(a). *See, e.g.,* DRESSLER, *supra* note 1, at § 30.06 ("The prosecution is not required to establish that the crime would not have occurred but for the accessory or that the accomplice contributed a substantial amount of assistance.").

To appreciate the import of this actual assistance or encouragement requirement, consider (again) the relationship between accomplice liability and the general inchoate crime of conspiracy. *See supra* note 2. A's purposeful agreement to aid P in the commission of a crime provides the basis for a conspiracy conviction even where the promise to help goes unfulfilled, provided that P "engages in an overt act in furtherance of the agreement," RCC § 22E-303(a), and A does not meet the relatively stringent requirements for a renunciation defense under RCC § 22E-306. In contrast, that same unfulfilled agreement to aid will only provide the basis for holding A responsible for P's conduct as an accomplice if its formation bolstered P's criminal resolve, and, therefore, *actually encouraged* P to commit the target offense under RCC § 22E-

This means that an unsuccessful accomplice—i.e. one who *attempts* to aid or encourage the principal but fails to promote or facilitate the target offense in any way—is not subject to liability under section 210.[14]

Paragraphs (a)(1) and (a)(2) also clarify that the requisite assistance or encouragement must be accompanied by a purpose to facilitate or promote the principal's criminal conduct.[15] This "purposive attitude" constitutes the foundation of the culpability required for accomplice liability.[16] It can be said to exist when a person, in rendering assistance or encouragement, *consciously desires* to facilitate or promote another person's criminal conduct.[17]

210(a)(2). *Compare* DRESSLER, *supra* note 1, at § 30.09(B)(1)(d) ("In most cases, [A]'s agreement to aid in the commission of an offense serves as encouragement to P and, therefore, functions as a basis for common law accomplice liability."), *with* Model Penal Code § 2.06(3) (a)(ii) (accomplice liability applies to one who "*agrees* . . . to aid [an]other person in planning or committing of an offense").

[14] For example, where A attempts to assist P by opening a window to allow P to enter a dwelling unlawfully, but P (unaware of the open window) enters through a door, A is *not* an accomplice to P's trespass. Likewise, if A utters words of encouragement to P who fails to hear them, but nevertheless proceeds to enter the dwelling unlawfully anyways, A is *not* an accomplice to P's trespass. *Compare* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 (1983) ("At common law, an unsuccessful attempt to aid, one that was unknown to the perpetrator and that neither encouraged nor assisted him, would not support accomplice liability."), *with* Model Penal Code § 2.06(3) (a)(ii) (accomplice liability applies to one who "*attempts* to aid [an]other person in planning or committing of an offense") (italics added).

[15] *But see* LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2(c) ("This is not to suggest, however, that an accomplice can escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[16] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*) ("[T]hroughout centuries of common law," the definitions of complicity "have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; . . . . [T]hey all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, "abet"-carry an implication of purposive attitude towards it.") (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)); *see, e.g., Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) (quoting *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949)).

[17] *See generally* RCC § 22E-206(a) (purposely defined). The following scenario is illustrative. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature. Having been informed of this, P offers to purchase A's car for market value. A rejects the offer, but counters with an arrangement wherein A will give P his car in return for a ten percent stake in the profits. P agrees to this arrangement, and, subsequently completes the bank robbery with P's vehicle. However, the next day, both P and A are arrested by the police, who access security camera footage of both P and A's vehicle in the bank's parking lot. On these facts, A can be held liable for robbery as an accomplice to P's crime because, *inter alia*, A consciously desired to facilitate and promote P's criminal conduct.

That an accomplice must have the purpose to facilitate or promote the principal's criminal conduct does not preclude convictions for recklessness and negligence-based theories of liability concerning the result elements of the target offense, provided that the defendant acts with both the requisite purpose and the "culpability required for the [target] offense," RCC § 22E-210(a). The following example is illustrative. Passenger A tells driver P to exceed the legal speed limit so that they can both get to a party on time, notwithstanding the fact that they're currently driving through a school zone in the middle of the day. P is responsive to the request and quickly steps on the gas. Soon thereafter, P loses control of his car and fatally crashes into V, a nearby child leaving school for the day. Under these circumstances, P can be convicted of reckless homicide provided that: (1) P was aware of a substantial risk of death to V; and (2) that P's disregard of that risk was a gross deviation from the standard of conduct that a reasonable individual would follow.

The corollary to this purpose requirement is that accomplice liability is not supported under section 210 if the defendant's primary motive was to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[18] And this is so even if the would-be accomplice knew that his or her aid or encouragement was likely to promote or facilitate that criminal scheme.[19] Neither awareness of, nor indifference towards, the success of another person's criminal plans is sufficient to satisfy the purpose requirement incorporated into paragraphs (a)(1) and (a)(2).[20]

Along similar lines, A could be also be convicted of reckless homicide on a complicity theory provided that: (1) A consciously desired to encourage P to speed through the school zone; (2) A was aware that speeding through the school zone created a substantial risk of death to V; and that (3) A's disregard of that risk was a gross deviation from the standard of conduct that a reasonable individual would follow. *See* RCC § 22E-206(c)(1) (definition of recklessness as to result elements). A comparable analysis would govern a negligent homicide charge brought against A under a complicity theory. The only difference is that the government would not need to prove that A was actually aware of a substantial risk of death to V; instead, proof that A *should* have been aware of such a risk would suffice. *See* RCC § 22E-206(d)(1) (definition of negligence as to result elements).

[18] *See, e.g., United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Kadish, *supra* note 1, at 353 (absent purpose requirement, complicity would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 2.06 cmt. at 312 & n.42, 314-19 (purpose requirement appropriate because, *inter alia*, "there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent").

[19] It has been observed that:

> Often, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation. But there are many and important cases where this is the central question in determining liability. A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in commission of a crime. A doctor counsels against an abortion during the third trimester but, at the patient's insistence, refers her to a competent abortionist. A utility provides telephone or telegraph service, knowing it is used for bookmaking. An employee puts through a shipment in the course of his employment though he knows the shipment is illegal. A farm boy clears the ground for setting up a still, knowing that the venture is illicit.

Model Penal Code § 2.06 cmt. at 316. In each of these situations, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed." DRESSLER, *supra* note 1, at § 27.07. However, in the absence of a purposive attitude towards the customer's criminal objective, the seller's mere awareness of probable illegal activity will not suffice for accomplice liability. *Id.*; *see, e.g.,* Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000) (purpose requirement reflects majority approach).

[20] To illustrate, consider the following modified version of the scenario presented *supra* note 21. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature. Having been informed of this, P offers to purchase A's car for market value. A accepts the offer to sell his car for market value because A was already planning to sell the vehicle, so accepting P's offer will save A the effort of having to list it on his own. However, A thinks the bank robbery is a stupid idea, and tells P this much. P ignores A's advice and soon thereafter proceeds to carry out the bank robbery with P's vehicle. The next day, both P and A are arrested by the police, who access security camera footage of both P and A's vehicle in the bank's parking lot. On these facts, A cannot be held liable for robbery as an accomplice to P's crime because, *inter alia*, A did not consciously desire to

Paragraphs (a)(1) and (a)(2) also clarify that accomplice liability requires that the defendant "acts with the culpability required for that offense."[21] Pursuant to this principle, a defendant may not be held liable as an accomplice under section 210 absent proof that he or she acted, in fact, with, at minimum, the culpable mental state(s)—in addition to any other broader aspect of culpability[22] —required to establish that offense.[23]

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facilitate or promote P's criminal conduct. (Instead, A's purpose was to save himself the hassle of having to list and sell the vehicle on his own.) That A knew the sale of his car to P would facilitate the bank robbery, and was arguably indifferent as to P's criminal conduct, would not support liability under section 210.

[21] *See, e.g.,* DRESSLER, *supra* note 1, at § 30.05(A)(1) (It is well-established that "to be an accomplice, a person 'must not only have the purpose that someone else engage in the conduct which constitutes the particular crime charged, *but the accomplice must also share in the same intent which is required for commission of the substantive offense*.") (quoting *State v. Williams*, 718 A.2d 721, 723 (N.J. Super. Ct. Law Div. 1998)) (italics added); LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2(c) ("The prevailing view is that the accomplice must also have the mental state required for the crime of which he is to be convicted on an accomplice theory.").

[22] The term "culpability required" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(e) (culpability required defined). For example, if the offense aided or abetted requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201(e)(3) ("'Culpability required' includes . . . Any other aspect of culpability specifically required for an offense."); *id.*, at Explanatory Notes (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, accomplice liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(e)(1) (voluntariness requirement also part of culpability required for an offense). For additional principles governing the culpable mental state requirement of accomplice liability, see *infra* notes 19–32 and accompanying text.

[23] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the assistance or encouragement at issue in all complicity prosecutions. *See infra* notes 19-24 and accompanying text. Generally speaking, accomplice liability entails proof that the accused: (1) "intended" to assist or encourage conduct planned to culminate in an offense; and (2) "intended," through that assistance or encouragement, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.,* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994); Kadish, *supra* note 1, at 349. The following scenario illustrates how these "dual intent" requirements fit together. DRESSLER, supra note 1, at § 30.05.

In this example, police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P's plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the building, only to observe an individual, A, with a large collection of packages blocking the front entrance to the building. The officers' entry into the building is delayed due to A's blockage, which in turn enables P to successfully carry out the assassination. If A later finds herself in D.C. Superior Court charged with aiding the murder of a police officer committed by P, can she be convicted as an accomplice? The answer to this question depends upon whether A's state of mind fulfills both of the dual intent requirements governing accomplice liability.

For example, if A was blocking the entrance to the building because she accidentally dropped her packages, then neither requirement is met: A did not intentionally assist the conduct of P which, in fact, resulted in the death of a police officer; nor did A act with the intent that, through her assistance, a police officer be killed.

Alternatively, if A was blocking the entrance to the building because P, posing as a janitor, had asked A to stop anyone from entering the building so that a damaged television could quickly be unhinged, the first requirement is met: A intentionally assisted the conduct of P which, in fact, resulted in the death of a police officer. But the second requirement is not met: A did not intend, through her assistance, to cause the death of anyone, let alone a police officer.

Subsection (b) provides additional clarity concerning the relationship between accomplice liability and the culpability required for the target offense. Whereas the prefatory clause of subsection (a) broadly clarifies that accomplice liability entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "actor must intend for all circumstance elements required by the offense to exist." The latter requirement incorporates a principle of culpable mental state elevation applicable whenever the target offense is comprised of a circumstance element that may be satisfied by proof of a non-intentional mental state (i.e. recklessness or negligence), or none at all (i.e. strict liability).[24] To satisfy this threshold culpable mental state requirement, the government must prove that the defendant's assistance or encouragement was accompanied by a *practically certain belief* that the circumstance elements incorporated into the target offense existed, or, alternatively, that the defendant *consciously desired* for the requisite circumstances to exist.[25]

Subsection (c) addresses the appropriate disposition of complicity prosecutions involving the commission of an offense that is graded by distinctions in culpability as to result elements.[26] In this situation (most common in homicide prosecutions), an

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Lastly, if A was blocking the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both requirements: A acted with both the intent to facilitate P's conduct and the intent that, through her assistance, a police officer be killed. (Note, however, that if A intended to kill V but lacked awareness that V was still a police officer, then the second intent requirement would not be met: although A intended to kill V, A did not intend to kill a *police officer*.) *See generally* Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 135–36 (2015) (developing similar hypothetical and comparable analysis).

[24] *See, e.g., Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime…. That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense."); *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 589 (1st Cir. 2015) ("[U]nder *Rosemond*, an aider and abettor of [the crime of producing child pornography] must have *known* the victim was a minor" although the victim's age is a matter of strict liability for the target offense). For those target offenses that already require proof of intent, knowledge, or purpose as to a circumstance element, subsection (b) does not elevate the applicable culpable mental state.

[25] *See generally* RCC §§ 22E-206(a)(2) and (b)(2) (defining purposely and intentionally as to circumstance elements). The following scenario involving two thirty year-old males, A and P, is illustrative. A lets P borrow his bedroom to engage in consensual sex with V, a fourteen year-old minor, who P mistakenly believes to be twenty-one and, crucially, who A has never met. Thereafter, P and V have sex in A's room. If P is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, P can be convicted notwithstanding his mistake of fact. However, the same mistake of fact would exonerate A under subsection (b) notwithstanding the strict liability nature of the target offense. Although A purposely assisted P with his sexual rendezvous with V, A lacked the *intent* to facilitate sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

[26] The requirement in subsection (c) that the target "offense" be "graded by distinctions in culpability as to result elements" should be broadly construed to support convictions for greater and lesser-included versions of the same substantive offense. This should be done, moreover, even where the relevant criminal statutes are neither (1) formally described in the RCC as distinct degrees of the same offense, nor (2) codified in the same statutory provision. To illustrate, consider the overlapping, hierarchically related offenses of first-degree murder, second-degree manslaughter, and negligent homicide. These three offenses are *not* formally described as distinct degrees of the same offense (e.g., homicide) under the RCC, and each is codified in a different section of the code. *See generally* RCC §§ 22E-1101, 1102, and 1103. However, because all three

accomplice is liable for any grade for which he or she possesses the culpability required, although the person who committed the offense acted with a different kind of culpability.[27] Consequently, an accomplice may be convicted of a grade of an offense that is either higher[28] or lower[29] than that committed by the principal actor based upon distinctions between the two (or more) actors' states of mind.

Subsection (d) specifies that an accomplice may be charged as a principal, and is subject to the same maximum penalties as a principal. Under this subsection, an indictment does not need not include a charge of aiding and abetting in order for the theory to be presented to the jury.[30] However, although an accomplice may be *charged* as a principal, accomplice liability still requires that the government proves the requirements for accomplice liability set forth under this section beyond a reasonable doubt. In addition, although an accomplice is subject to the same maximum penalties as the principal, in some cases it may be appropriate for an accomplice to receive a different sentence than the principal.

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of these homicide statutes are graded by distinctions in culpability as to the same result element (death), RCC § 22E-210(c) would authorize the imposition of liability for (among other possibilities) the following in a three person criminal scheme: (1) first-degree murder upon P; (2) second-degree manslaughter on A1; and (3) negligent homicide on A2. *See, e.g.,* DRESSLER, *supra* note 1, at § 30.6 ("It is fair to say [] that when P commits the 'offense' of criminal homicide, this 'crime' is imputed to [A], whose own liability for the homicide should be predicated on his own level of *mens rea*, whether it is greater or less than that of the primary party."); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 386–87 (1997) (same).

[27] This means that (for example):

> To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2(c).

[28] Consider the following scenario: A gives P a knife and encourages P to throw it at V from a distance. If P is intoxicated, and opts to throw the knife for the thrill of it, P may only be reckless if it ultimately hits/kills V. Nevertheless, A may have concocted the scheme with premeditation/intent. On these facts, A can be convicted of assisting a homicide with the mental state necessary for first-degree murder (i.e. intent/absence of mitigating circumstances), although P can only be convicted of acting with the mental state necessary for second-degree manslaughter (i.e. recklessness).

[29] Consider again the following scenario: A gives P a knife and encourages P to throw it at V from a distance. If A is intoxicated and encourages P to throw the knife for the thrill of it, A may only be reckless if P ultimately hits/kills V. Nevertheless, P may have thrown the knife with premeditation/intent to kill. On these facts, A can be convicted of assisting a homicide with the mental state necessary for second-degree manslaughter (i.e. recklessness), in a case where P can be convicted of acting with the mental state necessary for first-degree murder (i.e. intent/absence of mitigating circumstances).

[30] *E.g., Price v. United States*, 813 A.2d 169, 176 (D.C. 2002) (citing *Head v. United States*, 451 A.2d 615, 626 (1982)).

Subsection (e) addresses the relationship between the prosecution of the accomplice and the treatment of the principal actor's criminal conduct.[31] The provision establishes that the legal disposition of the principal actor's situation is generally immaterial to that of the accomplice.[32] This includes the fact that the principal actor has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted. In addition to the language in subsection (d), RCC § 22E-216 establishes that an actor can be liable as an accomplice even if the principal actor is under the age of 12 years and is not subject to criminal liability under the RCC.

Section 210 has been drafted in light of, and should be construed in accordance with, prevailing free speech principles. Given the centrality of speech to encouragement, accomplice liability directly implicates a criminal defendant's First Amendment rights.[33] And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[34] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[35] The RCC respects this distinction by requiring that the defendant encourage the principal actor to engage in "*specific* conduct" constituting an offense under paragraph (a)(2).[36] To meet this requirement, it is not necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. At the very least, though, it must be proven that the defendant's communication, when viewed in the context of the knowledge and position of the planned recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[37]

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[31] *See, e.g.,* Model Penal Code § 2.06(7) ("An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.").

[32] *See, e.g., Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 & 1256 (D.C. 1995) (citing, *inter alia*, *Standefer v. United States*, 447 U.S. 10, 14–20 (1980) and *Branch v. United States,* 382 A.2d 1033, 1035 (D.C. 1978)); Model Penal Code § 2.06(7) cmt. at 327-28.

[33] *See, e.g.,* DRESSLER, *supra* note 1, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

[34] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949)).

[35] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

[36] *See, e.g.,* Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if," *inter alia*, he or she "*solicits* such other person to commit it[.]") (italics added); Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "*encourages* . . . another person to engage in *specific conduct* that would constitute such crime . . .") (italics added).

[37] *E.g.,* Model Penal Code § 5.02 cmt. at 376; LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 11.1. So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy the encouragement prong of accomplice liability. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to "go out and revolt." *State v. Johnson*, 202 Or. App. 478, 483 (2005); *see generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

Section 210 is intended to preserve existing District law relevant to accomplice liability to the extent it is consistent with the RCC's statutory text and accompanying commentary. Subsections (a), (b), (c), and (d) therefore incorporate existing District legal authorities whenever appropriate.[38]

Relation to Current District Law. Section 210 codifies, clarifies, and fills gaps reflected in District law on the culpable mental state requirement and conduct requirement for accomplice liability, as well as the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense.

The D.C. Code addresses accomplice liability through section 22-1805, which establishes that:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.[39]

This statute "was enacted by Congress in 1901, eight years before its federal analogue."[40] It was the product of a "reform movement," the purpose of which was to enact complicity legislation "abolish[ing] the distinction between principals and accessories and render[ing] them all principals."[41] While the general purpose sought to be

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[38] This includes all existing District law relevant to the procedural aspects of accomplice liability, such as, for example: (1) charging, *Murchison v. United States*, 486 A.2d 77 (D.C. 1984); (2) jury instructions, *Dickens v. United States*, 163 A.3d 804 (D.C. 2017); (3) juror unanimity, *Tyler v. United States*, 495 A.2d 1180 (D.C. 1985); and (4) evidentiary considerations, *Brooks v. United States*, 599 A.2d 1094 (D.C. 1991). *See generally* D.C. Crim. Jur. Instr. § 3.200.

[39] D.C. Code § 22-1805. This statute is to be distinguished from D.C. Code § 22-1806, the District's criminal statute addressing "accessories after the fact." That statute reads:

> Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than 1/2 the maximum fine or imprisonment, or both, to which the principal offender may be subjected.

D.C. Code § 22-1806. This statute reflects the "modern view" that an accessory after the fact "is not truly an accomplice in the crime," i.e. "his offense is instead that of interfering with the processes of justice and is best dealt with in those terms." LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. §§ 13.3, 13.6.

[40] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*); *see also Hackney v. United States*, 389 A.2d 1336, 1342 (D.C. 1978) ("Our aiding and abetting statute does not differ substantially from its federal counterpart."). The original federal aiding and abetting federal statute, initially codified in 18 U.S.C. § 550, provided that "[w]hoever directly commits an act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." The current federal statute, 18 U.S.C. § 2, states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

[41] *Dickens v. United States*, 163 A.3d 804, 818 (D.C. 2017) (quoting *Standefer v. United States*, 447 U.S. 10, 18 (1980) and *Tann v. United States*, 127 A.3d 400, 438 n.19 (D.C. 2015)). As the DCCA in *Brooks v. United States* observed:

achieved by this statute are clear, its precise contours are more ambiguous. The District's general complicity statute—like its federal analogue—does not define any of the relevant statutory terms it employs. This statutory silence has effectively delegated to District courts the responsibility to establish the elements of accomplice liability.

Consistent with the interests of clarity and consistency, subsections (a), (b), (c), and (d) translate existing principles governing the conduct requirement and culpable mental state requirement of accomplice liability, as well as the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense, into a detailed statutory framework. In so doing, these provisions also fill gaps in the District law of complicity.

A more detailed analysis of District law and its relationship with subsections (a), (b), (c), and (d) is provided below. It is organized according to three main topics: (1) the conduct requirement; (2) the culpable mental state requirement; and (3) the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense.

RCC § 22E-210(a): Relation to Current District Law on Conduct Requirement. RCC § 22E-210(a) codifies, clarifies, and fills gaps in District law relevant to the conduct requirement of accomplice liability.

It is well established in the District that *merely intending* to promote or facilitate an offense perpetrated by another is an insufficient basis for accomplice liability; rather, to be held liable as an accomplice, one must have engaged in conduct that in some way contributed to the commission of that offense.[42] At the same time, the essential characteristics of this required contribution are described in a variety of ways.

For example, the District's general complicity statute utilizes a number of terms to express the conduct requirement of complicity: "*advising*, *inciting*, or *conniving* at the offense, or *aiding* or *abetting* the principal offender."[43] The first three terms in this

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> The common law was burdened with obscure and technical distinctions between principals and accessories, and these refinements had the potential for derailing prosecutions for reasons unrelated to the merits. If the defendant were charged as a principal he could not be convicted upon proof that he was an accessory. Likewise, one charged only as an accessory could not be convicted if the evidence established that he was instead a principal. A great deal could depend on the skill and artistry of the pleader.

599 A.2d 1094, 1098–99 (D.C. 1991) (internal quotations and citations omitted).

[42] *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016) ("Acting with the intent that a knife be used unlawfully does not in and of itself automatically satisfy the requirement that the accomplice himself do something to further the carrying of the knife by the principal. The accomplice may mentally intend for the knife to be used but may not do anything to assist the principal with the carrying and use of the knife."); D.C. Crim. Jur. Instr. § 3.200 ("For [^] [name of defendant] to be guilty of aiding and abetting the offense of [^] [insert possessory firearm offense], the government must prove beyond a reasonable doubt [both that s/he aided and abetted the commission of [^] [insert name of crime of violence or dangerous crime] and also] that s/he aided and abetted the possession of a firearm. To aid and abet the possession of a firearm, [^] [name of defendant] must have engaged in some affirmative conduct to assist or facilitate the principal's possession of a firearm.]"); *see, e.g., Walker v. United States*, 167 A.3d 1191, 1202 (D.C. 2017) (analyzing whether defendant "encouraged or aided the commission of [the victim's] murder with malice aforethought").

[43] D.C. Code § 22-1805.

formulation—"advising," "inciting," and "conniving" rarely show up in the case law.[44] Nevertheless, their meaning, when viewed in historical context, is clear enough: they indicate that one may become an accomplice without being "personally present at the commission" of a crime.[45] Instead, as many modern criminal codes phrase it, "solicitation of the crime is enough."[46]

More typical under District law is judicial reliance on the statute's "aiding" or "abetting" language.[47] The standard formulation for accomplice liability, endorsed by the DCCA's *en banc* opinion in *Wilson Bey* and captured in the Redbook jury instructions, requires proof that the defendant "knowingly associated [himself or herself] with the commission of the crime, that [he or she] participated in the crime as something [he or she] wished to bring about, and that [he or she] intended by [his or her] actions to make it succeed."[48] Textually speaking, this formulation intertwines the culpable mental state requirement and conduct requirement of accomplice liability together; it is, therefore, not a model of clarity.

More helpful, then, is the DCCA's repeated observation that "one can be found guilty of aiding and abetting by merely encouraging or facilitating a crime."[49] This statement articulates the widely endorsed principle—reflected both inside and outside the

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[44] *See generally* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 135 (2005).

[45] *Maxey v. United States*, 30 App. D.C. 63, 72 (D.C. Cir. 1907); *see, e.g., Thompson v. United States*, 30 App. D.C. 352, 364 (D.C. Cir. 1908) ("By the common law, all persons who command, advise, instigate, or incite the commission of an offense, though not personally present at its commission, are accessories before the fact, and the object of the aforesaid section was to make all such persons principal offenders. For reasons of public policy it obliterated the common-law distinction between accessories before the fact and principals."); *Tomlinson v. United States*, 93 F.2d 652, 655 (D.C. Cir. 1937) ("It was not the contention of the government in this case that Tomlinson was physically present at the time and place of the offense, but that he was guilty as a principal, nevertheless, under section 908 of the D.C. Code 1924 . . . The issue in dispute was whether, prior to the robbery, Tomlinson had advised, incited, connived at, aided, or abetted the commission of the offense."). Nor, pursuant to such language, is it "essential that there be any direct communication between the actual perpetrator and the person aiding and abetting." *Williams v. United States*, 190 A.2d 269, 270 (D.C. 1963) (citing *Maxey*, 30 App.D.C. at 72–73; *Ladrey v. United States*, 155 F.2d 417, 420 (D.C. Cir. 1946)).

[46] LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2 n.10 (collecting statutory authorities); *see also Tann*, 127 A.3d at 505 (defining "incitement" in the field of criminal law as "[t]he act of persuading another person to commit a crime") (quoting BLACK'S LAW DICTIONARY 880 (10th ed. 2014)); *cf. United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States,* 196 F.2d 573, 580 (D.C. Cir. 1952)). With respect to conspiracy, the DCCA has observed that: "Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy." *Tann*, 127 A.3d at 491 (quoting *Pereira v. United States,* 347 U.S. 1, 11, 74 S.Ct. 358, 98 L.Ed. 435 (1954)).

[47] *See also* David Luban, *Contrived Ignorance*, 87 GEO. L. REV. 957, 964 (1999) ("Supervisors implicitly or explicitly encourage their subordinates to meet their targets by any means necessary. That's abetting. Supervisors provide assistance and resources. That's aiding.").

[48] *Wilson-Bey*, 903 A.2d at 825; D.C. Crim. Jur. Instr. § 3.200.

[49] *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); *Settles v. United States*, 522 A.2d 348, 356 (D.C. 1987).

District—that aider and abettor liability encapsulates two independently sufficient categories of conduct: *physical assistance* and *psychological encouragement*.[50]

The following cases are illustrative of the breadth of these alternative requirements under current District law.[51] In *Price v. United States*, the DCCA upheld a conviction for theft premised on a complicity theory where the defendant took an item off the shelf at a hardware store, and thereafter carted it over to the principal—located within the store—who then tried to make a fraudulent return.[52]

In *Wesley v. United States*, the DCCA upheld a conviction for armed robbery premised on a complicity theory where the defendant merely engaged in a conversation with a bystander that enabled the principal to "slip into the barbershop" that was ultimately robbed, and perhaps also "serv[ed] as a lookout" for the principal.[53]

And in *Creek v. United States*, the DCCA upheld a conviction for armed robbery premised on a complicity theory based on the mere fact that the defendant was with the robber immediately before the robbery, retraced his steps back to the victim's home, stationed himself by her front gate while his companion seized her purse, and fled with the thief with whom he remained until caught by the police.[54]

One issue relevant to the conduct requirement of accomplice liability upon which District law appears to be silent is whether assistance by omission can, under appropriate circumstances, suffice for liability. For example, may a corrupt police officer who fails to stop a crime with the intent to aid the perpetrators be deemed an accomplice to that crime? There does not appear to be any DCCA case law directly on point.[55] Nevertheless, general

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[50] *See Walker v. United States*, 167 A.3d 1191, 1201–02 (D.C. 2017) (noting the alternative requirements of "encouragement or aid"); *Tann*, 127 A.3d at 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2); *see also Tann*, 127 A.3d at 499 n.8 ("Nor has the government been able to find any case, from any jurisdiction, holding a defendant liable as an aider and abettor for the independent criminal act of another that the defendant did not intentionally encourage or assist in some way."); *cf. English v. United States*, 25 A.3d 46, 53–54 (D.C. 2011) ("This is not a case, for example, in which 'there appears to be some indication in the record before us that [Anderson] may have *urged or directed* the driver to take evasive action.'") (quoting *United States v. Cook,* 181 F.3d 1232, 1235 (11th Cir. 1999)).

[51] It is well established under DCCA case law that "[a]lthough mere presence at the scene is not enough to establish guilt under an aiding and abetting theory," little more than such presence is necessary. *Porter v. U.S.*, 826 A.2d 398, 405 (D.C. 2003); *see Settles,* 522 A.2d at 357 ("[M]ere presence at the scene of the crime, without more, is generally insufficient to prove involvement in the crime, but it will be deemed enough if it is intended to [aid] and does aid the primary actors."); *Bolden v. United States*, 835 A.2d 532, 538–39 (D.C. 2003); *compare Perry v. United States,* 276 A.2d 719 (D.C. 1971) (mere presence), *with Forsyth v. United States,* 318 A.2d 292 (D.C. 1974) (presence coupled with flight and other circumstances).

[52] *Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

[53] *Wesley v. United States*, 547 A.2d 1022, 1026–27 (D.C. 1988).

[54] *Creek v. United States*, 324 A.2d 688, 689 (D.C. 1974); *see In re A.B.H.,* 343 A.2d 573, 575 (D.C. 1975) (sufficient evidence of aiding and abetting where defendant had a close association with co-respondent prior to and after the purse snatching, defendant was present very near the scene of the crime, and fled from the scene with the co-respondent); *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) ("[T]he jury could reasonably have found that appellant had participated in planning the robbery, driven his friends across town to the robbery site, waited for them while they robbed the decedent, and then picked them up after the crime. This evidence was sufficient to support the conviction of appellant as an aider and abettor of the robbery.").

[55] Note, however, that the commentary to the D.C. Criminal Jury Instruction on attempt liability, § 7.101, states that:

District authority on omission liability would seem to support imposing liability under these circumstances.[56] So too does the fact that the DCCA has held on multiple occasions that "failure to disassociate" oneself from a criminal scheme alongside "tacit approval" to the offenses perpetrated by the principal will suffice to satisfy the conduct requirement of accomplice liability.[57]

Subsection (a) codifies the above District authorities applicable to the conduct requirement of accomplice liability. More specifically, subsections (a)(1) and (a)(2) establish two alternative means of being an accomplice: by rendering assistance and by offering encouragement.[58] The first prong will most frequently be established by proof of physical assistance rendered by affirmative conduct; however, an omission to act may also provide a viable basis for establishing the assistance prong, provided that the defendant is under a legal duty to act (and the other requirements of liability are met).[59] The encouragement prong, in contrast, encompasses promotion of an offense by psychological influence. It includes various forms of influence, including (but not limited to) the

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> The court may wish to modify the instruction where an omission might constitute an attempt to commit a crime. For example, if the government alleges that the defendant did not activate the store's alarm system as part of a robbery attempt, the court might wish to modify the instruction that the "defendant omitted to do an act . . . ."

See also English v. United States, 25 A.3d 46, 54 (D.C. 2011) ("Although not directly on point, we note that there is authority for the proposition that, depending on the evidence in a particular case, if the vehicle in which a passenger is riding is involved in an accident causing death or injury, and if he or she fails to stop or to render assistance to the injured person, the passenger may be liable as an aider and abettor.") (collecting cases).

[56] *See* Commentary to RCC § 22E-202(c): Relation to Current District Law.

[57] *Johnson v. United States*, 883 A.2d 135, 143 (D.C. 2005) ("[H]aving knowledge of the offenses and failing to withdraw can be sufficient to establish implied approval, and hence aiding and abetting."); *Prophet v. United States*, 602 A.2d 1087, 1093 (D.C. 1992)("[T]he jury could reasonably conclude that [the defendant] failed to disassociate himself from [his co-defendant] and tacitly approved [his] actions" when he fled with the co-defendant even after "watch[ing] the robbery and murder"); *Clark v. United States,* 418 A.2d 1059 (D.C. 1980) (sidewalk robbery by co-defendant, who ran through alley into defendant's car; defendant drove at normal speed for one block and stopped car once police emergency lights activated); *Gayden v. United States*, 584 A.2d 578, 582–83 (D.C. 1990) (there was sufficient evidence to support instruction on aiding and abetting where the defendant "traveled to the scene of the crime [,] . . . was present at the killing[,] and . . . fled the scene with [two possible killers]"); *Settles v. United States*, 522 A.2d 348, 358 (D.C. 1987) (there was sufficient evidence of aiding and abetting where the defendant was potentially a lookout and "was with Settles before the crime, was present during the crime, and fled with Settles after the crime" because the defendant "must have had actual knowledge that a crime was being committed, but . . . he did nothing to disassociate himself from the criminal activity"). *Compare Jones v. United States*, 625 A.2d 281 (D.C. 1993) (fact that defendant brushed by the complainant shortly before co-defendant stabbed complainant, then walked away with co-defendant "laughing and talking" insufficient to prove aiding and abetting) *with Acker v. United States*, 618 A.2d 688 (D.C. 1992) ("jovial quip" to school friend before robbery and failure to prevent robbery of friend insufficient to prove aiding where defendant also failed to facilitate getaway of those actively engaged in the robbery).

[58] Whether assistance or encouragement is at issue, there is no requirement that the principal actor have *actually* been aware of the effect of the defendant's conduct. However, the defendant's conduct *must have, in fact,* assisted or encouraged the principle actor in some way (i.e. an unsuccessful accomplice is not subject to criminal liability under RCC § 22E-210).

[59] *See generally* RCC § 22E-202(c) (setting forth the requirements of omission liability under the RCC).

encouragement afforded by a command, request, or agreement, as well as advice, counsel, instigation, incitement, and provocation.

RCC §§ 210 (a), (b), & (c): Relation to Current District Law on Culpable Mental State Requirement. Subsections (a), (b), and (c) codify and clarify District law concerning the culpable mental state requirement governing accomplice liability.

The DCCA has addressed the culpable mental state requirement of accomplice liability on numerous occasions. Generally speaking, it is well established by such case law that "[t]here is a dual mental state requirement for accomplice liability."[60] The first requirement speaks to the relationship between the accomplice's state of mind and the promotion or facilitation of the requisite criminal conduct committed by the principal. The second requirement, in contrast, speaks to the relationship between the accomplice's state of mind and the results and/or circumstances brought about by the principal (and which are prohibited by the target offense).

As it relates to the first of these two culpable mental state requirements, DCCA case law establishes that the defendant must have acted with the *purpose* of promoting or facilitating criminal conduct. The basis for this requirement is the DCCA's *en banc* decision in *United States v. Wilson-Bey*, which holds that, "[t]o establish a defendant's criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture], and [] *sought by his action to make it succeed*."[61]

This requirement of a "purposive attitude" is, as the *Wilson-Bey* court explained, drawn from Judge Hand's well-known decision in *United States v. Peoni*.[62] As the DCCA observed:

> Although *Peoni* was decided sixty-eight years ago, it remains the prevailing authority defining accomplice liability. In 1949 the Supreme Court explicitly adopted *Peoni's* purpose-based formulation. *Nye & Nissen v. United States,* 336 U.S. 613, 618, 69 S.Ct. 766, 93 L.Ed. 919 (1949). This court has likewise followed *Peoni, see, e.g.,* [*Reginald B.*] *Brooks v. United States,* 599 A.2d 1094, 1099 (D.C.1991); *Hackney,* 389 A.2d at 1342, and we have held that an accomplice "must be concerned in the commission of *the specific crime with which the principal defendant is charged* [;] he must

[60] *Tann*, 127 A.3d at 491 ("There is a dual mental state requirement for accomplice liability: the accomplice not only must have the culpable mental state required for the underlying crime committed by the principal; he also must assist[ ] or encourage[ ] the commission of the crime committed by the principal with the intent to promote or facilitate such commission.").

[61] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006).

[62] 100 F.2d 401 (2d Cir. 1938). After considering an array of common law authorities, Judge Hand concluded that:

> [A]ll these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; . . . . [T]hey all demand *that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.* All the words used-even the most colorless, "abet"-carry an implication of purposive attitude towards it.

Id.

> be an associate in guilt of *that crime*." *Roy v. United States,* 652 A.2d 1098, 1104 (D.C. 1995) (emphasis in original).
>
> Every United States Circuit Court of Appeals has adopted *Peoni's* requirement that the accomplice be shown to have intended that the principal succeed in committing the charged offense, and the federal appellate courts have thus rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite showing of intent. The majority of state courts have also adopted a purpose-based standard. *See also* LaFave § 13.2(d), at 349 & n. 97. Federal and state model jury instructions are also generally consistent with *Peoni,* and require proof that the accomplice intended to help the principal to commit the charged offense.[63]

Since *Wilson-Bey*, *Peoni's* purpose-based standard has been incorporated into the District's jury instructions,[64] and reaffirmed in numerous DCCA cases.[65] At the same time, this standard is not a model of clarity, and has led to subsequent litigation.[66] Nevertheless,

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[63] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006).

[64] D.C. Crim. Jur. Instr. § 3.200.

[65] *See, e.g., Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014); *Gray v. United States*, 79 A.3d 326, 338 (D.C. 2013); *Joya v. United States*, 53 A.3d 309, 314 (D.C. 2012); *Ewing v. United States*, 36 A.3d 839, 846 (D.C. 2012).

[66] For example, in *Tann v. United States*, a split panel of the DCCA disagreed over the specificity of the purpose requirement, questioning whether an "aider and abettor who acts, as *Wilson–Bey* requires, with the same purpose and intent as the principal must also 'intentionally associate' with that specific principal." 127 A.3d at 440. Which is to say, "[m]ore pointedly, the question [raised in *Tann* was] whether the aider and abettor must know of the presence and conduct of the specific principal and form the intent to help *him or her* with the commission of his or her crime, as opposed to share simply (with whoever shared the aider and abettor's purpose) in the *mens rea* required to commit the crime itself." *Id.* The majority opinion answered this question in the negative, determining that:

> [T]he case law supports the following propositions rooted in the common law and incorporated in our aiding-and-abetting statute: (1) the aider and abettor must have the *mens rea* of the principal actor, see *Wilson–Bey*, 903 A.2d at 822, and must have the "purposive attitude towards" the criminal venture described in *Peoni*, 100 F.2d at 402; (2) a defendant is not responsible for the actions of a third-party who, wholly unassociated with and independent of the defendant, enters into a crime when there is no community of purpose between the defendant and the third-party . . . however, (3) the defendant need not know of the presence of every participant in a group crime (including the principal) in order to be found guilty under an aiding-and-abetting theory of liability . . . and (4) where the criteria in (1) above are met and the evidence at trial proves that the defendants by their action, foreseeably (and thus, the factfinder may conclude, intentionally) incited action by a third party who shared in their community of purpose, aiding-and-abetting liability may be found . . . .

127 A.3d at 444-45. Note that the majority opinion still holds that the government had to prove, *inter alia*, that "Harris and Tann intended to aid any of their fellow crew members who were present and participating in doing so." *Id.* at 450.

A partial dissenting opinion written by Judge Glickman reached an opposite conclusion, determining that a person "can[not] be found guilty as an aider and abettor under the law of the District of Columbia without proof that he intended to assist or encourage the principal offender." *Id.* at 499. This is

this much appears to be clear from the relevant District authorities: in order to be held liable as an accomplice, the defendant must, at minimum, have "designedly encouraged or facilitated" the commission of criminal conduct by another.[67]

As DCCA case law relates to the second culpable mental state requirement applicable to accomplice liability, the relationship between the accomplice's state of mind and the results and/or circumstances brought about by the principal (and which are prohibited by the target offense), there are a few well established principles.

Most fundamentally, the government must prove that the defendant acted with, at minimum, "the culpable mental state required for the underlying crime committed by the principal."[68] Practically speaking, this means that a defendant may never be held criminally responsible for the conduct of another as an accomplice absent proof that the defendant acted with the culpable mental states governing the results and circumstances that comprise the offense committed by the principal.[69]

So, for example, the DCCA in *Wilson Bey* held that, with respect to results, an accomplice to first-degree murder must, like the principal, "be shown to have specifically intended the decedent's death and to have acted with premeditation and deliberation."[70] And, as for circumstances, the DCCA held in *Robinson v. United States* that, "[i]f the principal offender must know he is armed when he is committing a violent or dangerous

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not to say that "the accomplice always must know the identity of the principal offender." *Id.* Indeed, "it is possible in some circumstances to be an aider and abettor—to help or induce another person to commit a crime, and to do so knowingly and intentionally—without knowing who that other person is." *Id.* ("A typical example is the person who knowingly attaches himself to a large group, such as a lynch mob, a criminal gang, or a vigilante body, that is engaged in or bent on breaking the law.") *Id.* Even still, "one cannot be liable as an aider and abettor without having the intent to assist or encourage a principal actor at all." *Id.* That is, "[o]ne cannot be an inadvertent accomplice." *Id.*

[67] *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)); *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); *see also English v. United States*, 25 A.3d 46, 53 (D.C. 2011) ("The key question is whether, drawing all reasonable inferences in the prosecution's favor, an impartial jury could fairly find beyond a reasonable doubt that Anderson intentionally participated in English's reckless flight from the pursuing officer, and that he not only wanted English (and his passengers) to succeed in eluding the police (which Anderson undoubtedly did), but that he also took concrete action to make his hope a reality.").

[68] *Tann*, 127 A.3d at 444-45; *see, e.g., Collins v. United States*, 73 A.3d 974, 981 n.3 (D.C. 2013) (in order to convict a defendant as an aider and abettor "the government was required to show that the accomplice had the same intent necessary to prove commission of the underlying substantive offense by the principal"); *Lancaster v. United States*, 975 A.2d 168, 174 (D.C. 2009) ("Because armed robbery is a specific-intent crime, the government must prove that the aider and abettor shared the same *mens rea* required of the principals."); *Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006) ("[W]here a specific mens rea is an element of a criminal offense, a defendant must have had that mens rea himself to be guilty of that offense, whether he is charged as the principal actor or as an aider and abettor."); *Carter v. United States*, 957 A.2d 9, 19 (D.C. 2008).

[69] *See, e.g., Appleton v. United States*, 983 A.2d 970, 977 (D.C. 2009) ("Any instruction on aiding and abetting must make clear that a defendant needs to have the *mens rea* required of the underlying crime in order to be convicted of the crime as an aider and abettor."); *Wheeler v. United States*, 977 A.2d 973 (D.C. 2009), *reh'g granted*, *opinion modified*, 987 A.2d 431, 431 (D.C. 2010) (*per curiam*) (The "charged aider and abettor will have to know and intend the steps taken, amounting to the same mental state required of the principal.").

[70] *Wilson Bey*, 903 A.2d at 840 ("Because the District's aiding and abetting statute requires proof that an accomplice acted with the mental state necessary to convict her as a principal, the government here was required to prove, in order for the jury to find [the defendant] guilty of first-degree murder, that she acted with a specific intent to kill after premeditation and deliberation.").

crime in order to be subject to the 'while armed' enhancement of § 22–4502, then the aider and abettor . . . also must know the principal is armed for the enhancement to be applicable to her as well." [71]

That proof of the culpable mental states governing the results and circumstances that comprise the target offense is *necessary* to support accomplice liability, however, raises the question of whether it is also *sufficient*? With respect to results, it would appear that it is; DCCA case law seems to endorse a principle of culpable mental state equivalency under which proof of the minimum culpable mental state requirement applicable to the results of the target offense will suffice for accomplice liability.

For example, in *Coleman v. United States*, the DCCA held that an accomplice to depraved heart murder must (but need only) possess the extreme recklessness as to death required of the principal of a depraved heart murder.[72] And in *Perry v. United States*, the DCCA held that an accomplice to aggravated assault must (but need only) possess the extreme recklessness as to serious bodily required of the principal of an aggravated assault.[73]

As for circumstances, DCCA case law is more ambiguous. Generally speaking, the government is required to show in all cases in which accomplice liability is charged that the defendant's "participation was with guilty knowledge."[74] In practice, this appears to amount to a principle of culpable mental state elevation, under which proof of awareness or belief as to the target offense's circumstance elements is necessary to secure a conviction based on accomplice liability.

The clearest statement of this approach is reflected in the DCCA's decision in *Robinson v. United States*, which specifically held that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[75] The basis for such a determination is, as the *Robinson* court explains, the more general idea that, in order for an accomplice to be deemed "guilty of a crime"—for example, "an offense committed while armed"—the defendant "must, *inter alia,* intend to facilitate the *entire offense*."[76]

This effective principle of culpable mental state elevation is, as the *Robinson* court proceeds to explain, both rooted in the DCCA's *en banc* opinion in *Wilson-Bey*, as well as the U.S. Supreme Court's recent decision in *Rosemond v. United States*, which held that "an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime."[77] (Which is to say, as the *Rosemond* Court explained, "[t]he intent must go to the specific and entire crime charged,"

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[71] *Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014).
[72] *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008); *see Tann*, 127 A.3d at 430-31 ("Because he was convicted of second-degree murder for aiding and abetting Cooper's shooting of Terrence Jones, the government was required to prove that Tann had, at a minimum, a "depraved heart" with regard to Terrence Jones's death.").
[73] *Perry v. United States,* 36 A.3d 799, 817–18 (D.C. 2011); *see also Story v. United States*, 16 F.2d 342, 344 (D.C. Cir. 1926) (upholding accomplice liability based on "criminal negligence" as to causing death).
[74] *Tyree v. United States*, 942 A.2d 629, 636 (D.C. 2008); *see, e.g., Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017); *Tann*, 127 A.3d at 434; *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016); *Wheeler v. United States*, 977 A.2d 973, 986 (D.C. 2009), *reh'g granted, opinion modified*, 987 A.2d 431 (D.C. 2010).
[75] *Robinson*, 100 A.3d at 105–06.
[76] *Robinson*, 100 A.3d at 106 and n.17 (citing *Wilson–Bey*, 903 A.2d at 831).
[77] *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).

such as "predicate crime plus gun use."[78]) Since *Robinson* was handed down, this rationale has been reaffirmed by the DCCA on multiple occasions.[79]

There exists one additional principle governing the culpable mental state of accomplice liability under District law that bears notice. While an accomplice may never be convicted of an offense absent proof of a culpable mental state that satisfies the requirements of the offense charged,[80] "the principal and the aider and abettor(s) need not have the same *mens rea* as each other if an offense can be committed with an alternate *mens rea.*" [81] Rather, where an offense is divided into degrees based upon distinctions in culpability (e.g., homicide), "each participant's responsibility [turns] on his or her individual intent or *mens rea.*"[82]

Consistent with this principle, the DCCA in *Mayfield v. United States* deemed the defendant's conviction for premeditated first-degree murder while armed to be appropriate under an aiding and abetting theory, although the principal who had fired fatal shot was convicted of second-degree murder.[83] Likewise, in at least two other decisions, the DCCA has—again, in accordance with this principle—deemed it appropriate to hold a secondary party liable for second-degree murder, although the principal party committed a premeditated first-degree murder.[84]

Viewed collectively, the above analysis of District law supports four propositions. First, an accomplice must act with the purpose of assisting or encouraging the criminal conduct of another. Second, an accomplice need only act with the culpable mental state

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[78] *See Rosemond*, 134 S. Ct. at 1249.

[79] *See, e.g., Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016); *Tann*, 127 A.3d at 434; *see also Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017) ("Evans was found guilty of the charges relating to weapons via the aiding and abetting theory and accordingly, the government was required to prove Evans's guilty knowledge.").

[80] *Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006).

[81] Commentary on D.C. Crim. Jur. Instr. § 3.200.

[82] *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008) (quoting *Wilson–Bey v. United States,* 903 A.2d 818 (D.C. 2006) (*en banc*)).

[83] 659 A.2d 1249, 1254 (D.C. 1995). The U.S. Court of Appeals for the D.C. Circuit, discussing District case law on this point, observes that "[t]here is nothing unfair about [such an outcome]." *United States v. Edmond*, 924 F.2d 261, 267 (D.C. Cir. 1991).

> First-degree murder requires premeditation, as when a killing is planned and calculated; second-degree murder does not involve planning, although the homicide is committed intentionally and with malice aforethought. *Harris v. United States,* 375 A.2d 505, 507–08 (D.C.1977); *Austin v. United States,* 382 F.2d 129, 137 (D.C.Cir.1967). In a joint trial, if a jury thought an aider and abettor carefully conceived a murder but enlisted an executioner only at the last possible moment, it could consistently convict the abettor of first-degree murder while finding the actual perpetrator guilty only of the lesser offense. There is no reason why separate juries in separate trials of the principal and the aider and abettor would be acting inconsistently or unfairly if they did the same. The degree of murder in each case depends on the *mens rea* of the defendant who is on trial.

Id.

[84] *McKnight v. United States, 102* A.3d 284, 285 (D.C. 2014); *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008); *see Branch v. United States*, 382 A.2d 1033, 1035 (D.C. 1978) ("As voluntary manslaughter while armed is a lesser included offense within second-degree murder while armed, the jury necessarily found that codefendant Simpson's conduct included voluntary manslaughter while armed. Having so found, the jury's conviction of appellant for aiding and abetting that offense is proper.").

applicable to the result element of the offense perpetrated by another. Third, an accomplice must act with at least knowledge of—or intent as to—the circumstances of the offense perpetrated by another, regardless of whether the principal may be convicted based upon some lesser culpable mental state. Fourth, and finally, where an offense is graded based upon distinctions in culpability, an accomplice may be held liable for any grade for which he or she possesses the specified culpability.

Section 210 codifies these propositions as follows. Subsection (a) establishes that the culpability required for accomplice liability necessarily incorporates "the culpability required for the [target] offense." Subparagraphs (a)(1) and (2) thereafter establish that a requirement of purpose is applicable to both the assistance/encouragement as well as to the conduct sought to be brought about by that assistance/encouragement. Next, subsection (b) incorporates a principle of culpable mental state elevation under which proof of intent on behalf of the accomplice is required—regardless of whether the target offense is comprised of a circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e. strict liability). Finally, subsection (c) clarifies where an offense "is divided into degrees based upon distinctions in culpability as to results," an accomplice may be held "liable for any grade for which he or she possesses the culpability required."

RCC §§ 22E-210(d) and (e): Relation to Current District Law on Charging and Penalties. Subsections (d) and (e) both codify and clarify current District law concerning the nature of the relationship between an accomplice and the principal.

As described under subsection (a) of the revised statute, it is well established, both inside and outside of the District, that complicity is not a separate crime; rather, it delineates a theory of liability through which one person can be held legally responsible for one or more crimes committed by another person.[85] This is clearly reflected in the District's complicity statute, which establishes that "all persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offender, shall be charged as principals and not as accessories."[86]

One important implication of this aspect of complicity is that liability for "aiding and abetting is predicated upon a proper demonstration of all of the necessary elements of the underlying criminal act."[87] Which is to say, as the District's criminal jury instructions phrase the point: "[f]or a defendant to be convicted as an aider and abettor, the government must prove beyond a reasonable doubt all of the elements of the underlying crime, including commission of the crime by someone other than the accused."[88]

A good illustration of this basic requirement is the DCCA case law on the intersection of complicity and the District offense of carrying a pistol without a license (CPWL). Where a CPWL charge is in play, it is well-established that a "defendant cannot be convicted . . . on an aiding and abetting theory where there is no proof that the person

[85] *See, e.g., Hawthorne v. United States*, 829 A.2d 948, 952–53 (D.C. 2003); *Payton v. United States*, 305 A.2d 512, 513 (D.C. 1973).
[86] D.C. Code § 22-1805.
[87] *Matter of J. W. Y.*, 363 A.2d 674, 677 (D.C. 1976); *see, e.g., United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1973); *Hawthorne,* 829 A.2d at 952; *Gray v. United States,* 260 F.2d 483, 484 (D.C. Cir. 1958); *see also* D.C. Crim. Jur. Instr. § 3.200 ("[It is not necessary that all the people who committed the crime be caught or identified. It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted in committing the crime.]").
[88] D.C. Crim. Jur. Instr. § 3.200.

in actual possession of the pistol did not have a license to carry it."[89] Relying on this legal proposition, the DCCA has, in turn, overturned complicity-based convictions for CPWL premised upon proof that the defendant him or herself, rather than the principal, lacked the requisite license.[90]

However, while it must be proven that another person committed a crime,[91] District case law also is clear that the principal need not be convicted of the crime. The DCCA has held that: "[a]n aider and abettor may be convicted of an offense even though the principal has not been convicted."[92] Further, an aider and abettor may be convicted of an offense even though the principal has been acquitted.[93] Notably, where there is a conviction of the principal actor, the DCCA has also held that an "aider and abettor may be convicted of a lesser or greater offense than the principal."[94]

Consistent with the above analysis of District law, subsections (d) and (e) address the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense as follows. Subsection (d) provides that in terms of charging there is not difference between an accomplice and the principal, and that the offense penalty available to the accomplice is the same as if to a principal. Subsection (e) identifies various ways in which the legal disposition of the principal's situation is immaterial to that of the accomplice, namely, it is not a defense to a prosecution premised on a theory of aiding and abetting that "the principal has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted for an offense."

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[89] *Jefferson v. U.S.*, 558 A.2d 298, 303-04 (D.C. 1989); *see Halicki v. United States*, 614 A.2d 499, 503–04 (D.C. 1992) ("[W]e have repeatedly held that, in order to convict of CPWL on an aiding and abetting theory, the government must show that the principal (not the aider and abettor) was not licensed to carry the pistol."); *Jackson v. U.S.*, 395 A.2d 99, 103 n.6 (D.C. 1978).

[90] *Jefferson*, 558 A.2d at 303-04; *Jackson,* 395 A.2d at 103 n.6.

[91] The offense need not be a completed offense. Rather, a person may be held liable for aiding and abetting an attempt to commit an offense, so long as it is shown that the principal him or herself committed that attempt. *See, e.g., Ladrey v. United States*, 155 F.2d 417 (D.C. Cir. 1946) (attempted bribery of witness premised on complicity theory); *Williams v. United States*, 190 A.2d 269 (D.C. 1963) (attempted petit larceny premised on complicity theory); *Montgomery v. United States,* 384 A.2d 655 (D.C.1978) (same); *Carter v. United States*, 957 A.2d 9, 17 (D.C. 2008) (attempted armed robbery premised on complicity theory); *Felder v. United States*, 595 A.2d 974, 975 (D.C. 1991) (same).

[92] *Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995); *Murchison v. United States,* 486 A.2d 77, 81 (D.C. 1984).

[93] *Morriss v. United States,* 554 A.2d 784, 790 (D.C. 1989) ("[T]he acquittal of a principal does not preclude conviction of an aider and abettor"); *Gray v. U.S.*, 260 F.2d 483 (D.C. Cir. 1958) (conviction of aider and abettor sustained despite acquittal of the principal); *United States v. McCall*, 460 F.2d 952, 958 (D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *see Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995) (citing *Standefer v. United States*, 447 U.S. 10, 14–20 (1980) (conviction of principal is not a prerequisite to an aiding and abetting conviction, even where principal is acquitted in a separate trial)); *United States v. McCall*, 460 F.2d 952, 958 (D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *U.S. v. Edmond*, 924 F.2d 261 (D.C. Cir. 1991) (defendant could be convicted as aider and abettor to first degree murder after gunman had been acquitted of offense).

[94] *Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995) (citing *Branch v. United States,* 382 A.2d 1033, 1035 (D.C. 1978) (aider and abettor convicted of lesser offense).

RCC § 22E-211. LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON.

Explanatory Notes. Section 211 establishes general principles of legal accountability based on causing crime by an innocent or irresponsible person.[1]

The theory of liability codified in this section provide a causal mechanism for holding one party, P, criminally liable for the acts of another party, X, under circumstances where X is innocent or irresponsible, and, therefore, cannot him or herself be held criminally liable.[2] Where, as in these situations, P has effectively used X as a means of achieving a criminal objective, it is appropriate to view X's conduct as an extension of P's for analytical purposes.[3] Section 211 authorizes this form of legal accountability[4] upon proof of three basic requirements.

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[1] That "one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent" is a "universally acknowledged" principle of common law origin. Model Penal Code § 2.06 cmt. at 300; *see, e.g., Morrisey v. State*, 620 A.2d 207, 211 (Del. 1993) ("It is well-established at common law that an individual is criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime."); Commentary on Ky. Rev. Stat. Ann. § 502.010 ("That an individual may incur criminal liability by procuring a prohibited harm through an act of an innocent or irresponsible agent is a principle of long standing."); *see also, e.g., United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) ("[This] doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as *Regina v. Saunders*, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century"); F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

[2] Ordinarily, one party cannot be held criminally liable for the conduct of a second party unless the second party actually commits a crime. *E.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.1 (3d ed. Westlaw 2019). However, where the second party is an innocent or irresponsible agent who has been manipulated by the first party to commit what would be a crime if the second party were not legally excused, then the first party "is considered the perpetrator of the offense, the 'principal in the first degree' in traditional common law parlance, based on the 'innocent instrumentality' doctrine." *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.03 (6th ed. 2012).

The following hypothetical is illustrative. P, a drug dealer, asks X, his sister, to pick up a package for him at the post office. P credibly tells X—who is unaware of her brother's means of employment—that the package is filled with cooking spices. However, the package is actually filled with heroin. Soon after picking up the package from the post office, X is arrested in transit. On these facts, X cannot be convicted of possession of narcotics because she lacks the required culpable mental state (i.e. knowledge) as to the nature of the substance possessed. And because X cannot be convicted for directly possessing the heroin, P cannot be convicted for possessing the heroin as X's accomplice under section 210, which requires "proof of the commission of the offense" by another person. P can, however, be held criminally responsible for possession as a *principal* under section 211 upon proof that: (1) P caused X to possess the heroin; (2) P acted with the culpable mental state for drug possession; and (3) X lacked the culpable mental state for drug possession.

[3] *See, e.g.,* Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct.").

[4] Accomplice liability and causing crime by an innocent or irresponsible person constitute distinct bases of legal accountability (that is, ways of holding one person criminally responsible for the conduct of another person). To illustrate the different roles these theories play, consider the difference between: (1) aiding and abetting a theft via a solicitation; and (2) causing an innocent person to commit a theft via a solicitation.

In the first scenario, P says the following to X: "V just bought a really expensive television, and I have his house keys. How about I give them to you, you grab the television while V is away, and then I'll sell the TV and we can split the profits?" If X agrees to the plan and the scheme is successful, X is the

The first requirement under subsection (a) is that the intermediary must be "an innocent or irresponsible person," a term defined in subsection (b) that envisions two main types of actors.[5] Pursuant to paragraph (b)(1), there are those who, having engaged in conduct that satisfies the objective elements of an offense, but lack the culpable mental state required for that offense.[6] Pursuant to paragraph (b)(2), there are those who engage in conduct that satisfies the objective elements of an offense, but meet the requirements for a general excuse or justification defense. The definition under subsection (b) is not an exclusive list, however, and other actors may include very young children.[7]

The second requirement, codified under paragraph (a)(1), is one of causation, namely, the defendant must *cause* the (innocent or irresponsible) intermediary to engage in conduct constituting an offense.[8] To meet this requirement, the nexus between the conduct of the defendant and that of the intermediary must be sufficiently close to satisfy the principles of factual and legal causation set forth in section 204.[9] In this context, the

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perpetrator of the offense and P is an accomplice to the theft based upon the solicitation under RCC § 22E-210.

In the second scenario, P lies to X: "My new television set is at V's house. I let V borrow it, but V no longer needs it and has asked me to pick it up/given me his keys. Would you do me a favor, X, and retrieve the TV for me while V is at school?" If X believes P's false representations and retrieves V's property, P would not be X's accomplice since X did not actually commit theft. (That is, although X took V's property, X did not possess the intent to steal, and, therefore, X cannot be convicted of theft.) P can, however, be convicted of directly perpetrating the theft himself under section 211 based on his having caused innocent person X to satisfy the objective elements of theft with the intent to steal.
See generally DRESSLER, *supra* note 2, at § 28.01 (employing similar illustration).

[5] The definition of "innocent or irresponsible person" in subsection (b) is not necessarily limited, however, to these two different types of actors. *See* RCC § 22E-211(b) (use of "includes," rather than "means," in prefatory clause). This non-exclusive definition leaves open the possibility that an intermediary who is justified, or possesses some other defense other than an excuse, may also qualify as an "innocent or irresponsible person" within the meaning of subsection (a). *See, e.g.,* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 372-85 (1985) (discussing conceptual difficulties relevant to who qualifies as innocent or irresponsible person); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 82 (Westlaw 2019) (same); *see also, e.g.,* Ky. Rev. Stat. Ann. § 502.010(2) (use of "includes" in comparable statutory definition of innocent or irresponsible person); Ala. § 13A-2-22(2)(b) (same).

[6] This may apply, for example, in the situation of bank manager, P, who carries out a theft by asking an employee, X, to retrieve funds, based on the lie that the company's CEO has authorized the withdrawal.

[7] *See, RCC § 22E-216, Minimum Age for Offense Liability* (excluding from offense liability a person under 12 years of age).

[8] RCC § 22E-211(a) ("the person causes an innocent or irresponsible person to engage in conduct constituting an offense"). The phrase "conduct constituting an offense," as employed in this subsection, refers to "the conduct under the circumstances and causing the results proscribed by the offense definition." Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 733 (1983) ("The objective elements for causing crime by an innocent are relatively straightforward. The defendant need not satisfy the objective elements of the substantive offense; the point of the provision is to hold him legally accountable when he engages in conduct that causes an innocent or irresponsible person to satisfy the objective requirements."); *compare* Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person *to engage in such conduct*.") (italics added).

[9] *See* RCC § 22E-204(a) ("No person may be convicted of an offense that contains a result element unless the person's conduct is the factual cause and legal cause of the result."). Section 211 is both based on, but also departs from, normal principles of causation. Typically, "[a]ctions are seen not as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not one who set the stage for his action." Sanford H. Kadish, *Complicity, Cause and Blame: A Study*

principle of factual causation entails proof that the defendant did something to manipulate or otherwise impact the innocent or irresponsible person, so that it may be said that, but for the defendant's actions, the intermediary would not have engaged in the prohibited conduct.[10] Even where this empirical prerequisite is met, however, the principle of legal causation precludes liability if the nexus between the conduct of the defendant and that of the intermediary is too remote or attenuated to fairly allow for a conviction.[11] Paragraph (a)(1) uses the term "in fact," to specify that there is no culpable mental state required as to the actor causing the innocent or irresponsible party to engage in conduct constituting the offense. This does not mean that actors are strictly liable for causing conduct of innocent or irresponsible parties. As discussed below, paragraph (a)(2) requires the actor have the same culpability as required by the target offense.

The third requirement, codified under paragraph (a)(2), is that the defendant must act "with the culpability required for [the target] offense."[12] This requirement entails proof that the defendant caused an innocent or irresponsible person to engage in conduct constituting an offense with the state of mind—purpose, knowledge, intent, recklessness, negligence, or none at all (i.e. strict liability)—applicable to each of the objective elements that comprise the offense. In practical effect, this means that a defendant *may* be held criminally liable for a crime of recklessness or negligence under section 211, provided that they caused the conduct of an innocent or irresponsible person with the requisite non-

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in the Interpretation of Doctrine, 73 CAL. L. REV. 323, 391 (1985); *see, e.g.,* JOHN KAPLAN ET AL., CRIMINAL LAW 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions."). Where, however, one party induces another party to engage in generally prohibited conduct that is legally excused, the analysis materially changes. This is because, "[f]or purposes of causation doctrine, excusable and justifiable actions are not seen as completely freely chosen." *Id.* at 370. Under these conditions, "the defendant is seen as causing the other's act in the same way he would be seen to cause a physical event" (i.e. "[t]he primary actor becomes 'merely an instrument' of the secondary actor"). *Id.*

[10] DRESSLER, *supra* note 2, at § 30.03; *see* RCC § 22E-204(b) ("A person's conduct is the factual cause of a result if: (1) The result would not have occurred but for the person's conduct; or (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result."). For example, where P gives X, an irresponsible agent known to have a penchant for mad driving, the keys to P's car, P is the factual cause of any injuries X subsequently inflicts on the road. If, however, P merely helps X back out of the driveway while X is driving his own car, P would not be a factual cause of any injuries X subsequently inflicts on the road (provided, of course, that P's assistance is not a necessary condition to X's drive).

[11] *See* RCC § 22E-204(c). For example, if a parent leaves a loaded firearm in his toddler's outdoor play area, and the parent's own toddler find it, and subsequently uses it to injure a playmate at the parent's house, that parent is the legal cause of the subsequent harm caused by the toddler. If, in contrast, the parent leaves the loaded firearm in his toddler's outdoor play area, and an unknown third party thereafter moves the weapon to a park on the other side of the city, the parent would not be the legal cause of any harm caused by another toddler finding the weapon and injuring a playmate at the park.

[12] RCC § 22E-211(a). For example, if the defendant causes an innocent or irresponsible person to engage in conduct constituting an offense, and that offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability (as to the defendant) to secure a conviction. *See* RCC § 22E-201(e)(3) ("'Culpability required' includes . . . Any other aspect of culpability specifically required for an offense."); *id.*, at Explanatory Notes (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, the imposition of liability for causing crime by an innocent under section 211 is subject to the same voluntariness requirement (again, as to the defendant) governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(e)(1) (voluntariness requirement also part of culpability required for an offense).

intentional culpable mental state.[13] Under no circumstances, however, should section 211 be construed to allow for a conviction upon proof of a lesser form of culpability than that required by the target offense.[14]

Subsection (c) specifies that an actor who is criminally liable for the conduct of an innocent or irresponsible person may be charged, and is subject to the same maximum penalties, as if the actor had directly engaged in the conduct constituting the offense. Under this subsection, an indictment does not need not specify that the actor committed the offense via an innocent or irresponsible party in order for the theory to be presented to the jury.[15] However, although an actor may be *charged* as if they directly engaged in conduct constituting the offense, the government must prove the requirements for liability for conduct by an innocent or irresponsible person set forth under this section beyond a reasonable doubt.

Subsection (d) addresses the relationship between the prosecution of the actor and the treatment of the innocent or irresponsible party. The provision establishes that the legal disposition of the actor's situation is generally immaterial to that of the innocent or irresponsible party. This includes the fact that the innocent or irresponsible person has not been arrested, prosecuted, convicted, adjudicated delinquent, or acquitted. In addition to the language in subsection (d), RCC § 22E-216 establishes that an actor can be liable even if the innocent or irresponsible person is under the age of 12 years and is not subject to criminal liability under the RCC.

Subsection (e) cross references terms defined elsewhere in the RCC.

Relation to Current District Law. RCC § 22E-211 codifies, clarifies, and fill in gaps reflected in District law relevant to legal accountability based on causing crime by an innocent or irresponsible person.

There is little District authority on this form of legal accountability. Nevertheless, that which does exist supports the "universally acknowledged principle" that "one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent."[16]

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[13] The following situation is illustrative. P leaves his car keys out around X, an irresponsible agent known to have a penchant for mad driving. X subsequently finds P's keys, takes P's car out, drives in a dangerously erratic manner, and ends up killing pedestrian V. If P is later prosecuted for recklessly killing V (i.e. manslaughter) based on X's conduct, P's guilt will require proof that: (1) P *consciously disregarded a substantial risk* that, by leaving his keys out, X would take P's car out and kill someone by driving in a dangerous erratic manner; and (2) P's disregard of that risk was a gross deviation from the standard of conduct that a reasonable individual would follow. *See* RCC § 22E-206(c). *See, e.g.,* Model Penal Code § 2.06 cmt. at 303; Commentary on Ky. Rev. Stat. Ann. § 502.010.

[14] For example, if obtaining property by false pretenses is a crime only if the false pretenses are made purposely, P does not commit it by negligently causing his lawyer, X, to make statements that are false. Instead, P must do so purposely. *See, e.g.,* Model Penal Code § 2.06 cmt. at 303; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1. According to the same logic, where an offense is graded by distinctions in culpability as to result elements, the principal's "liability shall extend only as far as his mental state will permit." Commentary on Ala. Code § 13A-2-22. For example, if P recklessly causes his child, X, to intentionally kill V, X is guilty of reckless manslaughter but not murder (i.e. X's intent to kill may not be imputed to P, while P's lack of intent precludes murder liability). *See, e.g.,* Model Penal Code § 2.06 cmt. at 302-03; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1.

[15] *E.g., Price v. United States*, 813 A.2d 169, 176 (D.C. 2002) (citing *Head v. United States*, 451 A.2d 615, 626 (1982)).

[16] Model Penal Code § 2.06 cmt. at 300.

For example, more than a century ago, District courts recognized that criminal liability may attach for an offense committed indirectly, including through unwitting agents, such as, for example, "where one procures poison to be administered by an innocent agent to a third person."[17] And this also remains true today: while there exists uncertainty when it is appropriate to hold one person criminally responsible for causing a *culpable* actor to engage in prohibited conduct (separate and apart from aider and abettor liability),[18] there seems to be agreement that a causal theory of criminal liability is appropriate where "A uses B as an innocent instrumentality."[19]

Illustrative is the DCCA's decision in *Blaize v. United States*.[20] At issue in *Blaize* was the defendant's conviction for voluntary manslaughter, which was based on the following facts: D fires shots at V, sending V running; the noise of the shots also startles X, an illegally parked driver; in response to the shots, X speeds away at a rate of approximately 90 mph; X thereafter hits and kills V.[21] On appeal, the DCCA upheld the conviction applying a causal analysis, premised on the proposition that because "[X's] attempt[] to flee quickly, and without careful attention to pedestrian safety, w[as] entirely predictable," there was no problem with holding D responsible for the death of V although the immediate cause was X's conduct.[22]

Notably, there is also a Redbook jury instruction entitled "willfully causing an act to be done."[23] Premised on the federal statute, 18 U.S.C. § 2(b), that instruction states that the jury may find the defendant guilty of a crime without finding that he or she personally committed each of the acts constituting the offense. :

This instruction is thereafter accompanied by a brief commentary collecting federal cases, which support the proposition that "an individual can be criminally culpable for causing an

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[17] *United States v. Guiteau*, 1882 WL 118, at *16 (D.C. Jan. 10, 1882). Similarly, as the U.S. Court of Appeals for the D.C. Circuit observed in *Maxey v. United States*:

> It is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency." *United States* v. *Gooding*, 12 Wheat. 460, 469, 6 L. ed. 693, 696. *See also* 1 Bishop, Crim. Law, secs. 649, 651, 652; *People* v. *Adams*, 3 Denio, 190, 207, 45 Am. Dec. 468; *Seifert* v. *State*, 160 Ind. 464, 467, 98 Am. St. Rep. 340, 67 N. E. 100. Those authorities fully sustain the general principle of law declared by the court, that one may be convicted as a principal, though acting in the commission of the crime through an innocent agent.

30 App. D.C. 63, 74–75 (D.C. Cir. 1907).

[18] *See, Fleming v. United States*, 224 A.3d 213 (D.C. 2020) (en banc). In *Fleming*, the DCCA upheld a "gun battle" theory of liability, in which a defendant who engaged in a gun battle was held liable for fatal shots fired by other participants in the gun-battle. However, the DCCA limited its holding to gun-battle scenarios, and stated that principles of causation may operate differently under different theories of homicide liability.

[19] *Fleming*, 148 A.3d at 1189 n.14 (Easterly, J., dissenting).

[20] *Blaize v. United States*, 21 A.3d 78, 80 (D.C. 2011).

[21] *Blaize*, 21 A.3d at 80-81.

[22] *Id.* at 83.

[23] D.C. Crim. Jur. Instr. 3.102.

intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime."[24]

RCC § 22E-211 is substantively consistent with the above District authorities, while, at the same time, providing a clearer and more comprehensive approach to liability for causing crime by an innocent or irresponsible person. Subsection (a) establishes that a defendant may be held criminally liable for the acts of an innocent or irresponsible person provided that: (1) the principal actor causes the innocent or irresponsible person to engage in conduct constituting an offense; and (2) the principal actor does so with the culpability required for that offense. Subsection (b) defines circumstances where a human intermediary is "innocent or irresponsible," namely, when a person engages in conduct constituting and offense but does so: (1) lacking the culpable mental state requirement for the offense; or (2) acting under conditions that establish an excuse or justification defense.

[24] *See Fraley v. U.S.*, 858 F.2d 230, 233 (5th Cir. 1988); *U.S. v. Cook*, 745 F.2d 1311 (10th Cir. 1984); *U.S. v. Rucker*, 586 F.2d 899, 905 (2d Cir. 1978); *U.S. v. Deaton*, 563 F.2d 777, 778 (5th Cir. 1977); *U.S. v. Ordner*, 554 F.2d 24, 29 (2d Cir. 1977); *U.S. v. Rapoport*, 545 F.2d 802, 805-06 (2d Cir. 1976); *U.S. v. Lester*, 363 F.2d 68 (6th Cir. 1966).

RCC § 22E-212. EXCLUSIONS FROM LIABILITY FOR CONDUCT OF ANOTHER PERSON.

Explanatory Notes. RCC § 22E-212 establishes two exceptions to the general principles of legal accountability set forth in RCC § 22E-210, Accomplice Liability; and RCC § 22E-211, Liability for Causing Crime by an Innocent or Irresponsible Person.[1] Paragraph (a) uses the defined term "in fact"[2] to specify that there is no culpable mental state as to the requirements of the exclusion.

RCC § 22E-212(a) excludes the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under section 210 or for causing an innocent or irresponsible to commit that offense under section 211.[3] For example, a minor who pursues and agrees to engage in sex with an adult may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged that adult to perpetrate statutory rape against the minor.[4] Nevertheless, RCC § 22E-212(a) precludes holding the minor criminally liable for the statutory rape as an accomplice in the minor's own victimization under section 210.[5] The outcome would not be any different if the adult involved in the relationship suffered from a mental disability sufficient to rise to the level of a complete defense. While it might be said that the minor caused the adult to perpetrate a statutory rape under these circumstances,[6] RCC § 22E-212(a) precludes holding the minor legally accountable for the irresponsible person's conduct under section 211 where the minor was also victimized by it.[7]

RCC § 22E-212(a) also excludes actors who engage in conduct inevitably incident to commission of an offense—as defined by statute[8]—from being held legally accountable

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[1] *See, e.g.,* WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 13.3 (2d ed., Westlaw 2018) ("[O]ne is not an accomplice to a crime if (a) he is a victim of the crime; [or] (b) the offense is defined so as to make his conduct inevitably incident thereto . . ."); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019) (same); *see also United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (noting these are "exceptions to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime").

[2] RCC § 22E-207.

[3] *See, e.g.,* Model Penal Code § 2.06(6)(a) ("Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . he is a victim of that offense[.]"). This rule effectively *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of the offense perpetrated against themselves. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 ("[T]he victim of the crime may not be held as an accomplice even though his conduct in a significant sense has assisted in the commission of the crime."); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (same).

[4] *See* RCC § 22E-210(a).

[5] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(d) (6th ed. 2012) ("A [minor] may not be convicted as an accomplice in her own victimization"); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (same). The same can also be said about "[t]he businessman who yields to the extortion of a racketeer," or "the parent who pays ransom to the kidnapper." Model Penal Code § 2.06(6) cmt. at 324. Although those "who pay extortion, blackmail, or ransom monies" can be understood to have "significantly assisted in the commission of the crime," the fact they are the "victim of a crime" means that they "may not be indicted as an aider or abettor." *Southard*, 700 F.2d at 19.

[6] See RCC § 22E-211(a) (Criminal Liability for Conduct by an Innocent or Irresponsible Person.).

[7] *See* Ala. Code § 13A-2-24(1) (victim exception equally applicable to accomplice liability and causing crime by an innocent); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (There exists "little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other.").

[8] That a person's conduct must be inevitably incident to commission of an offense *as defined by statute* clarifies that paragraph (a)(2) only applies when the offense could not have been committed without the

as an accomplice in the commission of that offense under section 210 or for causing an innocent or irresponsible person to commit that offense under section 211.[9] For example, the purchaser in a drug transaction may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged the seller to perpetrate the distribution of a controlled substance.[10] Nevertheless, § 22E-212(a) precludes holding the purchaser criminally liable for the seller's distribution as an accomplice under section 210.[11] The outcome would not be any different if the seller suffered from a mental disability sufficient to rise to the level of a complete defense. While it might be said that

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defendant's participation under any set of facts. This is to be distinguished from the situation of a defendant whose participation was merely useful or conducive to the commission of a crime *as charged in a particular case*. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (In applying the conduct inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime.") (quoting *State v. Duffy*, 8 S.W.3d 197, 201-202 (Mo. App. 1999)).

So, for example, the role of a doorman in protecting a particular drug house from being robbed or ripped off may inextricably be part of the main business of that home, the sale and purchase of controlled substances. Nevertheless, because, as a general matter, it is entirely possible to distribute drugs without the assistance of a doorman, the doorman's conduct—as contrasted with that of the purchaser—is *not* "inevitably incidental" to the commission of the crime of drug distribution. Therefore, subsection (a)(2) would not preclude holding a doorman who assists a drug dealer liable for aiding the distribution of controlled substances. *Wagers v. State*, 810 P.2d 172, 175-76 (Alaska Ct. App. 1991) ("[B]ecause [defendant's] role as a doorman/guard was not 'inevitably incidental' to the commission of the crime of possession with intent to deliver, [he] is not exempt from accomplice liability under AS 11.16.120(b)(2).").

For another example, consider a prospective bribery scheme involving bribe offeror, B, go-between G, and public official, P. B gives G $20,000 in cash with instructions to approach P and propose a transaction whereby P will receive the money in return for providing B with a government license to which B is not otherwise entitled. If G agrees with B to participate in this scheme and approaches P, paragraph (a)(2) would *not* preclude holding G liable for aiding the crime of bribe offering. Although G's agreed-upon role as middleman might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to commit the crime of bribe offering, which can be completed without a go-between. *See, e.g., Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, "as a matter of law," defendant's facilitative conduct was not "inevitably incident" to the crime of assault because that offense "does not as defined require one person to identify the victim and another to strike the blow").

[9] *See, e.g.,* Model Penal Code § 2.06(6)(b) ("Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . the offense is so defined that his conduct is inevitably incident to its commission[.]"). This rule effectively *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of an offense for which their participation was logically required as a matter of law. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (accomplice liability does not apply "where the crime is so defined that participation by another is inevitably incident to its commission"); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (same).

[10] *See* RCC § 22E-210(a).

[11] That is, because the distribution of narcotics necessarily requires two parties, a seller and a purchaser, the purchaser may not be held criminally responsible as an accomplice to that distribution under the conduct inevitably incident exception. *See, e.g., State v. Pinson,* 895 P.2d 274, 277 (N.M. Ct. App. 1995) ("When an illegal drug sale is completed, there are two separate crimes committed, trafficking by the seller and possession by the purchaser. Each conduct is necessarily incident to the other crime."); *Wheeler v. State,* 691 P.2d 599, 602 (Wyo. 1984) ("The purchaser of controlled substances commits the crime of 'possession' and not 'delivery,' and, thus, is not an accomplice to a defendant charged with unlawful distribution."). This rule may apply to parties that broker the sale of a controlled substance, provided the broker does not satisfy the requirements for accomplice liability under RCC § 22E-210 with respect to the seller. *Simms v. United States*, 17-CM-1137 (D.C. 2021).

the purchaser caused the seller to distribute drugs under these circumstances,[12] § 22E-212 precludes holding the purchaser legally accountable for the irresponsible person's conduct under section 211.[13]

RCC § 22E-212(a) establishes an important limitation on the exclusions to liability for conduct of another person, namely, that the limitations apply *"*unless otherwise expressly specified by statute[.]*"* This clarifies that section 212 is only a *default* bar on criminal liability for victims or those who engage in conduct inevitably incident to commission of an offense.[14] It merely establishes that such actors are excluded from the general principles of legal accountability set forth in sections 210 and 211.[15] As such, the legislature is free to impose criminal liability upon these general categories of protected actors on an offense-specific basis.[16] In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.[17]

Subsection (b) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. RCC § 22E-212 codifies and fills in gaps in current District law to improve the clarity and proportionality of the revised statutes.

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[12] See RCC § 22E-211 (Criminal Liability for Conduct by an Innocent or Irresponsible Person).

[13] *See* Ala. Code § 13A-2-24(2) (conduct inevitably incident exception equally applicable to accomplice liability and causing crime by an innocent); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (There exists "little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other.").

[14] *See, e.g.,* Model Penal Code § 2.06(6) cmt. at 323-24 ("If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to conduct 'inevitably incident to' the commission of the crime, the problem inescapably presents itself in defining the crime.").

[15] This reflects the fact that both the victim and conduct inevitably exclusions are justified on the basis of legislative intent. *See, e.g., United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at *6–7 (S.D.W. Va. July 26, 2016) ("Where the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a person.") (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3); *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (observing that the standard rationale for the conduct inevitably incident exception is "that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by the others in the offense as a crime.") (citing LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

[16] *See, e.g.,* ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.").

[17] The following situation is illustrative: X, the bribe giver in a two-person corruption scheme involving public official Y, agrees to give Y $20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable as an *accomplice* in the commission of the crime of bribe *receiving* under RCC § 22E-212 since X's conduct is inevitably incident to Y's perpetration of that crime. X can, however, *directly* be held criminally liable for his *own conduct* under a statute that, through its express terms, prohibits the *offering of a bribe*. *See, e.g.,* N.Y. Penal Law § 20.00 cmt. ("[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.") (quoted in *People v. Manini*, 79 N.Y.2d 561, 571 (1992)).

Relation to Current District Law on Legal Accountability for Victims. There is no current District law directly addressing whether, as a general principle of criminal law, a victim can be held legally accountable for the commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed.

No current District criminal statute explicitly exempts victims from the scope of general accomplice liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District's first-degree child sex abuse offense subjects to potential life imprisonment a person who, "being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."[18] And the District's second-degree child sex abuse offense subjects to ten years of imprisonment a person who, "being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."[19] These current offenses exist specifically for the *protection* of minor-victims.[20]

At the same time, the normal principles of aider and abettor liability derived from the District's general complicity statute, D.C. Code § 22-1805,[21] would appear to authorize treating a minor-victim legally accountable as an accomplice in the perpetration of child sex abuse against him or herself.[22] Consider, for example, the situation of a minor who both initiates and pursues a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully assisted and encouraged the adult to commit statutory rape in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.[23] In practical effect, then, applying general principles of aider and abettor liability to the District's child sex abuse statutes would mean that a minor may be subject to the same liability and punishment as the adult who perpetrates the offense.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's statutory rape offenses. Given these problems, it's unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse do not appear to include a single prosecution involving charges of this nature. This example may also indicate that—from

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[18] D.C. Code § 22-3008.
[19] D.C. Code § 22-3009.
[20] *See* D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); *Ballard v. United States*, 430 A.2d 483, 486 (D.C. 1981) ("[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.").
[21] D.C. Code § 22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").
[22] *See generally* RCC § 22E-210 and accompanying Commentary.
[23] *See id.*; *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (An accomplice is someone who "designedly encouraged or facilitated" the commission of criminal conduct by another) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)).

a broader legislative and executive perspective—a victim exception to accomplice liability is implicitly understood to exist in District law and practice.

This kind of exception has also been explicitly recognized in two century-old District judicial decisions in the course of interpreting congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted for aiding or abetting the target offenses, the holding in each case remains directly relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense precisely *because* she was victim of the party committing the act.[24] In the second case, *Thompson v. United States* (1908), the Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.[25]

Another relevant aspect of District law is the *de facto* victims exception incorporated into the District's prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding "children"—defined as anyone under the age of 18[26]—from criminal liability for prostitution.[27] Beyond creating a general immunity from prosecution for victimized children (including, presumably, those who

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[24] *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) ("The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.").

The relevant statute, as quoted in *Yeager*, reads:

> Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

[25] *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose "miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.").

The relevant statute, as quoted in *Thompson*, reads:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

[26] D.C. Code § 22-2701(d)(3).

[27] *See generally* D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it "unlawful for any person to engage in prostitution or to solicit for prostitution," subject to the "[e]xcept[ion] provided in subsection (d)." *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any "child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value." *Id.* at § (d)(1).

might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to "refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[28] These provisions appear to reflect the D.C. Council's view, articulated in supporting legislative history, that "[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted."[29]

RCC § 22E-212(a) accords with the above authorities, as well as the policy considerations that support them. These provisions exclude the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under RCC § 22E-210, or for causing an innocent or irresponsible person to commit that offense under RCC § 22E-211, unless expressly provided by the target offense.[30] (This is consistent with the similar exclusion for victims applicable to the general inchoate crimes of solicitation and conspiracy under RCC § 22E-305.[31])

Relation to Current District Law on Legal Accountability for Conduct Inevitably Incident. There is no current District law directly addressing whether, as a general principle of criminal law, a person can be held legally accountable for the commission of a crime in which his or her conduct was inevitably incident. That said, this exception is consistent with the legislative intent underlying current statutory offenses enacted by the D.C. Council. And it has also been implicitly recognized by the DCCA through *dicta* in the course of interpreting one of those statutes.

No current District criminal statute explicitly recognizes an exemption to accomplice liability for those who engage in conduct inevitably incident to the commission of an offense. However, an analysis of the drug statutes in the D.C. Code illustrates why this exception is consistent with legislative intent.

Compare the District's different approaches to punishing those who distribute and those who merely possess controlled substances. The District's distribution statute makes it a thirty year felony for "any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance," which is, in

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[28] *Id.* at § (d)(2).

[29] COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

> Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

[30] Note that under RCC § 22E-22E-212 the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[31] *See generally* Commentary on RCC § 22E-305(a)(1).

fact, "a narcotic or abusive drug" subject to classification "in Schedule I or II."[32] In contrast, the District's possession statute makes it a 180 day misdemeanor to "knowingly or intentionally to possess a controlled substance" of a similar nature.[33] This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.[34]

At the same time, application of the District's normal principles of aider and abettor liability would appear to authorize holding a purchaser-possessor legally accountable for the distribution of drugs by the seller as an accomplice.[35] Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully assisted and encouraged the seller to commit distribution in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.[36] In practical effect, then, applying general principles of aider and abettor liability to the

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[32] D.C. Code § 48-904.01(a)(1)-(2); *see id.* at (a)(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]")

[33] D.C. Code § 48-904.01(d)(1) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than $1,000, or both."); *compare* D.C. Code § 48-904.01(d)(2) ("Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.").

[34] Indeed, "[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct." *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 4–123, THE UNIFORM CONTROLLED SUBSTANCES ACT OF 1981, 2–3 (April 8, 1981)) (hereinafter "Committee Report").

For example, the legislative history underlying the District's Uniform Controlled Substances Act observes that:

> While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Id. at 5. *See also, e.g., Long*, 623 A.2d at 1150 (observing that "the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District's Uniform Controlled Substances Act."); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) ("[A] central purpose of the enactment of the [District's] local [drug] statute was to abolish the 'unilateral approach' of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.").

[35] *See generally* RCC § 22E-210 and accompanying Commentary.

[36] *See generally* RCC § 22E-210 and accompanying Commentary.

District's drug distribution statute would mean that the drug user could be held liable to the same extent as the seller.

Treating the purchaser-possessor in a drug deal in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's controlled substances offenses.[37] Given these problems, it's unsurprising that reported District case law does not appear to include a single drug distribution prosecution brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by *dicta* in at least one reported DCCA opinion. In the relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction between "a willing buyer [and] a willing seller" can be held criminally liable for distribution as an accomplice.[38] One judge dissented, arguing that, among other problems, the majority's holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.[39] In response, the two-judge majority explained that they were "unpersuaded at this point that the court's interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution," while citing to federal case law explicitly recognizing that "one who receives drugs does not aid and abet distribution 'since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession."[40]

The bribery statute in the D.C. Code is susceptible to a similar analysis. The relevant District prohibition on bribery applies a statutory maximum of "not more than ten years" to anyone who:

> (1) Corruptly offers, gives, or agrees to give anything of value, directly or indirectly, to a public servant; or
>
> (2) Corruptly solicits, demands, accepts, or agrees to accept anything of value, directly or indirectly, as a public servant;

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[37] *See* sources cited *supra* notes 21-23 and accompanying text; *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be "deemed an aider and abettor to [distribution]," this would effectively "write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession.'") (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

[38] *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought "a willing buyer to a willing seller" and "specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy"); *see, e.g., Griggs v. United States*, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was "working," the defendant escorted the officer to a seller, and the defendant told the seller that the officer "wanted one twenty"); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) ("[B]eing an agent of the buyer is not a defense to a charge of distribution.").

[39] *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that "if the government's position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori,* every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.").

[40] *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

> in return for an agreement or understanding that an official act of the public servant will be influenced thereby . . . .[41]

On its face, the District's bribery statute embodies a legislative judgment that bribe giving and receiving are equally culpable acts deserving of no more than ten years of potential imprisonment. That said, application of the District's normal principles of aider and abettor liability would seem to provide the basis for effectively doubling the punishment for either party to a bribery scheme because each party's conduct is inevitably incident to the other.

Consider, for example, that most (if not all) bribe givers will purposely assist and encourage the bribe receiver's violation of D.C. Code § 22-712(a)(2), thereby satisfying the requirements of accomplice liability as to bribe receiving. Conversely, most (if not all) bribe receivers will purposely assist and encourage the bribe giver's violation of D.C. Code § 22-712(a)(1), thereby satisfying the requirements of accomplice liability as to bribe giving. Such an application of accomplice liability, if accepted, would seem to authorize up to twenty years of potential imprisonment in most (if not all) instances of bribery.

Dealing with bribery in this way seems disproportionate, counterintuitive, and in conflict with the penalty structure reflected in the District's bribery statute. Given these problems, it's unsurprising that reported District case law does not appear to include a single prosecution for bribery involving duplicate liability of this nature.[42] This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.[43]

RCC § 22E-212(a) accords with this implicit understanding, as well as the policy considerations that support it, by excluding conduct inevitably incident to the commission of an offense as a matter of law from the scope of legal accountability under RCC §§ 22E-210 and 211 unless expressly provided by the target offense.[44] (This is consistent with the similar exclusion for conduct inevitably incident applicable to the general inchoate crimes of conspiracy and solicitation under RCC § 22E-305.[45])

RCC § 22E-213. WITHDRAWAL DEFENSE TO LEGAL ACCOUNTABILITY.

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[41] D.C. Code § 22-712(a), (c).

[42] The only reported case involving this statute appears to be: *Colbert v. United States*, 601 A.2d 603, 608 (D.C. 1992). *Compare May v. United States*, 175 F.2d 994, 1005 (D.C. Cir. 1949) (extending general complicity principles to hold offeror of bribe criminally responsible for aiding and abetting public official's violation of federal statute prohibiting receipt of unlawful compensation).

[43] One other relevant aspect of District law worth noting is the fact that a substantively related exclusion applies to the general inchoate crime of conspiracy by way of the judicially-recognized doctrine of "Wharton's Rule," which "is an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)). The meaning and import of DCCA case law on Wharton's Rule are discussed in the Commentary on RCC § 22E-305(a)(2).

[44] Note that under RCC § 22E-212 the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[45] *See generally* Commentary on RCC § 22E-305(a)(2).

Explanatory Notes. Section 213 establishes an affirmative defense to criminal liability premised upon the general principles of legal accountability set forth in RCC § 22E-210, Accomplice Liability, and RCC § 22E- 211, Liability for Causing Crime by an Innocent or Irresponsible Person.[1]

Subsection (a) sets forth the scope of this affirmative defense, which is comprised of two basic requirements.[2] The first is that the defendant must "terminate[] their efforts to promote or facilitate commission of an offense before it has been committed[.]"[3] This clarifies that only withdrawals from criminal schemes prior to their completion will provide the basis for avoiding legal accountability for the conduct of another under the RCC.[4]

The second requirement is that the defendant's timely withdrawal must be accompanied by "reasonable efforts" at preventing the target offense.[5] Importantly, this does not mean that the defendant's conduct *actually* needs to prevent the target offense from being completed.[6] Rather, a withdrawal defense to legal accountability remains available under the RCC although the defendant's efforts are unsuccessful.[7] At the very

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[1] Typically, "an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019). However, there is an important exception applicable to criminal liability based on legal accountability for the conduct of another, which is similarly applicable in the context of general inchoate crimes. *Id.*; *see* RCC § 22E-306 (renunciation defense to attempt, solicitation, and conspiracy). In these contexts, the criminal justice system affords an "offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise." *Id.* As it arises in the context of accomplice liability, this defense is typically referred to as "withdrawal." *E.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.3(d) (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.07 (6th ed. 2012).

[2] The idea that "a person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor, can avoid accountability for the subsequent criminal acts of the primary party" is both historically rooted and well established. DRESSLER, *supra* note 1, at § 30.07; *see, e.g., United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) ("Withdrawal is traditionally a defense to crimes of complicity[.]"); CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW § 37 (15th ed. 2018) ("At common law, a party could withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime."); Commentary on Ky. Rev. Stat. § 502.040 (observing the "prevailing doctrine which allows an aider or abettor or an accessory before the fact to relieve himself of liability by countermanding his counsel, command or encouragement through a communication delivered in time to allow his principal to govern his actions accordingly"); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 ("A majority of jurisdictions recognize some form of withdrawal or abandonment defense to complicity liability.").

[3] RCC § 22E-213(a) (prefatory clause).

[4] *See, e.g.,* DRESSLER, *supra* note 1, at § 30.07 (A "spontaneous and unannounced withdrawal will not do.") (citing *State v. Thomas*, 356 A.2d 433, 442 (N.J. Super. Ct. App. Div. 1976), *rev'd on other grounds*, 387 A.2d 1187 (N.J. 1978)); *State v. Formella*, 158 N.H. 114, 119 (2008) (It must "be possible for the trier of fact to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed.") (quoting *People v. Lacey*, 49 Ill. App. 2d 301, 307 (1964)).

[5] RCC § 22E-213(a).

[6] *E.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d); DRESSLER, *supra* note 1, at § 30.07.

[7] For this reason, the withdrawal defense to legal accountability specified in this section is more lenient than the renunciation defense to general inchoate crimes under section 306, which requires proof that the target offense was actually prevented in order to avoid liability for an attempt, solicitation, or conspiracy. *See* RCC § 22E-306(a) ("It is an affirmative defense to a prosecution for an attempt, solicitation, or conspiracy that . . . *the target offense was not committed*.") (italics added).

least, though, the defendant must engage in conduct reasonably calculated towards disrupting—whether directly or indirectly—the offense that he or she initially promoted or facilitated.[8] Paragraphs (a)(1), (2), and (3) describe three alternative standards for evaluating the sufficiency of the defendant's conduct in this regard.[9]

Paragraph (a)(1) establishes that a withdrawal defense is available where the defendant ensures their prior efforts are wholly ineffective.[10] The type of conduct that satisfies this standard is necessarily contingent upon the nature of the conduct that provides the basis for the defendant's legal accountability in the first place.[11] For example, where the defendant's contribution to a criminal scheme takes the form of verbal encouragement, a clear (and timely) oral statement of disapproval communicated to his or her co-

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Another way in which the withdrawal defense to legal accountability is more lenient than the renunciation defense to general inchoate crimes relates to the defendant's motive. Whereas a renunciation defense is *unavailable* where the defendant was motivated by a desire to avoid getting caught, the withdrawal defense does not incorporate a comparable requirement of blameless intent (i.e. any motive underlying the withdrawal will suffice). *Compare* RCC § 22E-213(a) (no voluntariness requirement), *with* RCC § 22E-306(a)(2) (requirement of voluntary renunciation); RCC § 22E-306(b)(1) (renunciation not voluntary when "motivated in whole or in part by a belief that circumstances exist which . . . Increase the probability of detection or apprehension of the actor or another participant in the criminal enterprise; [or] Render accomplishment of the criminal plans more difficult . . . .").

Because of these two differences, it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct under the RCC. The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P's reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V earlier made against A. One day later, A has a change of heart, which is motivated, in large part, by A's having been alerted to the fact that the police were monitoring the phone call and are therefore very likely to catch and arrest both P and A. So A decides to again call P, and does his very best to persuade P to desist from violence against V, and, ultimately, to forgive V for the slight. However, A's reasonable efforts at dissuading P from carrying out the planned execution is unsuccessful; P goes on to kill V anyways.

On these facts, A satisfies the standard for withdrawal under section 213, and, therefore, cannot be deemed an accomplice to P's murder of V under section 210. A would not, however, be able to avail himself of a renunciation defense under section 306 to avoid liability for his original solicitation of P (to commit murder) under the RCC's general solicitation statute. *See* RCC § 22E-302(a). Specifically, a renunciation defense would not be available to A under section 306 because: (1) the target offense at the heart of A's solicitation, the murder of V, was completed; and (2) A's renunciation was not voluntary (i.e. it was motivated by a desire to avoid getting caught).

[8] *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d) (The defendant must terminate his or her participation in a criminal scheme and: "(1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable."); DRESSLER, *supra* note 1, at § 30.07 ("[T]he accomplice must communicate his withdrawal to the principal and make bona fide efforts to neutralize the effect of his prior assistance.").

[9] While the examples and analysis in this commentary entry focus on legal accountability based upon accomplice liability under RCC § 22E-210, a withdrawal defense is similarly available where the defendant has been charged with causing an innocent or irresponsible person to commit a crime under section 211. This ensures equivalency of outcome where the defendant's co-participants in a criminal scheme cannot be held liable due to their being "innocent or irresponsible." RCC § 22E-211.

[10] *See, e.g.,* Model Penal Code § 2.06(6)(c)(i) (withdrawal defense available where defendant "wholly deprives [aid or encouragement] of effectiveness in the commission of the offense").

[11] *See, e.g.,* Commentary on Haw. Rev. Stat. § 702-224 ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").

participants may provide the basis for a withdrawal defense.[12] However, a statement of this nature will not suffice where the defendant's participation involved loaning a weapon central to the scheme's success.[13] In that case, the actual retrieval of the weapon may be necessary to meet the standard proscribed in this paragraph.[14]

Paragraph (a)(2) establishes that a withdrawal defense is available where the defendant "[g]ives timely warning to the appropriate law enforcement authorities."[15] Under this standard, a defendant who provides warning to a law enforcement agency with jurisdiction over the requisite criminal scheme sufficiently early may avoid legal accountability.[16] Under this paragraph, the warning must be "timely." This does not require that the warning be made as early as practicable,[17] but the warning must be made early enough so that law enforcement authorities have a reasonable opportunity to interrupt the criminal endeavor. This paragraph also requires that the actor actually gives warning to law enforcement authorities. It is insufficient if an actor attempts, but fails to actually communicate with law enforcement authorities.[18] This indirect means of withdrawing from an offense is to be encouraged, particularly where it is: (1) unlikely that the defendant will be able to prevent the consummation of the target offense acting alone,[19] or (2) dangerous for the defendant to attempt to do so on his or her own.[20]

Paragraph (a)(3) establishes that a withdrawal defense is available where the defendant "[o]therwise makes reasonable efforts to prevent the commission of the offense."[21] This catchall "reasonable efforts" alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (a)(1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably

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[12] *See, e.g.,* Model Penal Code § 2.06(6) cmt. at 326 (If "complicity inhered in request or encouragement, countermanding disapproval may suffice to nullify its influence, providing it is heard in time to allow reconsideration by those planning to commit the crime.").

[13] *See, e.g.,* Commentary on Haw. Rev. Stat. § 702-224 ("More will be required of one who distributes arms than one who offers verbal encouragement.").

[14] *See, e.g.,* Model Penal Code § 2.06(6) cmt. at 326 ("If the behavior consisted of aid, as by providing arms, a statement of withdrawal ought not to be sufficient; what is important is that he get back the arms, and thus wholly deprive his aid of its effectiveness in the commission of the offense.").

[15] *See, e.g.,* Model Penal Code § 2.06(6)(c)(ii) (withdrawal defense available where defendant "gives timely warning to the law enforcement authorities").

[16] *See, e.g.,* DRESSLER, *supra* note 1, at § 30.07 (In the situation of a defendant who opts to withdraw by notifying law enforcement, that notification must be early enough to provide the police with a reasonable opportunity to disrupt the criminal scheme); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d) (same).

[17] Compare with the shoplifting statute, RCC § 22E-2104, which provides qualified immunity for persons who detain suspected shoplifters, provided they notify law enforcement authorities as soon as practicable.

[18] For example, if a person leaves a handwritten note containing information about a planned criminal endeavor on the sidewalk outside of a police station in the hopes that law enforcement authorities will read the note and take action, that would not satisfy the requirements under this paragraph.

[19] For example, where A aids an armed robbery planned to take place in another state by providing a weapon to P1 and P2, alerting the relevant legal authorities in that state in a timely fashion may be the only practical alternative if P1 and P2 later become unreachable by phone or email.

[20] For example, where A aids an armed robbery by loaning a weapon to P1 and P2, but P1 and P2 also have many other weapons available to them, and any attempt by A at retrieving the weapon may pose a risk to D's life, then alerting the relevant legal authorities in a timely fashion would clearly be a more desirable alternative.

[21] *See, e.g.,* Model Penal Code § 2.06(6)(c)(ii) (withdrawal defense available where defendant "otherwise makes proper effort to prevent the commission of the offense.").

calculated towards disrupting it.[22] This standard should be evaluated in light of the totality of the circumstances.[23]

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

Relation to Current District Law. Subsection (a) codifies, clarifies, and fills gaps in District law concerning the availability and burden of proof governing a withdrawal defense to legal accountability.

The D.C. Code does not address the availability of a withdrawal defense; however, the DCCA has discussed it on a few different occasions. The relevant case law can generally be divided into two categories: decisions involving withdrawal from a conspiracy (a topic not addressed by RCC § 22E-213); and decisions involving withdrawal from aider and abettor liability (the focus of RCC § 22E-213).

With respect to the first category, the relevant case law pertains to when an actor may be relieved from the *collateral consequences of a conspiracy*.[24] For example, "a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators."[25] Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run."[26] On these kinds of collateral issues, the DCCA recognizes a defense of withdrawal, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."[27]

With respect to the second category, the relevant case law addresses when an actor may be relieved from liability as an aider and abettor.[28] In this context, withdrawal

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[22] *See* Model Penal Code § 2.06 cmt. at 326 ("The sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule.").

[23] For example, alerting the victim of a criminal scheme of its existence could constitute "reasonable efforts" at preventing the commission of an offense, where: (1) the disclosure to the victim is *timely*; and (2) the disclosure provides the victim with a *reasonably feasible* means of avoiding the target harm. Where, in contrast, the disclosure is made too late, or does not enable to victim to easily and safely escape harm, then the defendant's conduct would not meet the "reasonable efforts" standard.

[24] ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 (Westlaw 2018) ("Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates."); Model Penal Code § 5.03 cmt. at 456 (distinguishing "withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators").

[25] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 29.09 ("If a person withdraws from a conspiracy, she may avoid liability for subsequent crimes committed in furtherance of the conspiracy by her former co-conspirators.").

[26] LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 1, at § 27.07 ("[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor."); Buscemi, *supra* note 21, at 1168 ("[W]ithdrawal is principally directed toward the time dimension of conspiracy.").

[27] *Bost v. United States*, 178 A.3d 1156, 1200 (D.C. 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g., Tann v. United States,* 127 A.3d 400, 467 (D.C. 2015) (citing *United States v. Moore,* 651 F.3d 30, 90 (D.C. Cir. 2011); *Baker v. United States*, 867 A.2d 988, 1007 n.24 (D.C. 2005).

[28] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

provides the basis for a *complete defense to criminal liability*.[29] Which is to say, under District law an accomplice who "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[30]

With respect to both categories, there does not appear to be any reported District case law in which a defendant has successfully raised a withdrawal defense. Rather, the published decisions in these areas of law primarily clarify the kind of proof that fall short of establishing it. For example, in at least two cases the DCCA has determined that where the defendant plays a central role in the planning and facilitation on a crime (e.g., providing a weapon), "[l]eaving the scene before a crime occurs is," by itself, "insufficient to demonstrate withdrawal."[31]

The DCCA has also clarified that a withdrawal defense is unavailable although an accused who was intimately involved in a robbery scheme "may have 'wanted to get out of there, and didn't want to do further damage to the victim'" after the robbery had commenced.[32] Observing the requirement that the defendant take "affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation,"[33] the court deemed the mere fact that the defendant "regretted the unfolding consequences of the brutal robbery in which he participated" to be insufficient to "relieve him of criminal liability."[34]

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[29] ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81.

[30] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability."); *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994).

[31] *Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *Harris*, 377 A.2d at 38) (the fact that appellant merely left the scene before the shooting occurred was "insufficient to establish withdrawal as a matter of law"). Relatedly, the U.S. Court of Appeals for the D.C. Circuit has observed that:

> Whatever may be the other requirements of an effective abandonment of a criminal enterprise, it is certain both as a matter of law and of common sense that there must be some appreciable interval between the alleged abandonment and the act from responsibility for which escape is sought. It must be possible for a jury to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed. While it may make no difference whether mere fear or actual repentance is the moving cause, one or the other must lead to an actual and effective retirement before the act in question has become so imminent that its avoidance is practically out of the question.

Mumforde v. United States, 130 F.2d 411, 413 (D.C. Cir. 1942) (quoting *People v. Nichols*, 230 N.Y. 221, 222, 129 N.E. 883 (1921)).

[32] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013).

[33] *Id.* (citing *Harris v. United States,* 377 A.2d 34, 38 (D.C. 1977)).

[34] *Id.* (citing *Plater v. United States,* 745 A.2d 953, 958 (D.C. 2000) ("The defendants' fleeing of the crime scene after participating in the assault does not constitute legal withdrawal.").

One issue relevant to a withdrawal defense that is unresolved by DCCA case law is the *burden of proof*.[35] The commentary accompanying the District's criminal jury instruction on conspiracy seems to recommend that, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the burden should be on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it."[36] However, recent U.S. Supreme Court case law—cited to in recent DCCA case law—indicates that the burden of proof should instead rest with the defendant.[37] And the commentary accompanying the District's criminal jury instruction on accomplice liability says nothing at all about the burden of proof for a withdrawal defense.[38]

Even assuming that under current District law the burden of persuasion for a withdrawal defense to the collateral consequences of a conspiracy rests with the government, there are sound policy and practical reasons (discussed below) to place the burden of persuasion for a withdrawal defense to accomplice liability (the focus of RCC § 22E-213) on the defendant, subject to a preponderance of the evidence standard. And there is also general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.[39]

Consistent with the above analysis, the RCC recognizes a broadly applicable affirmative defense to legal accountability, subject to proof by the defendant beyond a

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[35] As the D.C. Court of Appeals explained in *Green v. Dist. of Columbia Dep't of Employment Servs.*:

> The term 'burden of proof' [] encompass[es] two separate burdens: the burden of production and the burden of persuasion . . . The former refers to the burden of coming forward with satisfactory evidence of a particular fact in issue . . . The latter constitutes the burden of persuading the trier of fact that the alleged fact is true.

499 A.2d 870, 873 (D.C. 1985) (internal citations omitted).

[36] Commentary on D.C. Crim. Jur. Instr. § 7.102.

[37] *Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law); *see Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *id.*).

[38] *See generally* D.C. Crim. Jur. Instr. § 3.200.

[39] Most notably, this includes the District's statutory insanity defense, D.C. Code § 24-501 ("No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."); *see Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a prima facie case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury."); *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Reasonably viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment."). For other examples, see D.C. Code § 22-3611 (b) (providing, with respect to penalty enhancement for crimes committed against minors, that it "is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense," which "defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against minors); D.C. Code § 22-3011(b) (providing, with respect to child sex abuse, that [m]arriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence . . . .").

preponderance of the evidence.[40] (Recognition of a withdrawal defense to legal accountability is broadly congruent with recognition of the renunciation defense to general inchoate crimes under RCC § 22E- 305.[41])

[40] The withdrawal defense established by RCC § 22E-213 also applies to legal accountability based upon culpably causing an innocent or irresponsible person to commit an offense. It is unclear under current District law whether a withdrawal defense would be available in this rare situation. There are only a handful of reported District cases involving this theory of liability and none implicate withdrawal.

[41] *See* RCC § 22E-306. Note, however, that the RCC renunciation defense differs from the RCC withdrawal defense in two primary ways. First, the renunciation defense incorporates an "actual prevention" standard, which entails that the defendant successfully prevent the target of the general inchoate crime from being consummated—whereas "reasonable efforts" on behalf of the defendant will suffice to establish a withdrawal defense. Second, the renunciation defense incorporates a voluntariness requirement, which entails that the abandonment of criminal purpose have been motivated by something other than a desire to avoid getting caught—whereas the withdrawal defense does not incorporate any subjective requirement. Given these differences, it is possible that a defendant may satisfy the standard for a withdrawal defense, and therefore escape legal accountability under RCC §§ 22E-210 and 211, but fail to satisfy the standard for a renunciation defense, and thus retain criminal liability under one or more of the general inchoate crimes under RCC §§ 22E-301, 302, and 303. *See supra* note 7 (providing illustration).

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

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

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[1] The issue of merger is "[o]ne of the more important and vexing legal issues" confronting sentencing courts. Tom Stacy, *Relating Kansas Offenses*, 56 U. KAN. L. REV. 831, 831-32 (2008); *see, e.g.,* Bruce A. Antkowiak, *Picking Up the Pieces of the Gordian Knot: Towards A Sensible Merger Methodology*, 41 NEW ENG. L. REV. 259, 285-86 (2007) ("Merger is one of those portal issues that can take us to the center of our basic conceptions about the place criminal law has in our society. What we make criminal generally defines the frontier we establish between the individual and the state in any democratic society."); *Com. v. Campbell*, 351 Pa. Super. 56, 70 (1986) ("In recent years, there have not been many issues which have received . . . a more uneven treatment than claims that offenses have merged for purposes of sentencing."). At the heart of the problem is the fact that "federal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 518-19 (2001); *see, e.g.,* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 708 (2005) (observing that "Congress has adopted repetitive and overlapping statutes," such as "mostly superfluous offenses like 'carjacking' that deal with conduct addressed by existing provisions such as robbery and kidnapping.").

[2] The merger policies set forth in this section only apply to *RCC* offenses (in contrast to *all* criminal offenses in the D.C. Code). This limitation is consistent with RCC § 22E-103(a), which establishes that "[u]nless otherwise provided by law, a provision in this title applies to this title alone." Because of this limitation, the principles and procedures established in section 214 would not govern the merger of multiple District offenses located outside the RCC, nor would they apply to multiple convictions for an RCC offense and one or more non-RCC District offenses.

[3] § 22E-214 addresses what are sometimes referred to as "multiple description claims" of merger, which "arise when a defendant who has been convicted of multiple criminal offenses under *different* statutes alleges that the statutes punish the same offense." *State v. Smith*, 436 S.W.3d 751, 766 (Tenn. 2014). In contrast, § 22E-214 does not address what are sometimes referred "unit-of-prosecution claims" of merger, which arise "when a defendant who has been convicted of multiple violations of the *same* statute asserts that the multiple convictions are for the same offense." *Id.*; *see, e.g.,* Jeffrey M. Chemerinsky, *Counting Offenses*, 58 DUKE L.J. 709 (2009); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 68 (2d. Westlaw 2019).

[4] Legislation of this nature is appropriate because "[t]he gradation of punishment for an offense is clearly a matter of legislative choice, whether it be as severe as authorizing dual punishment for lesser-included offenses . . . or as mild as prohibiting the imposition of multiple convictions even where two offenses clearly involve different elements." *Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991); *see, e.g.,* Model Penal Code § 1.07(1) (recommending legislative specification of "the situations in which conviction for more than one offense based on the same conduct is precluded"). Merger issues, while implicating the Fifth Amendment's prohibition against "twice [placing someone] in jeopardy of life or limb" for the "same offense," are ultimately a matter of legislative intent subject to the safeguards afforded by the constitutional prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness. *See, e.g.,* Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L. Rev. 595, 596–97 (2006) ("Under the Double Jeopardy Clause, when the defendant complains only of multiple punishment, and not successive prosecution, the defendant essentially complains that two convictions were obtained and two sentences were imposed where only one was permitted. But the issue is one of legislative intent rather than constitutional limitation."); MICHAEL S. MOORE, ACT AND CRIME 309 (1993) (discussing difference between a double jeopardy question and an Eighth Amendment question). The merger principles incorporated into section 214 provide an express codification of legislative intent, and have been drafted to *limit* multiple liability well *below* what the constitutional ceiling on excessive punishments might otherwise allow for. *See, e.g.,* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of*

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

The prefatory clause of subsection (a) establishes that the general principles set forth in subsection (a) only address the merger of multiple convictions that "aris[e] from the same act or course of conduct."[6] It is under these circumstances that the imposition of multiple liability most clearly raises issues of proportionality.[7] In contrast, where the defendant's convictions arise from separate courses of conduct, the imposition of multiple liability is less likely to be unfairly duplicative.[8] The principles of merger set forth in subsection (a) are not intended to govern the latter situation.

The first of these principles, set forth in paragraph (a)(1), establishes that merger is required where "[o]ne offense is necessarily established by proof of the elements of the

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Constitutional Sentencing Law and the Case for Uniformity, 107 MICH. L. REV. 1145 (2009) (observing that in non-capital cases the ceiling for constitutionally excessive punishments is extremely high); Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012) (discussing relationship between proportionality and the Eighth Amendment).

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

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

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

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

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

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

other offense as a matter of law."[9] This language effectively codifies the elements test originally set forth by the U.S. Supreme Court in *Blockburger v. United States*.[10] The

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

[10] 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."); *see, e.g.,* Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 400-01 (2005) ("The *Blockburger* test itself originated as a limit on cumulative punishments, but later cases abandoned the elements test as an absolute bar against multiple punishment and instead deployed the test as a guide to legislative intent.").

It is important to note that the elements test has received significant criticism, particularly where it operates as the sole basis for conducting merger analyses. Four general problems have been highlighted. The first is a marked lack clarity and consistency, namely, the element test "is formally indeterminate, has no ready application to common crimes with alternative elements, and facilitates result-oriented manipulation of elements." Hoffheimer, *supra* note 10, at 437 ("Growing judicial experience with the elements test demonstrates that the test fails to achieve the simplicity and ease of application promised by its promoters."); *Texas v. Cobb*, 532 U.S. 162, 185-86 (2001) ("The (elements) test has emerged as a tool in an area of our jurisprudence that the Chief Justice has described as 'a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.' . . . Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's Serbonian Bog . . . Where Armies whole have sunk.") (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (internal quotations and citations omitted).

The second problem is disproportionality in convictions, namely, the elements test, as applied to any criminal code comprised of many substantially related overlapping offenses, effectively treats "defendants who commit what is, in ordinary terminology, a single crime [] as though they committed many different crimes." Stuntz, *supra* note 1, at 519-20; Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 770-71 (2004) ("from the intuitive perspective of a layperson, [in contrast to the elements test,] the defendant has committed a single crime").

The third problem, which follows directly from the second, is that of disproportionality in sentencing exposure. Assuming that the statutory maximum (and mandatory minimum, if any) for individual offenses in a criminal code is proportionate, then it will necessarily be the case that aggregating the punishments for two of more substantially overlapping offenses based on the same act or course of conduct will lead a defendant to face an overall level of sentencing exposure that is disproportionately severe. *See, e.g.,* Tom Stacy, *Relating Kansas Offenses*, 56 U. KAN. L. REV. 831, 832 (2008); ("Allowing multiple convictions can add years to criminal sentences because consecutive sentences are imposed or because the elevated criminal history score lengthens the term of imprisonment for subsequent offenses."); *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970) ("Legislative refinement of an essentially unitary criminal episode into numerous separate violations of the law has resulted in a proliferation of offenses capable of commission by a person at one time and in one criminal transaction . . . But as the separate violations multiply by legislative action, the likelihood increases that [under the elements test] a defendant will actually be punished several times for what is really and basically one criminal act.").

The fourth problem emphasizes the corrosive procedural dynamics that flow from the two proportionality problems just noted. Specifically, it is argued that the narrow scope of merger inherent in the elements test encourages a prosecutorial practice known as "charge-stacking," wherein the government brings as many substantially-overlapping charges as possible, thereby subjecting defendants to more severe punishments and providing defendants with "greater incentives to plead guilty." Husak, *supra* note 10, at 770-71; Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453 (2009) ("Redundant and overlapping criminalization poses a considerable risk for prosecutorial misuse in a relatively low-visibility manner that is hard to monitor. Prosecutors can stack charges that drive defendants into hard bargains; even when charges are ultimately dropped, they have done their work as bargaining chips.").

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

Paragraph (a)(2) next addresses three particular kinds of variances, which, if constituting the sole distinctions between two or more offenses, support merger.[13] The first, codified by subparagraph (a)(2)(A), is where the offenses differ only in that one requires a less serious injury or risk of injury than is necessary to establish commission of the other offense.[14] The second, codified by subparagraph (a)(2)(B), is where the offenses differ only in that one requires a lower culpable mental state under RCC § 22E-206 or § 22E-207 than the other.[15] And the third, codified by subparagraph (a)(2)(C), is where

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Section 214 addresses these criticisms by incorporating a range of merger principles—including but also going beyond the elements test—which together constitute a more proportionate approach that is neither "too rigid" nor can be said to "reflexively stack the deck in favor of multiple convictions and punishments." *State v. Carruth*, 993 P.2d 869, 875 (Utah 1999) ("I believe that the 'statutory elements' test (contained in the state legislation) is too rigid and should be repealed by the legislature and replaced with a more realistic test.") (Howe, C.J., concurring in the result); Stacy, *supra* note 1, at 856 ("The Blockburger test, and even more so the same-elements test, reflexively stack the deck in favor of multiple [] punishments.").

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

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

[13] *See, e.g.,* Model Penal Code §§ 1.07(1)(a), (4)(c) (barring multiple liability where one offense "differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."); *id.* § 1.07(1)(d) (barring multiple liability where "the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 68 (collecting authorities that employ comparable formulations).

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

[15] An example of two offenses that satisfy this principle are: (1) murder, defined as "intentionally causing death"; and (2) reckless manslaughter, defined as "recklessly causing death." *See, e.g.,* Model Penal Code § 1.07, cmt. at 133 (giving the example of offenses that are "less serious types of homicides," and also observing that this principle would apply to "offenses that are the same [] except that they require recklessness or negligence while the [other] offense [] requires a purpose to bring about the consequences, or, finally, offenses that are the same as the [] except that they require only negligence while the [other] offense [] requires either recklessness or a purpose to bring about the consequences").

This may go beyond the scope of the elements test codified in paragraph (a)(1). Note, for example, that the Commentary to the Hawaii Criminal Code observes that the state's comparable provision, Haw. Rev. Stat. Ann. § 701-109(c), varies from the elements test:

the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.[16] Where two offenses satisfy one or more of these principles, the imposition of multiple liability would be disproportionate.[17]

Paragraph (a)(3) establishes that merger is required where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law."[18] This principle applies when the facts required to prove offenses arising from the same course of conduct are legally "inconsistent with each other."[19] Where the proof necessary to establish one offense necessarily precludes the existence of the proof necessary to establish another offense under any set of facts, the imposition of multiple liability would be disproportionate.[20]

> in that, although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the facts necessary to prove the offense. Therefore [the elements test] would not strictly apply and (c) is needed to fill the gap. For example, negligent homicide would probably not be included in murder under [the elements test], because negligence is different in quality from intention. It would obviously be included under (c), because the result is the same and only the required degree of culpability changes.

Commentary on Haw. Rev. Stat. Ann. § 701-109(c); *see also Stepp v. State,* 286 Ga. 556, 557, 690 S.E.2d 161 (2010) (describing comparable Georgia provision as one of several "additional statutory provisions concerning prohibitions against multiple convictions for closely related offenses") (citation omitted).

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

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

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

[19] *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States*, 407 F.2d 1199, 1223 (1967) (*en banc*)). Compare, for example, a theft offense defined as "taking property of another with intent to permanently deprive" and an unlawful use offense defined as "taking property of another with intent to temporarily deprive." Because a finding that the defendant took property with the intent to *permanently* deprive logically precludes a finding the defendant took property with the intent to *temporarily* deprive, paragraph (a)(3) precludes the imposition of multiple liability for these two offenses. *See, e.g.,* Model Penal Code § 1.07, cmt. at 114 (giving the example of "robbery and receiving the stolen property, in which it was clear that the defendant had either robbed or received the goods but could not have done both"). The same analysis would also preclude the imposition of multiple liability for a murder offense defined as "intentionally causing the death of another person *absent mitigating circumstances*" and a manslaughter offense defined as "intentionally causing the death of another person *in the presence of mitigating circumstances*."

[20] Precluding multiple liability based on inconsistent guilty verdicts is to be distinguished from, and is therefore not intended to displace, the legal system's well established "tolerat[ion]" of verdicts of *guilt* and *innocence* that are inconsistent with one another." *Evans v. United States*, 987 A.2d 1138, 1140–41 (D.C. 2010) ("[A] logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict") (quoting *Yeager v. United States*, 557 U.S. 110, 112 (2009) (discussing *Dunn v.*

Paragraph (a)(4) establishes that merger is required where "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each."[21] This principle applies whenever the gravamen of one offense duplicates that of another offense.[22] This purpose-based evaluation goes beyond mere consideration of

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United States, 284 U.S. 390 (1932))); *see, e.g., United States v. Powell*, 469 U.S. 57 (1984). For example, whereas paragraph (a)(3) would preclude multiple liability for theft and unlawful use, it would not in any way limit the ability of the fact finder to convict on theft but acquit on unlawful use, notwithstanding the fact that the elements of theft necessarily include the elements of unlawful use.

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

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

Note also that a handful of jurisdictions appear to have legislatively adopted categorical bars on multiple convictions arising from the same conduct—i.e. merger without regard to the nature of the underlying offenses—which are significantly broader than paragraph (a)(4) (as well as any other principle in section 214). *See, e.g.,* Minn. Stat. Ann. § 609.035 ("[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . . ."); *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn.1986) (this provision categorically "prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident"); Cal. Penal Code § 654 ("An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."); *People v. Myers*, 59 Cal. App. 4th 1523, 1529, 69 Cal. Rptr. 2d 889, 892 (1997) (observing that this categorical bar on multiple liability ensures that "punishment is commensurate with a defendant's culpability").

[22] *See, e.g.,* Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 606 (2004) (arguing that elements test should be replaced with a

whether it is theoretically possible to commit one offense without committing another.[23] Instead, it requires evaluation of the harm or wrong, culpability, and penalty proscribed by each offense to determine whether a conviction for one offense reasonably accounts for a conviction for another offense.[24]

Paragraph (a)(5) addresses merger in two different situations involving multiple convictions for general inchoate offenses and completed offenses.[25] The first is where "[o]ne offense consists only of a criminal attempt or criminal solicitation of [t]he other offense."[26] The second is where "[o]ne offense consists only of a criminal attempt or

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broader principle that "asks whether the gravamen of one offense duplicates that of another"); Antkowiak, *supra* note 1, at 268 ("If merger is all about legislative intent, then determining legislative intent is all about identifying the harm, evil, or mischief the statute is supposed to remedy."); *see also* Stacy, *supra* note 1, at 855 ("So how should a court deal with two crimes whose elements overlap only in part? Unfortunately, there is no simple heuristic. Courts should compare the elements of the two offenses, recognize the ways in which the crimes differ, and then use common sense to determine whether the differences between the crimes fundamentally change the character of one crime relative to the other.").

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

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

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

[25] The merger principle set forth in this paragraph arguably departs from the elements test, codified in paragraph (a)(1), in that convictions for both a substantive offense and an inchoate offense designed to culminate in that same offense "would not necessarily be barred under *Blockburger*." Model Penal Code § 1.07, cmt. at 108. So, for example, under *Blockburger*, "convictions of both a substantive offense and its solicitation would be possible since solicitation requires proof of an element, the solicitation, which would not be required to prove the substantive offense, and the substantive offense requires proof of an element, actual commission of the offense, not required to prove the solicitation." *Id.* Nevertheless, because the general inchoate crime of solicitation is "not designed to cumulate sanctions for different stages of conduct culminating in a criminal offense but to reach the preparatory conduct if the offense is not committed," it "would be a perversion of the legislative intent to [] pyramid convictions and punishment." *Id.* at 109.

[26] RCC § 22E-2214(a)(5)(A); *see, e.g.,* Model Penal Code § 1.07(1)(a) (establishing that no person may be convicted of more than one offense if one offense is "included in the other charge," which, as defined in

criminal solicitation toward commission of . . . "[a]n offense that is related to that offense in the manner described in paragraphs (a)(1)-(a)(4) of this subsection."[27] In the first situation, subparagraph (a)(5)(A) requires merger for engaging in preparation to commit an offense and the subsequent completion of that offense whenever the convictions involve the same criminal objective.[28] In the second situation, subparagraph (a)(5)(B) ensures that

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Model Penal Code § 1.07(4)(b), includes "an attempt or solicitation to commit the offense charged"); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 84 (2d. Westlaw 2019) ("It is almost universally the rule that a defendant may not be convicted of both a substantive offense and an inchoate offense designed to culminate in that same offense").

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

The drafters of the Model Penal Code sought to overturn the common law rule on the rationale that general inchoate liability largely exists to provide a basis for arresting, incarcerating, and rehabilitating dangerous offenders—which purposes are equally well-served by a conviction for the completed offense. Model Penal Code § 1.07 cmt. at 109 (conviction for a completed offense alone "adequately deals with such conduct"). Since publication of the Model Penal Code, however, "only [] a minority of the modern recodifications" appear to have been persuaded by this position. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(d) (3d ed. Westlaw 2019) (collecting statutes); *see, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.03 (6th ed. 2012) (contemporary majority approach recognizes that, "[u]nlike the crimes of attempt and solicitation, the offense of conspiracy does not merge into the [] completed offense that was the object of the conspiracy").

Today, most American jurisdictions appear to believe that—consistent with the common law approach—"[conspiratorial] agreement is 'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'" *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). Specifically, the argument driving the common law approach is that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts" for three interrelated reasons: (1) it "increases the likelihood that the criminal object will be successfully attained"; (2) it "decreases the probability that the individuals involved will depart from their path of criminality"; and (3) it "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). And where, as under the RCC, a criminal code employs a bilateral definition of conspiracy, the argument against categorical merger of all conspiracies rests on an even stronger foundation. *See, e.g.,* DRESSLER, *supra* note 26, at § 30.01 ("[I]f the focus of the offense is on the dangerousness of the individual conspirator, her punishment should be calibrated to the crime that she threatened to commit; punishing her for both crimes is duplicative. *The non-merger rule makes sense, however, if one focuses on the alternative rationale of conspiracy law, i.e. to attack the special dangers thought to inhere in conspiratorial groupings.*") (italics added); RCC § 22E-303(a) (requiring proof that the defendant and "at least one other person" agree to commit a crime).

[27] RCC § 22E-2214(a)(5)(B); *see, e.g.,* Proposed Ill. Crim. Code § 254(1)(b) (requiring merger whenever: "one offense consists only of an inchoate offense toward commission of . . . (i) the other offense, or . . . (ii) a substantive offense that is related to the other offense in the manner described in Subsection (1)(a)."); *People v. Thomas*, 531 N.E.2d 84, 88 (Ill. App. 1988) (vacating aggravated battery conviction where same stabbing was basis for attempted murder conviction); Ala. Code § 13A-1-9(2) ("An offense is an included one if . . . It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense."); Kan. Stat. Ann. § 21-5109(4) (same).

[28] Where, for example, X fatally shoots V with intent to kill, X has satisfied the requirements of liability for both the *armed murder* of V and the *attempted armed murder* of V. However, subparagraph (a)(5)(A) precludes imposing multiple convictions upon X for both offenses. Likewise, if X successfully persuades Y to fatally shoot V, X has satisfied the requirements of liability for both the *armed murder* of V (as an accomplice) and *solicitation of armed murder* of V. However, subparagraph (a)(5)(A) precludes imposing

the outcome is the same although the completed offense is not the target of the general inchoate offense, provided that the completed offense and the target of the general inchoate offense: (1) involve the same criminal objective; and (2) would otherwise be subject to merger under any of the other principles specified in subsection (a).[29]

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

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multiple convictions upon X for both offenses. Note that the above limitations would not apply if the charges for either attempt or solicitation to commit armed murder and the (completed) armed murder involved *different victims*.

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

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

[31] RCC § 22E-2214(a)(6)(A); *see, e.g.,* Model Penal Code § 5.05(3) ("A person may not be convicted of more than one [general inchoate inchoate offense] for conduct designed to commit or to culminate in the commission of the same crime."); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 84 (2d. Westlaw 2019) ("Most jurisdictions bar multiple convictions for combinations of inchoate offenses designed to culminate in the same offense.").

Note that paragraph (a)(6) is limited to merger of multiple inchoate offenses that arise from the "same act or course of conduct." This is in contrast to the Model Penal Code approach, which appears to categorically preclude multiple liability for more than one general inchoate crime directed towards a single criminal objective, even where the convictions rest upon *separate* courses of conduct. *See* Model Penal Code § 5.05(3) (merger for multiple inchoate crimes whenever they rest upon "*conduct designed to commit or to culminate in the commission of the same crime*") (italics added); ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84 ("Apparently the drafters [of the Model Penal Code] believe that . . . where there are two inchoate offenses arising out of separate courses of conduct directed toward the same substantive offense there is only one harm."). If this reading of the Model Penal Code is accurate, then subsection 5.05(3) would dictate that (for example) where X unsuccessfully attempts to murder V in 2015, and thereafter unsuccessfully attempts to murder V again (or, alternatively, unsuccessfully solicits Y to murder V) in 2018, X *cannot* be convicted for more than one general inchoate crime. ROBINSON, *supra* note 3, at 1 CRIM. L. DEF. § 84.

Given the unintuitive nature of this outcome, various jurisdictions appear have revised this aspect of the Model Penal Code to incorporate a "same course of conduct" requirement. *See, e.g.,* Ky. Rev. Stat. Ann. § 506.110(3) ("A person may not be convicted of more than one (1) [general inchoate offense] for a *single course of conduct* designed to consummate in the commission of the same crime."); *State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) ("[T]he commission intended [the Oregon Criminal Code] to prevent multiple convictions for attempt, solicitation, and conspiracy on the basis of a defendant's *single course of conduct*, as opposed to preventing multiple convictions for multiple instances of one or another of the inchoate crimes."). The RCC accomplishes the same through paragraph (a)(6), which effectively limits merger of multiple inchoate offenses to situations where the underlying convictions share a relatively close temporal/substantive relationship to one another. *Compare, e.g., State v.* Gonzales-*Gutierrez*, 171 P.3d 384 (Or. Ct. App. 2007) (merging convictions of attempt, solicitation, and conspiracy to commit murder based on a series of phone conversations had between the defendant and the same police officer posing as a hit man), *with State v. Badillo*, 317 P.3d 315, 321 (Or. Ct. App. 2013) (upholding separate convictions for two

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

Subsection (b) establishes three main procedural aspects of the merger analysis set forth in RCC § 22E-214. First, § 22E-214 does not constrain the number of offenses over which the fact finder may deliberate. Rather, the trier of fact may find the defendant guilty of any number of offenses that merge under section 214 for which the requirements of liability have been met.[35] Second, under paragraph (b)(1) a judge can merge offenses that merge under subsection (a) prior to sentencing by vacating all but one of the convictions using the rule of priority in subsection (c) of the section.[36] Third, under paragraph (b)(2)

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counts of solicitation because the defendant solicited two separate individuals, several days apart); *State v. Habibullah* 373 P.3d 1259, 1263 (Or. Ct. App. 2016) (upholding multiple convictions for conspiracy/solicitation to commit murder and attempt to murder the same victim because conduct that formed the basis of the conspiracy/solicitation convictions occurred a month after the attempt).

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

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

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

[35] *See, e.g.,* Model Penal Code § 1.07 ("When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if . . . ."); Alaska Stat. Ann. § 11.31.140(d) ("[The merger principle set forth in this] section does not bar inclusion of multiple counts in a single indictment or information charging commission of a crime defined by AS 11.31.100-11.31.120 and commission of the crime that is the object of the attempt, conspiracy, or solicitation.").

[36] This would be a change compared to current court practice, described immediately below. *See also State v. Cloutier*, 286 Or. 579, 601–03, 596 P.2d 1278, 1289–91 (1979) ("A trial court might pronounce a judgment of conviction on each of the charges, indicating the sentence he would impose if the conviction stood alone but suspending its execution (or suspending imposition of sentence), and accompany the judgment on each but the gravest charge with an order that the judgment is vacated by its own terms *whenever the time for appeal has elapsed or the judgment appealed from has been affirmed*.").

In the event that one or more convictions is dismissed by the trial court pursuant to section 214 before sentencing, that dismissal shall not be considered an acquittal on the merits, such that a vacated

a judge can proceed to enter a judgment of conviction for each of the offenses that merge and sentence the actor for those offenses. However, if the sentencing court proceeds under paragraph (b)(2), the sentences for offenses that merge must run concurrent to one another[37] and all but, at most,[38] one of the convictions must be vacated using the rule of priority in subsection (c) of this section after the expiration of appellate rights or affirmance on appeal.[39]

When applying the procedure in subsection (b), the sentencing judge confronts questions of law regarding the manner in which the statutory elements of criminal offenses relate to one another under subsecton (a).[40] The determination of whether those principles preclude multiple liability for two or more substantially related offenses should generally be conducted without regard to the underlying facts of a case. [41] It is expected that once a court determines that § 22E-214 requires merger of two or more offenses, that determination would be treated as binding on all future cases involving the same offenses.[42]

Notably, the principles of merger set forth in § 22E-214 do not have legal import for the resolution of issues that go beyond determining when the legislature has authorized the imposition of multiple liability for substantially related offenses prosecuted in a single proceeding. This includes, but is not limited to, determining: (1) when successive

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conviction may be re-instated in appropriate circumstances (e.g., where the remaining offense is overturned on appeal for reasons that do not effect the vacated offense).

[37] Concurrent sentencing helps ensure that a defendant does not serve additional time pending an appeal, or waiting for the time to appeal to have expired.

[38] The language "at most" recognizes the possibility that an appellate court may overturn all convictions that otherwise would merge under RCC § 22E-214.

[39] This clarification is intended to provide D.C. Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the D.C. Court of Appeals for resolution on direct review, should they so choose. *See, e.g., Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985); *Warrick v. United States*, 528 A.2d 438, 443 n.6 (D.C. 1987); *Fuller v. United States*, 407 F.2d 1199, 1224–25 (D.C. Cir. 1967).

[40] Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 607 (2004) (observing that comparable merger principles "would present issues of law regarding how defined offenses relate to each other," and arguing that, because "a court's finding regarding the appropriateness of multiple convictions for two separate offenses could be binding on all future cases involving those same offenses," this would enhance the "predictability, stability, and evenhandedness in the imposition of multiple liability.") (discussing Proposed Ill. Crim. Code § 254(1)(a)); *see, e.g.,* Commentary on Proposed Del. Crim. Code § 210(a).

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

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

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

prosecutions for substantially related offenses may be brought[43]; (2) when a jury may be instructed on an offense that was not specifically charged in the indictment[44]; and (3) when an appellate court may direct the entry of judgment for an offense over which the jury never deliberated.[45]

Subsection (c) establishes a rule of priority for determining which of two or more merging convictions should be vacated and which should remain.[46] It is comprised of two different principles. The first dictates that where, among any group of merging offenses, one has a higher authorized maximum term of incarceration than the others, the conviction for that offense is the one that should remain. The second proscribes that where, among any group of merging offenses, two or more offenses have the same, highest statutory maximum term of incarceration, then the determination of which among those more severely punished offenses should remain is submitted to the court's discretion.

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

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

The District's current approach to merger is, as a matter of substantive policy, piecemeal, frequently ambiguous, and unduly narrow. The D.C. Court of Appeals (DCCA), construing D.C. Code § 23-112,[47] employs the elements test as the primary basis

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[43] *See, e.g., Grady v. Corbin*, 495 U.S. 508, 509, *overruled by United States v. Dixon*, 509 U.S. 688 (1993) ("Successive prosecutions, whether following acquittals or convictions, raise concerns that extend beyond [] the possibility of an enhanced sentence" implicated by merger/multiple punishment); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. Colo. L. Rev. 595, 646 (2006) (["T]he courts must distinguish between the analysis appropriate for double jeopardy claims based on successive prosecution, and that appropriate for claims of multiple punishment. Although conflating the two types of analysis has not led to excessive protection against punishment, it has eroded double jeopardy protection against successive prosecution, making it vulnerable to legislative fragmentation of offenses.").

[44] *See, e.g., Com. v. Jones*, 590 Pa. 356, 369-70 (2006) ("When a defendant may be convicted on a charge absent from the indictment, concerns of fundamental fairness dictate that analysis of potential greater and lesser included offenses proceed in a more narrow fashion than when sentencing merger is at issue."); *Matter of D.B.H.*, 549 A.2d 351, 353 (D.C. 1988) ("[W]hether or not simple assault is a lesser-included offense of a charged robbery in general, it cannot be considered, for purposes of providing sufficient notice to the accused, a lesser-included offense of the robbery charged here."); WAYNE R. LAFAVE ET AL., 6 CRIM. PROC. § 24.8(e)) (4th ed. Westlaw 2019)) ("No area of law relating to jury instructions has created more confusion than that governing when a court may or must put before the jury for its decision a lesser-included offense, that is, an offense not specifically charged in the accusatory pleading that is both lesser in penalty and related to the offense specifically charged.").

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

[46] *See, e.g.,* 42 Pa.C.S. § 9765 ("Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense."); Cal. Penal Code § 654 ("An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.");

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

for determining whether to impose multiple liability for substantially related offenses arising from the same course of conduct. The court's application of the elements test to address this issue is at times inconsistent, and, in many situations where there is no clear legislative intent, may have the unintended effect of authorizing the imposition of disproportionate punishment. RCC § 22E-214 replaces this judicially developed approach with a comprehensive set of substantive merger policies. Many of these policies are based on current District law, and, therefore, are primarily intended to clarify the mechanics of merger analysis for the purpose of enhancing the consistency and efficiency of District law. However, a few of these policies broaden the District's current approach to merger for purposes of enhancing the proportionality of the D.C. Code.

As a matter of judicial administration, the District's law of merger is currently treated as the sole province of appellate, rather than trial, courts. D.C. Superior Court judges, based on explicit instructions from the DCCA, appear to systematically ignore merger issues at sentencing, leaving them for appellate resolution. This approach brings with it both efficiency gains as well as potential liberty costs. The RCC merger provisions do not resolve this tension. Paragraph (b)(2) enables the substantive policies set forth in subsections (a) to be implemented in a manner consistent with the District's current approach of not addressing merger issues at initial sentencing, without precluding future administrative changes should District courts deem them to be appropriate.

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

It is well established under District law that the Double Jeopardy Clause of the U.S. Constitution prohibits the imposition of multiple punishments when—but only when—doing so would conflict with legislative intent.[48] As a result, the DCCA views "legislative intent [as the] key in determining whether offenses merge, as 'the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.'"[49] And, in the District, "the *Blockburger* rule, albeit in less than felicitous language, has been codified as an express declaration of legislative intent" as to merger under D.C. Code § 23-112.[50]

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

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

[50] *Byrd*, 598 A.2d at 386 (internal quotations and citation omitted); *see Blockburger v. United States*, 284 U.S. 299, 301 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each

The *Blockburger* rule, as applied to multiple convictions for different offenses prosecuted in a single proceeding, supports a rebuttable presumption of legislative intent[51] as to merger when (but only when) two basic requirements are met: (1) the convictions arise from the same act or course of conduct[52]; and (2) the underlying offenses upon which

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provision requires proof of a fact which the other does not."). The relevant statute, D.C. Code § 23-112, establishes that:

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

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

> The legislative history rather clearly confirms that Congress intended the federal courts to adhere strictly to the *Blockburger* test when construing the penal provisions of the District of Columbia Code. The House Committee Report expressly disapproved several decisions of the United States Court of Appeals for the District of Columbia Circuit that had not allowed consecutive sentences notwithstanding the fact that the offenses were different under the *Blockburger* test. *See* H.R. Rep. No. 91–907, p. 114 (1970). The Report restated the general principle that "whether or not consecutive sentences may be imposed depends on the intent of Congress." *Ibid*. But "[s]ince Congress in enacting legislation rarely specifies its intent on this matter, the courts have long adhered to the rule that Congress did intend to permit consecutive sentences . . . when each offense "'requires proof of a fact which the other does not,'" *ibid*., citing *Blockburger v. United States, supra*, and *Gore v. United States, supra.* The Committee Report observed that the United States Court of Appeals had "retreated from this settled principle of law" by requiring specific evidence of congressional intent to allow cumulative punishments, H.R. Rep. No.91–907, at 114, and the Report concluded as follows:
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> > "To obviate the need for the courts to search for legislative intent, section 23–112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglary and larceny unless the judge provides to the contrary."
>
> We think that the only correct way to read § 23–112, in the light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule for construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed "shall, unless the court expressly provides otherwise, run consecutively." And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.

445 U.S. 684, 692–93 (1980).

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

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

the convictions are based entail proof of the same facts.[53] The DCCA has expounded upon the contours of each of these requirements through a robust and well-developed body of case law.

Whether, for purposes of the first requirement, multiple convictions arise from separate acts or transaction depends upon an analysis of three factors. The first factor is the appropriate unit of prosecution, which is "generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence."[54] The second factor is the duration of the conduct in question; the analysis here focuses on whether there was an "appreciable length of time 'between the acts [alleged to] constitute the [multiple] offenses.'"[55] The third factor asks whether "a subsequent criminal act is '[] not the result of the original impulse, but a fresh one.'"[56] Judicial evaluation of the first factor is purely a matter of law; the inquiry focuses on legislative intent as discerned from the traditional sources of statutory meaning.[57] Judicial evaluation of the latter two factors, in contrast, requires application of "a fact-based approach,"[58] which revolves around whether the defendant reached a "fork-in-the-road."[59]

The second requirement, which is the crux of the *Blockburger* rule, incorporates what is often referred to as the elements test.[60] The central question presented by the elements test is whether, "where the same act or transaction constitutes a violation of two different statutory provisions, 'each provision require[] proof of a fact which the other does not[?]'"[61] If, based on consideration of the statutory elements of two offenses for which

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

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

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

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

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

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

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

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

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

the defendant has been convicted, this question can be answered in the negative, then the operative assumption is that the legislature intended to preclude the imposition of multiple liability and punishments, such that one of the convictions must be vacated.[62] Where, in contrast, an affirmative answer can be rendered—i.e. because element analysis indicates that both offenses of conviction require proof of at least one distinct fact—then it is presumed that the legislature intended to authorize multiple liability and punishments.[63] Judicial application of the elements test is generally understood by the DCCA to entail a pure legal analysis, which is to be conducted without regard to the underlying facts of a case. [64]

This wholly legal approach to the elements test is to be contrasted with the "fact-based analysis in determining whether multiple punishments [are] permissible" frequently applied by the DCCA prior to its *en banc* decision in *Byrd v. United States*.[65] Under this broader approach to merger, the DCCA would look beyond "abstract consideration of the statutes involved or the wording of the indictment,"[66] and instead look to the proof presented at trial to assess whether there exists a "significant difference in the nature of

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

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

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

[65] 598 A.2d 386, 390 (D.C. 1991); *see, e.g., Arnold v. United States*, 467 A.2d 136, 138-39 (D.C. 1983) (holding that a defendant could not be punished both for grand larceny and unauthorized use of a motor vehicle, and "observing that with respect to the specific factual situation in that case, the conviction for unauthorized use included proof of no fact not also adduced on the larceny charge"); *Worthy v. United States*, 509 A.2d 1157 (D.C. 1986) (applying the same fact-based analysis to convictions for unauthorized use of a vehicle and receiving stolen property, deeming Arnold "dispositive").

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

> In *Whitaker* the court held that unlawful entry was a lesser included offense of burglary for the purpose of allowing the defendant to request a jury instruction on unlawful entry, despite the fact that unlawful entry need not have necessarily been established as an element of burglary under the D.C. Code or under the indictment of that case. The *Whitaker* court reasoned that because unauthorized entry was an element of the vast majority of burglaries it should be considered a lesser included offense where the facts of the particular case indicate that it was a lesser included offense. The court added, however, that its novel analysis of lesser included offenses was given with the caveat that there must also be an inherent relationship between the greater and lesser offenses, i.e. they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

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

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

[the defendant's conduct]."[67] In *Byrd*, however, the *en banc* court opted to abandon this fact-sensitive analysis, reasoning that prior DCCA cases "erred in concluding that since the facts as actually presented by the government to prove one charge were necessarily used by the government to prove the second charge, the two charges constituted the 'same offense.'"[68] Under *Blockburger*, as the *Byrd* court concludes, "the focus should have been on the statutory elements of the two distinct charges," that is, "whether each statutory provision required proof of an element that the other did not."[69]

Although the general applicability of the elements test is clear in principle, District courts frequently struggle to determine when the standard is satisfied as a matter of course.[70] To help clarify matters, the DCCA frequently relies on the concept of a "lesser included offense" (LIO) to guide its analysis.[71] The general rule applied by District courts is that two offenses merge when (but only when) one of two offenses is an LIO of the other.[72] One offense is an LIO of another, in turn, if "the elements of the lesser offense are a subset of the elements of the charged offense."[73] Practically speaking, this means that Offense X is only an LIO of Offense Y if it is literally impossible to commit Offense Y without necessarily also committing Offense X under any set of facts.[74] Where application of this comparative analysis leads to the conclusion that one of two convictions is an LIO of the other, then "the trial court has but one course, to vacate the lesser-included offense," thereby imposing liability and punishment for the greater, more serious offense.[75]

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

[68] 598 A.2d at 390.

[69] *Id.*

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

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

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

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

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

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

It's worth noting that for a significant amount of time "it was generally thought that the prohibition against multiple punishments applied only to *consecutive* sentencing." *Byrd*, 598 A.2d at 393. This view changed, however, in *Doepel v. United States*, where the DCCA recognized that "even a concurrent sentence is an element of punishment because of potential collateral consequences" and accordingly forbade concurrent sentences for both felony murder and the underlying felony. 434 A.2d 449, 459 (D.C. 1981). And "[t]his interpretation of the result that follows from a *Blockburger* analysis of multiple punishments was, four

An illustrative example of two crimes that share this kind of element-based, LIO relationship are the District's offenses of second degree murder[76] and murder of a police officer (MPO).[77] Both offenses require a malicious killing; however, MPO, but not second degree murder, requires that the victim be a police officer.[78] Therefore, it *cannot* be said that each offense "requires proof of a fact which the other does not."[79] Rather, MPO requires proof of the same facts as second degree murder, plus at least one additional fact, namely, that the victim be a police officer.[80] As a result, it impossible to commit MPO without also committing second degree murder. It therefore follows that second degree murder is an LIO of MPO. Under the elements test, then, multiple convictions for both offenses, if based on the same act or course of conduct committed against a single victim, would merge at sentencing, thereby leaving a single conviction for only the greater offense, MPO.

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

The District's robbery statute applies a fifteen year statutory maximum to any person who, "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value."[81] Similarly, the District's carjacking statute applies a twenty one year statutory maximum (and seven year mandatory minimum) to any person who "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle . . . ."[82]

Comparing the elements of carjacking and robbery in *Pixley v. United States*, the DCCA ultimately concluded that the *Blockburger* rule supports the imposition of multiple liability and punishment for both offenses when based on the same act or course of conduct.[83] Central to the court's analysis is the theoretical possibility of satisfying the elements of carjacking without also satisfying the elements of robbery. True, "*most* carjackings" are likely to constitute robberies; however, this is not always the case.[84]

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years later, confirmed by the Supreme Court in *Ball v. United States*." *Byrd*, 598 A.2d at 393 (citing *Ball v. United States*, 470 U.S. 856 (1985) (because a separate conviction, even with a concurrent sentence, could have collateral consequences, the imposition of concurrent sentences "cannot be squared with Congress' intention")).

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

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

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

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

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

[81] D.C. Code § 22-2801.

[82] D.C. Code § 22-2803(a)(1).

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

[84] *Id.* at 440 (quoting *Letter to the Chairperson of the Committee on the Judiciary from then-Corporation Counsel John Payton* (November 17, 1992), at 1 (emphasis added)).

For example, it is possible to commit carjacking without also committing a robbery since robbery requires proof that the property have been *carried away*.[85] And, of course, it is possible to commit robbery without also committing carjacking since carjacking requires proof that the property at issue be a *motor vehicle*.[86] Accordingly, the DCCA concluded, the District's carjacking and robbery offenses do not merge under the elements test.[87]

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

Illustrative is the District law pertaining to merger of robbery and assault. The DCCA has repeatedly held that convictions for robbery and assault merge.[88] However, this conclusion is contrary to the results generated by a strict application of the elements test, which indicates that each "requires proof of a fact which the other does not."[89] For example, the District's assault offense requires "the unlawful use of force causing injury to another or the attempt to cause injury with the present ability to do so," without regard to whether a theft was involved.[90] In contrast, the District's robbery offense requires the theft of property in the victim's immediate actual possession, without regard to whether an assault was involved (i.e. a taking by "stealthy seizure" or "snatching" will suffice).[91] It

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

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

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

[88] *Simms v. United States*, 634 A.2d 442, 447 (D.C. 1993); *In re Z.B.*, 131 A.3d 351, 355 (D.C. 2016) ("[I]t is not possible to commit robbery without also committing assault, and assault accordingly merges as a lesser-included offense."); *Beaner v. United States*, 845 A.2d 525, 540–41 (D.C. 2004) ("ADW is a lesser included offense of armed robbery when the assault is committed in order to effectuate the robbery."); *In re T.H.B.*, 670 A.2d 895, 899 (D.C. 1996) (assault with intent to rob LIO of robbery). *But see Matter of D.B.H.*, 549 A.2d 351, 353 (D.C. 1988) ("[W]hether or not simple assault is a lesser-included offense of a charged robbery in general, it cannot be considered, for purposes of providing sufficient notice to the accused, a lesser-included offense of the robbery charged here."). For pre-*Byrd* case law, see, for example, *Rogers v. United States*, 566 A.2d 69, 71 n.3 (D.C. 1989) (assault LIO of robbery); *Norris v. United States*, 585 A.2d 1372, 1375 (D.C. 1991) (assault with a dangerous weapon LIO of armed robbery); *Harling v. United States*, 460 A.2d 571, 574 (D.C. 1983).

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

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

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

is, therefore, theoretically possible to commit one of these offenses without necessarily committing the other.[92]

How, then, has the DCCA determined that the District's robbery and assault offenses are subject to merger? The legal basis for this conclusion is not clearly articulated in the case law. However, it seems to rest upon a theory-specific interpretation of *robbery by assault* (i.e. a taking "against resistance" rather than a taking by "sudden or stealthy seizure or snatching"), under which a fact-based consideration of how the robbery was committed effectively limits the scope of the elements being compared under *Blockburger*.[93]

This same theory-specific, fact-based approach also appears to be at the heart of District law governing merger of felony murder and the underlying offense. An abstract elemental analysis of felony murder and any particular offense that serves as the source of aggravation—e.g., rape, burglary, arson, etc.—weighs against merger given that each offense "requires proof of a fact which the other does not."[94] For example, felony murder requires proof of a killing, which is not required by any specific enumerated felony. In contrast, each of these specific enumerated felonies requires proof of facts that are not necessary to prove felony murder, since proof of the commission of a different enumerated felony may always suffice. As a result, it is always theoretically possible to commit felony murder without necessarily committing the offense that actually serves as the basis for the aggravation of the homicide in any particular case.

In the face of this abstract elemental analysis, the DCCA (as well as the U.S. Supreme Court interpreting District law[95]) has repeatedly held that "the underlying felony

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

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

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

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

will merge with [] felony murder."[96] Yet, as with the case law pertaining to merger of assault and robbery, the rationale for this outcome is not explicitly provided by the DCCA. Here again, though, the conclusion only seems supportable if one accounts for the government's theory of liability—as reflected in the charging document and/or facts proven at trial—to ensure that the underlying felony upon which merger is sought is, in fact, the basis for aggravation of homicide.

It's also worth noting that, in rare situations, the DCCA requires merger of overlapping offenses under circumstances that do not seem supportable under any interpretation of the elements test. Illustrative is the District law pertaining to merger of assault and attempt offenses. The DCCA has held that assault with a dangerous weapon is an LIO of, and therefore merges under *Blockburger* with, the while armed versions of both attempted robbery and attempted aggravated assault.[97] However, neither an abstract elemental analysis of the relevant statutes, nor a more context-sensitive evaluation of those elements in light of the government's theory of prosecution, would seem to support this conclusion. The lesser offense of assault with a dangerous weapon requires proof of a fact—an attempted battery, *plus the present ability* to commit, a battery[98]—that neither of the greater offenses of attempted robbery and attempted aggravated assault while armed require proof of. Therefore, the DCCA's decision to merge a conviction for assault with a dangerous weapon into both of these substantially overlapping offenses, while both intuitive and seemingly just, does not appear to be consistent with the results generated by a *Blockburger* analysis.[99]

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

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

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

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

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

Even accounting for the DCCA's periodic *de facto* application of a broader approach to the elements test, there is little question that the overall scope of merger under District law is exceedingly narrow. Indeed, relatively minor variances between what are otherwise very similar offenses routinely provide District courts with the basis for rejecting claims of merger.[100] This is problematic given that the breadth of liability inherent in such an approach has the potential to be highly disproportionate.

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

To illustrate both dimensions, consider again the DCCA's holding in *Pixley v. United States* that the District's carjacking and robbery offenses do not merge under the elements test.[101] In practical effect, this means that any person who participates in a successful carjacking in the District can always be convicted of both robbery and carjacking—notwithstanding the fact that, from a communicative perspective, a single conviction for carjacking would seem to suffice.[102] And it also means that any person who participates in a successful, unarmed carjacking in the District is subject to thirty-six years of incarceration (regardless of whether any force is actually applied[103]), which is three-and-a-half times the ten year statutory maximum facing someone who commits a "life-threatening or disabling" aggravated assault.[104]

The kinds of disproportionality inherent in the elements test stem from placing a singular focus on whether offenses require proof of different facts. This is problematic from the perspective of proportionate punishment because two substantially overlapping

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

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

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

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

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

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

offenses may require proof of slightly different facts, yet the gravamen of one offense—based upon the harm, culpability, and penalty it proscribes—may still duplicate that of the other.

Here again, a comparison of the District's robbery and carjacking offenses is illustrative. It is certainly true that a person can commit carjacking without necessarily committing robbery. Not only is asportation an essential element of robbery but not carjacking, but carjacking can be proven without regard to the defendant's extremely intoxicated state, which is not true of robbery.[105] These moral distinctions, while narrow, are meaningful: all else being equal, for example, a sober theft of property from a person is more blameworthy than a failed attempt at taking property while in an inebriated state. That said, the existence of these distinctions does not undercut a more general recognition that carjacking speaks to the same combined threat to personal security and property rights addressed by robbery.[106] The central difference is that carjacking affords additional protections—in the form of substantially increased minimum and maximum penalties—where the theft of property implicates an automobile.[107] (This conclusion is further bolstered by a recognition that the elements of an offense only set the floor of liability, while the statutory maximum is geared towards addressing more culpable/harmful variations of the same basic conduct—a characterization that seems to easily fit *sober* and *successful* carjackings.[108]) With that in mind, and assuming that the District's robbery and carjacking statutes are individually proportionate, then imposing multiple convictions and punishments for both offenses—where the gravamen of one duplicates that of the other—necessarily leads to the disproportionate duplication of liability and punishment.

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

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

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

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

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

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

Id. at 3.

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

In this scenario, Defendant X has not only satisfied the requirements of liability for carjacking and robbery, but also, at least three other District offenses: (1) unauthorized use of a vehicle (UUV), which subjects a person who uses the motor vehicle of another without permission to a five year statutory maximum[109]; (2) felony threats, which subjects a person who makes verbal threats to do bodily harm to a twenty year statutory maximum; and (3) felony theft, which subjects a person who steals property worth more than $1,000 to a ten year statutory maximum.[110]

None of these offenses appear to be subject to a presumption of merger under the elements test. For example, the DCCA has explicitly determined that UUV does not merge with carjacking because UUV, but not carjacking, requires the actual *use* of the vehicle.[111] DCCA case law likewise suggests that felony threats would not merge with carjacking because "it is possible to commit a robbery without committing verbal threats—that is, through the use of violence or conduct that puts one in fear."[112] And DCCA case law also indicates that felony theft would not merge with carjacking because for felony theft, but not carjacking, the value of the property stolen must be greater than $1,000.[113] (One could imagine, for example, a carjacking implicating a vehicle worth less than $1,000). Under the elements test, then, it appears that Defendant X could be could be convicted of, and cumulatively sentenced for, all five offenses, with an accompanying aggregate statutory maxima of seventy-one years.

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

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

In this scenario, Defendant X has satisfied the requirements of liability for at least seven different offenses: (1) armed carjacking, an aggravated form of carjacking that is subject to a forty year statutory maximum alongside a fifteen year mandatory minimum[114]; (2) robbery while armed, a combination offense subject to a forty five year statutory

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

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

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

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

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

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

maximum alongside a five to ten year mandatory minimum[115]; (3) felony theft (ten year statutory maximum); (4) felony threats (twenty year statutory maximum); (5) UUV (five year statutory maximum); (6) possession of a firearm during a crime of violence (PFCOV), which is subject to a fifteen year statutory maximum alongside a five year mandatory minimum[116]; and (7) carrying a pistol without a license (CPWL), which is subject to a five year statutory maximum.[117]

None of these offenses appear to be subject to a presumption of merger under the elements test. The first five offenses—armed carjacking, robbery while armed, felony theft, felony threats, and UUV—would not merge for the same reasons previously mentioned above in the context of an unarmed carjacking. Nor, however, would the PFCOV and CPWL convictions appear to be subject to merger under the elements test either. For example, PFCOV does not merge with either armed carjacking or robbery while armed because, as the DCCA has explained, "proof of possession does not necessarily prove armed with/readily available, and proof of a dangerous weapon does not necessarily prove a firearm or imitation thereof."[118] And CPWL does not merge with either of these offenses because, as the DCCA has explained, CPWL "presupposes an operable and unlicensed pistol outside one's own premises or place of business, but not proof that the pistol was used in a robbery or, for that matter, in any other crime."[119] Finally, the DCCA has determined that PFCOV does not merge with CPWL because, whereas "[t]he lack of a license is an element of CPWL, but not of PFCOV," the "commission of a crime of violence or a dangerous crime while in possession of a firearm or imitation firearm is an element of

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

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

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

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

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

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

PFCOV, but not of CPWL."[120] Pursuant to the elements test, therefore, it appears that Defendant X could be convicted of, and cumulatively sentenced for, all seven offenses, with an accompanying aggregate statutory maxima of over one hundred and thirty years alongside at least twenty five years of aggregated mandatory minima.[121]

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

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

> There are obvious differences between the two offenses, and each requires proof of a fact which the other does not. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.[] To establish a conspiracy, the government must prove an unlawful agreement among two or more persons. No such proof is required for attempted robbery. To establish attempted robbery, the government must prove that the defendant committed an overt act which was done with the intent to commit the crime and which, but for the intervention of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. [] No such proof is required for conspiracy, for the "overt act" requirement as to that crime is far less exacting; a preparatory act, innocent in itself, may be sufficient.[122]

Likewise, although the DCCA has never explicitly addressed the issue, the same *Blockburger*-based rationale would similarly seem to support the imposition of multiple convictions and punishments for both solicitation and attempt, as well as solicitation and conspiracy, to commit a single crime of violence.[123] If true, however, this would mean that

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

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

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

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

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed

a person could—pursuant to the elements test—be convicted of, and sentenced for, attempt, conspiracy, and solicitation to commit the same crime of violence.[124]

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

Scenario 1. X1 intentionally crushes Y's jaw with a sucker punch to the face. X1's goal is to inflict a horrific but non-fatal injury. X1 is successful; Y's injury requires urgent and continuing medical treatment, and results in visible and long-lasting scars.[125]

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

In scenario 1, X1 has committed aggravated assault, and is therefore subject to ten years of potential punishment. In scenario 2, X2 came close, but ultimately failed, to commit aggravated assault. He does, however, satisfy the requirements of liability for attempted aggravated assault, and is therefore subject to five years of potential punishment for that general inchoate offense.[126] In addition, X2 has also satisfied the requirements of liability for two other general inchoate offenses: (1) solicitation of aggravated assault, which is subject to ten years of potential punishment[127]; and (2) conspiracy to commit aggravated assault, which is subject to ten years of potential punishment.[128] Assuming, pursuant to the elements test, that convictions for these general inchoate offenses do not merge, then X2 would be facing a maximum sentence of twenty-five years for his

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carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

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

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

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

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

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

unsuccessful effort at harming Y. This outcome, when viewed in light of the ten years of potential incarceration confronting X1 for successfully causing the same injury to Y, seems highly disproportionate.

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

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

> A person may be convicted of any combination of theft, identity theft, fraud, credit card fraud, unauthorized use of a vehicle, commercial piracy, and receiving stolen property for the same act or course of conduct; provided, that no person shall be consecutively sentenced for any such combination or combinations that arise from the same act or course of conduct.[129]

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

> No person shall be consecutively sentenced for enticing a child or minor to engage in a sexual act or sexual contact . . . and engaging in that sexual act or sexual contact with that child or minor, provided, that the enticement occurred closely associated in time with the sexual act or sexual contact.[130]

The second relevant source of legal authority are the Voluntary D.C. Sentencing Guidelines (DCSG), which direct Superior Court judges to run such overlapping convictions concurrently in a variety of situations. The relevant provision, Rule 6.2, offers the following non-binding[131] guidance:

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

[130] D.C. Code § 22-3010.

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

6.2 Concurrent Sentences

The following sentences must be imposed concurrently:

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

The above language—when viewed in light of the relevant DCSG definitions of "crimes of violence"[132] and "event"[133]—indicates that multiple convictions for all non-violent offenses arising from the same act or course of conduct are to be sentenced concurrently. This appears to be true, moreover, without regard to whether there exists *any overlap* between the offenses of conviction in the first place. So, for example, a judge sentencing a defendant convicted of theft and carrying a dangerous weapon (CDW) based on the same act or course of conduct would, under this rule, impose concurrent sentences for each offense—notwithstanding the fact that CDW and theft are completely different offenses.[134] All the more so, then, Rule 6.2 appears to direct judges to impose concurrent

[132] The DCSG clarify that "[t]he term "crime of violence" under the Guidelines is . . . identical to the crime of violence definition provided in D.C. Code § 23-1331(4)." DCSG R. 7.4. That statutory provision, in turn, denotes the following list of offenses:

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

[133] DCSG R. 7.10 provides the following definition of "event":

> [O]ffenses are part of a single event if they were committed at the same time and place or have the same nucleus of facts. Offenses are part of multiple events if they were committed at different times and places or have a different nucleus of facts. When an offense(s) crosses jurisdictional lines (e.g., from Maryland into the District), it may result in multiple cases. However, this should not change the analysis regarding whether the offense(s) constitutes a single or multiple events.

[134] This practice may lead to disproportionate leniency in certain situations. *See, e.g.,* Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 605 (2004) (noting that the problem with a system in which courts "impose concurrent sentences for multiple offenses of conviction [when such offenses do not overlap]" is that it "has the obvious and pervasive flaw of trivializing, to the point of complete irrelevance, every offense other than the most serious one. A sensible liability scheme should require, or at least allow, some additional punishment for each such harm—although perhaps incrementally reduced punishment instead of the equally crude alternative of full consecutive sentences for each offense.").

sentences on a defendant who is convicted of multiple non-violent offenses that actually overlap.[135]

The District's concurrent sentencing policies, when viewed collectively, seem to *modestly* mitigate *some* of the proportionality problems inherent in the elements test. At the same time, however, the relevant safeguards these policies appear to provide are limited in key ways.

First, various provisions in the D.C. Code affirmatively encourage judges to run the sentences for substantially overlapping offenses back-to-back (hereinafter, "consecutive sentencing"). In some instances, the encouragement is "soft." For example, the DCCA has construed D.C. Code § 23-112 to embody a general "preference . . . that consecutive sentences be imposed when an individual is convicted of two or more offenses, even if the convictions arise out of the same act or transaction."[136] In other instances, however, the D.C. Code legally compels consecutive sentencing. For example, the District's UUV statute establishes that any person who commits the offense "during the course of or to facilitate a crime of violence, *shall be*," *inter alia*, "imprisoned for not more than 10 years, or both, *consecutive to the penalty imposed for the crime of violence*."[137]

Second, the relatively few number of offenses subject to a statutorily mandated rule of concurrent sentencing means that the circumstances in which an accused has a *legally enforceable right to concurrent sentencing* for substantially overlapping offenses are quite rare.

Third, the concurrent sentencing policies reflected in the DCSG are—their non-binding nature aside[138]—limited in important ways. Most significant is the fact that they only address the sentencing of multiple non-violent offenses arising from the same act or

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[135] The DCSG provides the following relevant example:

> The defendant sold heroin and cocaine to an undercover narcotics officer as part of a "buy – bust" operation. The defendant was not apprehended at the time of the transaction and a warrant was issued for her arrest. The defendant was arrested three days later. A search of the defendant's person at the time of her arrest uncovered liquid PCP. The defendant was convicted of distribution of heroin, distribution of cocaine, and possession of liquid PCP. The sentences imposed for distribution of heroin and distribution of cocaine should run concurrently because they are non-violent crimes that arose from the same event. The court has the discretion to impose a sentence for possession of liquid PCP that runs either concurrently or consecutively to the sentences imposed for the distribution of heroin and distribution of cocaine convictions because they are not part of the same event.

DCSG R. 6.3.

[136] *Jones v. United States*, 401 A.2d 473, 475 (D.C. 1979); *see, e.g., Banks v. United States*, 307 A.2d 767, 769 (D.C. 1973) ("Congress has clearly stated its intent [in the general sentencing statute with respect to consecutive sentences]."); *Bragdon v. United States*, 717 A.2d 878, 880 (D.C. 1998) (same). In practice, the statutory preference articulated in D.C. Code § 23-112 has little legal effect; for the most part, it merely makes consecutive sentencing the *default* in the absence of judicial specification. That is, where the sentencing court forgets to specify in a multi-conviction case how the various sentences are supposed to run. At the same time, there's also a local rule of criminal procedure, which more explicitly mandates this outcome as well. *See* D.C. Super. Ct. R. Crim. P. 32 ("Unless the Court pronouncing a sentence otherwise provides, a sentence imposed on a defendant for conviction of an offense shall run consecutively to any other sentence imposed on such defendant for conviction of an offense.").

[137] D.C. Code § 22-3215(2)(A).

[138] That is, because the DCSG are completely voluntary, an accused sentenced consecutively for committing two or more substantially overlapping offenses in contravention to Rule 6.2 effectively has no legal recourse.

course of conduct.[139] In contrast, the DCSG are completely silent on how to deal with comparable convictions for violent offenses.[140] Further, the relevant DCSG rule applicable to the sentencing of multiple non-violent offenses arising from the same act or course of conduct it itself subject to a "departure principle," under which judges may "deviat[e]" from the "consecutive and concurrent sentencing rules" if they believe that "adhering to them would result in a manifest injustice."[141]

Fourth, and perhaps most fundamentally, concurrent sentencing policies only address one kind of disproportionality arising from multiple convictions for substantially related offenses: the aggregation of sentencing exposure. They do nothing, in contrast, to address the second relevant kind of disproportionality: the accumulation of criminal convictions. The disproportionate accumulation of criminal convictions is a distinct problem given that a criminal conviction is—sentence length aside—a form of punishment.[142] This is a function of "the extra stigma imposed upon one's reputation" by the imposition of multiple criminal convictions.[143] And it is also a function of the collateral consequences associated with those convictions, which may include "the harsher treatment that may be accorded the defendant under the habitual offender statutes of some States; the possible impeachment by prior convictions, if the defendant ever becomes a witness in future cases; and, in some jurisdictions, less favorable parole opportunities."[144]

When viewed as a whole, then, the District's law of merger poses two different sets of problems. First, it suffers from a marked lack of clarity and consistency, as reflected in the DCCA's disparate and conflicting application of the elements test. Second, and perhaps more significant, application of the elements test—under any interpretation—creates the possibility of a disproportionate multiplication of criminal convictions and punishment. With those problems in mind, RCC § 22E-214 incorporates a comprehensive legislative

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[139] In practical effect, this means that a District judge faced with sentencing an offender like Defendant X in the carjacking hypothetical discussed earlier receives no guidance from the DCSG regarding the critical determination of whether that offender's sentences ought to run concurrently or consecutively.

[140] To be sure, there is a provision in the DCSG that addresses the overarching topic of sentencing an offender convicted of multiple violent offenses. However, that provision, Rule 6.1, appears to ignore the issue of how to sentence an offender who has committed multiple violent offenses in a single course of conduct, which involve one victim. *See id.* at R. 6.1 ("The following sentences must be imposed consecutively: For multiple crimes of violence: multiple victims in multiple events; multiple victims in one event; and one victim in multiple events for offenses sentenced on the same day . . .").

[141] *See* DCSG R. 6.3 ("The court has discretion to sentence everything else either consecutively or concurrently . . . The departure principles permit deviating from these consecutive and concurrent sentencing rules if adhering to them would result in a manifest injustice . . . ."). Presumably, then, a judge could impose consecutive sentences for the commission of multiple non-violent, substantially overlapping offenses without violating the DCSG at all—so long as the imposition would avoid a "manifest injustice." *Id.* And of course, this decision would not be subject to any legal review.

[142] *Com. v. Jones*, 382 Mass. 387, 396 (1981).

[143] *O'Clair v. United States*, 470 F.2d 1199, 1203 (1st Cir. 1972).

[144] *Jones*, 382 Mass. at 396 (citing, e.g., *Benton v. Maryland*, 395 U.S. 784, 790-791 & n.5 (1969); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 299-300 n.161 (1965); Note, *Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970)). To be sure, some of these collateral consequences can be dealt with in other ways. Illustrative is the current version of D.C. Code § 22-3203, which also establishes that for the relevant offenses subject to concurrent sentencing, "[c]onvictions arising out of the same act or course of conduct shall be considered as one conviction for purposes of any application of repeat offender sentencing provisions." D.C. Code § 22-3203. Still, this kind of roundabout solution is far from perfect. For example, it only applies to local repeat offender sentencing provisions, and thus presumably would not govern the calculation of an offender's criminal history score in another jurisdiction.

framework for addressing merger issues that is both clearer and broader than the District's current approach, and which is oriented towards improving the consistency and proportionality of District law.[145]

The centerpiece of this framework is RCC § 22E-214(a), which incorporates a cluster of principles to guide the judicial inquiry into legislative intent as to merger where substantially related offenses are based on the same act or course of conduct. The first, and most narrow, of these principles is the elements test. More specifically, paragraph (a)(1) codifies the elements test by requiring merger where "[o]ne offense is established by proof of the same or less than all the facts required to establish the commission of the other offense as a matter of law."[146]

Thereafter, paragraph (a)(2) addresses three particular kinds of variances, which, when constituting the sole distinctions between substantially related offenses, require merger. The first is where the offenses differ only in that one requires a less serious injury or risk of injury than is necessary to establish commission of the other offense (e.g., assault and aggravated assault). The second is where the offenses differ only in that one requires a lesser form of culpability than the other (e.g., murder and manslaughter). And the third is where the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct (e.g., murder and murder of a police officer).

Next, paragraph (a)(3) requires merger where "[o]ne offense requires a finding of fact inconsistent with the requirements for commission of the other offense as a matter of law." This limitation on multiple liability is intended to apply to convictions for two or more substantially related offenses that are "inconsistent with each other as a matter of law,"[147] that is, where the proof necessary to establish one offense necessarily precludes the existence of the proof necessary to establish another offense under any set of facts when based on the same act or course of conduct (e.g., intent to steal-theft and intent to use-theft).[148]

Although the District's law of merger is not a paradigm of clarity, it nevertheless appears that that each of the principles in paragraphs (a)(1)-(a)(3) is supported by District

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[145] To be sure, the most direct way of dealing with the proportionality problems that arise from offense overlap under current District law is to revise individual offenses in a manner that reflects their appropriate breadth, and to eliminate unnecessary offenses that merely duplicate preexisting coverage. CCRC work has endeavored to move in this direction. As a practical matter, however, drafting offenses that perfectly line up next to one another without any overlap (and avoiding gaps in coverage) is unachievable.

[146] *See Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) (*en banc*) (While the *Blockburger* test, as codified by D.C. Code § 23-112, "uses the phrase 'proof of a fact,' the reference is to what the statutory 'offense' requires in the way of proof, not to the specific 'transaction,'" i.e. "[t]he word 'requires' can refer only to elements, not to whatever facts may be adduced at trial").

[147] *McClain v. United States*, 871 A.2d 1185, 1192 (D.C. 2005) (citing *Fuller v. United States,* 407 F.2d 1199, 1223 (1967) (*en banc*).

[148] This rule against multiple liability based on inconsistent guilty verdicts is to be distinguished from, and is therefore not intended to displace, the legal system's well established "tolerat[ion]" of verdicts of *guilt* and *innocence* that are inconsistent with one another. *Evans v. United States*, 987 A.2d 1138, 1140–41 (D.C. 2010) ("[A] logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict") (quoting *Yeager v. United States*, 557 U.S. 110, 112 (2009) (discussing *Dunn v. United States*, 284 U.S. 390 (1932))); *see, e.g., United States v. Powell*, 469 U.S. 57 (1984).

case law.[149] However, the next merger principle in RCC § 22E-214 clearly goes beyond it.

Specifically, paragraph (a)(4) requires merger where "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." This principle, which is the broadest in subsection (a), calls for the merger of convictions for two or more substantially related offenses when the gravamen of one offense duplicates that of another. The pertinent evaluation goes beyond consideration of whether it is theoretically possible to commit one offense without committing another. Instead, it asks the court to consider the relevant offenses' purposes, accounting for the harm or wrong, culpability, and penalty proscribed by each.

The final two principles incorporated into RCC § 22E-214(a) address merger of general inchoate offenses. The first principle, codified in paragraph (a)(5), requires merger where "[o]ne offense consists only of a criminal attempt or criminal solicitation of [t]he other offense," or, alternatively, "[a]n offense that is related to that offense in the manner described in paragraphs (1)-(4) of this subsection." The first portion of this provision

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[149] For District case law in support of the elements test as codified RCC § 22E-2214(a)(1), see, for example, cases cited *supra* notes 52-68 and accompanying text.

For District case law in support of the lesser harm principle as codified in RCC § 22E-2214(a)(2)(A), see, for example, *In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) ("Appellant's conviction for felony assault . . . merges with her conviction for AAWA because felony assault is a lesser-included offense of AAWA."); *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014) ("[Felony assault] is a lesser-included offense of aggravated assault.") (quoting *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013)).

For District case law in support of the lesser culpability principle as codified in RCC § 22E-2214(a)(2)(B), see, for example, *Washington v. United States*, 884 A.2d 1080, 1085 (D.C. 2005) (involuntary manslaughter LIO of premeditated murder); *In re T.H.B.*, 670 A.2d 895 (D.C. 1996) (simple assault merges with assault with intent to commit robbery); *Teneyck v. United States*, 112 A.3d 906, 913 (D.C. 2015) (same).

For District case law in support of the specificity principle as codified in RCC § 22E-2214(a)(2)(C), see, for example, *Waller v. United States*, 389 A.2d 801, 808 (D.C. 1978) (assault merges with assault with a dangerous weapon).

Note that the District considers these three principles to be an extension of the elements test, whereas in at least some jurisdictions they are considered to be an addition to/expansion of the elements test. *See, e.g.,* Commentary on Haw. Rev. Stat. Ann. § 701-109(c); *Fraser v. State*, 523 S.W.3d 320, 333 (Tex. App. 2017).

For District case law consistent with RCC § 22E-2214(a)(3), see, for example, *Davis v. United States*, 37 App. D.C. 126, 133 (D.C. Cir. 1911) (precluding multiple convictions for logically inconsistent offenses of obtaining money by false pretenses and embezzlement of the same money in a case where "the trial court pertinently suggested, that the 'verdict under the embezzlement counts negatives one essential fact in the crime of procuring money by false pretenses, namely, the devesting of the title originally'"); *Fulton v. United States*, 45 App. D.C. 27, 41–42 (D.C. Cir. 1916) (reaffirming the principle set forth in *Davis*, namely, that multiple convictions are inappropriate for "counts charging distinct and inconsistent offenses," and holding that guilty verdicts on two embezzlement counts alleging ownership of the same property in different persons could not stand); *United States v. Daigle*, 149 F. Supp. 409, 414 (D.D.C), *aff'd*, 248 F.2d 608 (D.C. Cir. 1957) ("[W]here a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand."); *see also Byrd*, 598 A.2d at 397 (observing that "theft and RSP [] are closely related to one another, but mutually inconsistent," and that therefore, "unlike a lesser included offense where the lesser offense is committed at the same time as the greater offense, a defendant cannot commit theft and RSP at the same time.") (Belson, J., concurring in part and dissenting in part); *compare Edmonds v. United States*, 609 A.2d 1131, 1132 (D.C. 1992) ("Even if we assume that the verdicts on these two counts were inconsistent, it has long been recognized that inconsistent verdicts are permissible.").

precludes multiple convictions for an attempt or solicitation and the completed offense (e.g., attempt or solicitation to commit murder and murder). The second portion of this principle extends the same treatment to an attempt or solicitation and a completed offense that varies from the target of the attempt or solicitation in a manner that reflects the other, more general merger principles enumerated in subsection (a) (e.g., attempt or solicitation to commit murder and aggravated assault). This principle appears to at least generally reflect current District law.[150]

The second principle, codified in paragraph (a)(6), requires merger where "[e]ach offense is a general inchoate offense designed to culminate in the commission of [t]he same offense"; or, alternatively, "[d]ifferent offenses that are related to one another in the manner described in paragraphs (1)-(4) of this subsection." The first portion of this provision precludes multiple convictions for attempt, solicitation, and conspiracy to commit the same offense. The second portion of this principle extends the same treatment to multiple convictions for attempt, solicitation, and conspiracy to commit distinct target offenses, provided that the variance between those target offenses reflects the other, more general merger principles enumerated in subsection (a). This principle appears to be contrary to current District law at least insofar as merger of attempt and conspiracy is concerned.[151]

Subsections (a) provides a clear and comprehensive body of substantive merger policies that would broaden the District's current approach to merger in furtherance of the overall proportionality of District law. It's important to note, however, that this expansion would not change the essential nature of the merger inquiry currently facing District courts. This is because, although some of the merger principles enumerated in these provisions go

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[150] For District case law in support of RCC § 22E-2214(a)(5)(A) as it pertains to criminal attempts, see, for example, *In re T.M.*, 155 A.3d 400, 408 (D.C. 2017) (holding that convictions for attempt and completed offense merge); *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) ("Every completed criminal offense necessarily includes an attempt to commit that offense.").

Note that these cases support merger notwithstanding the fact that the offenses of attempt and the completed offense do not always satisfy the elements test. Consider that for a criminal attempt, the government must prove that the accused acted with the intent to cause any result required by the target offense, regardless of whether a lower culpable mental state, such as recklessness or negligence, will suffice to establish the target offense. *See Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015); *see also Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (discussing *Jones*). Practically speaking, this means that, where the target of an attempt is a crime of recklessness or negligence, it is not necessarily true that one who commits the target offense necessarily also commits an attempt. *Compare* D.C. SUPER. CT. R. CRIM. P. 31(c) ("A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.").

No District case law on general solicitation liability exists. *See* Commentary on D.C. Crim. Jur. Instr. § 4.500 (observing, with respect to the District's general solicitation offense, that there does not appear to be a single reported decision "involving this statute"). However, it seems at least plausible that the DCCA would apply a similar approach to dealing with merger of solicitation and the completed offense.

For District case law allowing multiple convictions for conspiracy and the completed offense, see, for example, *McCullough v. United States*, 827 A.2d 48, 59 (D.C. 2003) (citing *Robinson v. United States,* 608 A.2d 115, 116 (D.C. 1992)).

For District case law in support of RCC § 22E-2214(a)(5)(B) as it pertains to criminal attempts, see, for example, *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005) (finding that attempted aggravated assault while armed merges with assault with a dangerous weapon).

[151] *See supra* notes 21-30 and accompanying text (discussing merger of conspiracy and attempt under District law).

beyond the scope of the elements test as enumerated by the DCCA (and codified in RCC § 22E-214(a)(1)), these principles all share one core similarity: they present questions of law regarding the manner in which the statutory elements of criminal offenses relate to one another. Therefore, the determination of whether those principles preclude multiple liability for two or more substantially related offenses can—as is currently the case in the District[152]—be conducted without regard to the underlying facts of a case.[153]

RCC §§ 22E-214(b) and (c): Relation to Current State of Judicial Administration of Merger Policy. RCC §§ 22E-214(b) and (c) would neither require nor preclude changes to current District law pertaining to judicial administration of merger policy.

In the District, the law of merger is generally deemed to be the province of the appellate courts, with little role for trial judges to play in safeguarding "the double jeopardy bar on multiple punishments for the same offense."[154] This is reflected in the fact that D.C. Superior Court judges appear to systematically ignore all merger issues at sentencing, thereby leaving them for appellate resolution by the DCCA in the first instance. More specifically, the standard procedure followed by the District's trial judges seems to be as follows: (1) sentence the defendant on all counts of conviction without regard to whether any of those counts are likely to merge; and (2) determine whether those counts should run consecutively or concurrently.[155]

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[152] Note that where the merger analysis involves one or more offenses comprised of alternative elements of a nature described in RCC § 22E-214(c), then a limited factual inquiry will be necessary to determine the particular basis of a conviction (i.e. was the defendant convicted of felony murder-*rape* or felony murder-*burglary*). However, this also appears to reflect current District practice in at least some areas of law. *See* cases cited *supra* notes 99-106 and accompanying text.

[153] Therefore, the merger analysis under RCC § 22E-2214 is not a return to the fact-based approach disclaimed in *Byrd*, but rather, an expansion of the current law-based approach.

[154] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007).

[155] Here's one example from *Hanna v. United States*:

> After a hearing on January 28, 1992, appellants were sentenced to prison on February 3, 1992 for the first incident as follows: (1) three counts of armed kidnapping (D, E, I), eight to twenty-four years for each count; (2) two counts of first degree burglary while armed (F, G), four to twelve years for each count; (3) two counts of assault with a dangerous weapon (H, J), three to nine years for each count; (4) one count of armed robbery (K), three to nine years; and (5) one count of possession of a firearm during a crime of violence (L), a mandatory minimum sentence of five to fifteen years. Sentences on the two burglary counts (F, G) were concurrent with each other but consecutive to all the other counts. Sentences for the seven crimes of violence counts D, E, H, I, J, K, L were concurrent with each other. The overall sentence for the first incident was 12 to 36 years.
>
> Appellants received prison sentences for the second incident as follows: (1) two counts of first degree burglary while armed (M, N), four to twelve years for each count; (2) five counts of assault with a dangerous weapon (O, P, Q, R, S), three to nine years for each count; (3) one count of armed robbery (T), three to nine years; (4) one count of possession of a firearm during a crime of violence (U), a mandatory minimum sentence of five to fifteen years; (5) one count of carrying a pistol without a license (V), one year; and (6) one count of possession of a prohibited weapon (W), one year. Sentences on the two burglary counts (M, N) were concurrent with each other but consecutive to all other counts; sentences for the seven crimes of violence counts O, P, Q, R, S, T, U were concurrent with each other; and the sentences for carrying a pistol without a license and for possession of

This sentencing regime appears to have its roots in the DCCA's decision in *Garris v. United States*, where the court explained that:

> Initially permitting convictions on both counts serves the useful purpose of allowing this court to determine whether there is error concerning one of the counts that does not affect the other . . . If so, then no merger problem even arises as only one conviction stands. If not, a remand to the trial court with instructions to vacate one conviction cures the double jeopardy problem without risk to society that an error free count was dismissed . . . .
>
> The policy sought to be vindicated [by sentencing merger] is better served, in cases of appeal on issues other than validity of the sentence alone, by waiting for completion of the appeal process before vacating judgment on one of multiple counts. No legitimate interest of the defendant is served by requiring a trial court to guess which of multiple convictions will survive on appeal. Indeed, if the count chosen is reversed on grounds independent of the validity of the one vacated, a substitution would have to be made [] and a new appeal thereunder must be permitted if error independent of the reversed conviction is to be raised.[156]

> a prohibited weapon were concurrent with all other counts. The overall sentence for the second incident was nine to 27 years.
>
> Appellants' sentences for the two incidents, therefore, totaled 21 to 63 years of imprisonment. In sentencing appellants on all counts, the trial court acted consistently with this court's suggestion that sentence should initially be imposed on all counts to allow this court to review merger issues and to remand to the trial court for resentencing as necessary.

Hanna v. United States, 666 A.2d 845, 859 (D.C. 1995).

[156] *Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985). Nearly two decades earlier, the D.C. Circuit observed in *Fuller v. United States* that:

> There are sound reasons for permitting the jury to render verdicts as to separate offenses even where consecutive sentences are not permitted. For example, in the murder situation, a prosecutor should be permitted to proceed on both first degree murder theories. Perhaps the jury will believe one and not the other, and perhaps the jury will believe both. We see no reason for a rule of law that would require the prosecutor to elect between the offenses before the case is sent to the jury. Nor do we see why the jury must elect. Permitting a guilty verdict on each count—if warranted by the facts—may serve the useful purpose of avoiding retrials by permitting an appellate court, or a trial court on further reflection, to uphold a conviction where there is error concerning one of the counts that does not infect the other. Moreover, that course precludes a range of double jeopardy contentions.
>
> There is no general reason why the jury should not be permitted to render a verdict on each theory, so long as the offenses are not in conflict and no aspect of the case gives reasonable indication that the jury might be confused or led astray.

407 F.2d 1199, 1224–25 (D.C. Cir. 1967).

In subsequent years, the DCCA has "reiterate[d] the suggestion . . . made in *Garris*," namely, that:

> [W]hen a jury has returned guilty verdicts on two counts which merge, the trial court need not guess which [] conviction will survive on appeal and enter an acquittal on the other count. [Rather, the trial court should simply leave the issues to be resolved by the DCCA]. This policy will avoid situations [] in which it becomes necessary to remand for substitution of convictions, from which the defendant may take a second appeal.[157]

When, pursuant to this regime, the DCCA is presented with merger issues on appeal, they are subject to a *de novo* standard of review[158] in which context the court "is limited to assuring that the sentencing court d[id] not exceed its legislative mandate by imposing multiple punishments for the same offense."[159] If, in the course of conducting this review, the DCCA concludes that two or more convictions should merge—or, alternatively, where the government concedes that two or more convictions should merge[160]—then the appellate court will remand the convictions "to the trial court for the limited purpose of merger and resentencing."[161] Importantly, however, "when

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[157] *Warrick v. United States*, 528 A.2d 438, 443 n.6 (D.C. 1987) (internal quotations and alterations omitted).
[158] *Roy v. United States*, 871 A.2d 498, 510 (D.C. 2005) ("We review issues of merger *de novo*, to determine whether there has been a violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.") (quoting *Nixon v. United States,* 730 A.2d 145, 151–52 (D.C. 1999)); *Robinson v. United States*, 50 A.3d 508, 532 (D.C. 2012).
[159] *James v. United States,* 718 A.2d 1083, 1086–87 (D.C. 1998).
[160] *Collins v. United States*, 73 A.3d 974, 985 (D.C. 2013) ("The government concedes that appellant's conviction for ASBI of Brown merges with his conviction for aggravated assault of Brown because ASBI is a lesser-included offense.").
[161] *Newman v. United States*, 705 A.2d 246, 265 (D.C. 1997) (citing *Whalen v. United States*, 445 U.S. 684 (1980)). Insofar as correction of illegal sentences is concerned, the District's rules of criminal procedure provide:

> Rule 35. Correction or reduction of sentence or collateral; setting aside forfeiture.
>
> (a) *Correction of sentence.* The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) *Reduction of sentence.* A motion to reduce a sentence may be made not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The Court shall determine the motion within a reasonable time. After notice to the parties and an opportunity to be heard, the Court may reduce a sentence without motion, not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 120 days after entry of any order or judgment of the Supreme Court, denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this paragraph.

resentencing to respect the double jeopardy bar on multiple punishments for the same offense where the defendant has been convicted of a greater and lesser-included offense, the trial court has but one course, to vacate the lesser-included offense."[162] And, when a defendant's sentences for the merged counts "are concurrent and congruent," it is well-established that "[r]esentencing is not required."[163]

The current state of judicial administration regarding merger issues in the District is notable. The approach to merger proscribed by the DCCA in *Garris* and its progeny is one that, in effect, seems to require and/or encourage trial judges to disregard clear or potential constitutional violations at initial sentencing, in favor of initial appellate resolution.

The unintuitive-ness of such an approach is well captured by the DCCA's decision *Mooney v. United States*.[164] On the one hand, the *Mooney* court recognized that the merger-based remands to trial courts produced by this regime involve a mandate to "correct the *illegality* of a sentence that violates double jeopardy's bar on the imposition of multiple punishments for the same offense."[165] But, on the other hand, the *Mooney* court also recognized that the "illegality" of a sentence in this context "does not imply trial court error as [DCCA case law has] established that the trial court should enter convictions on all guilty verdicts returned by the jury, subject to review by this court on appeal on 'issues other than the validity of the sentence alone.'"[166]

As a matter of policy, the current judicial approach favoring initial review of merger issues at the appellate level has mixed support. There surely are, as the *Garris* decision highlights, important judicial efficiency benefits under the current system, which helps to avoid cases from being sent back and forth between Superior Court and the Court of

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Super. Ct. Crim R. 35(a) & (b).

[162] *Mooney v. United States*, 938 A.2d 710, 724 (D.C. 2007); *see Franklin v. United States*, 392 A.2d 516, 519 n.3 (D.C. 1978) ("[W]here an appellant has been convicted of both the crime and a lesser included offense, the appropriate appellate remedy is vacation of the lesser included offense.") (citing *Franey v. United States,* 382 A.2d 1019, 1021 (D.C. 1978)).

[163] *Collins*, 73 A.3d at 985; *see, e.g., United States v. Battle*, 613 F.3d 258, 266 (D.C. Cir. 2010) ("Because the court sentenced [appellant] to the same, concurrent terms of imprisonment for [both] convictions, resentencing is unnecessary."); *Medley v. United States*, 104 A.3d 115, 133 (D.C. 2014).

One key procedural question on remand is whether the defendant has a right to allocute. For example, "a defendant is constitutionally 'guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure.'" *Kimes v. United States*, 569 A.2d 104, 108 (D.C. 1989) (quoting *Kentucky v. Stincer,* 482 U.S. 730, 745 (1987)). This includes the right to be present upon the imposition of sentence—"a fundamental [right] which implicates the due process clause." *Warrick*, 551 A.2d at 1334 (citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam)). Additionally, Superior Court Rule of Criminal Procedure 32(c)(1) provides that at the time of sentencing, the defendant shall have the right to allocute, that is, to present any information in mitigation of punishment, and to make a statement on his or her "own behalf." Super. Ct. Crim R. 32(c)(1). However, Superior Court Rule of Criminal Procedure 43 provides that a defendant is not required to be present "[w]hen the proceeding involves a reduction or correction of sentence under Rule 35." Super. Ct. Crim R. 43(c)(4). Rule 35, in turn, states that the Superior Court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein . . . . " Super. Ct. Crim. R. 35(a). Typically, therefore, the defendant's presence is only required after an appeal that remands for sentencing based upon a count that was not originally sentenced. *Mooney*, 938 A.2d at 724.

[164] *Mooney*, 938 A.2d at 722–23.

[165] *Id.*

[166] *Id*.

Appeals for re-adjudication of sentencing issues. At the same time, the *Garris* decision seems to either overlook or misconstrue at least some of the relevant considerations. The court says little, for example, about the risk of "leav[ing] both sentences standing if for any reason there were no appeal" that exists under the District's present system of dealing with merger issues, which is a concern that has lead at least one state judiciary to explicitly reject adoption of a similar regime.[167]

In addition, the *Garris* decision seems to highlight—as a supposed benefit of the District's present system of dealing with merger issues—the need to safeguard against a "risk to society that an error free count was dismissed."[168] Yet it is not at all clear that this risk actually exists. The situation envisioned by the *Garris* court seems to be as follows: (1) the sentencing judge enters a judgment on one conviction and merges the rest; (2) the defendant files an appeal arguing that an (evidentiary) error should lead to that conviction being overturned; (3) the appellate court agrees, but finds that the error does not affect any of the merged offenses. Under these circumstances, it does not appear—contra *Garris*—that an appellate court would have any difficulty ordering the re-imposition of one of the previously merged offenses by the trial court.

The DCCA's subsequent decision in *Warrick v. United States* is illustrative.[169] In that case, the trial court merged two convictions for burglary, which were respectively based on an underlying assault and theft committed in the same course of conduct, and sentenced the defendant on the former.[170] On the first appeal, the DCCA overturned the burglary (assault) conviction, and ordered the previously vacated burglary (theft) conviction to be reinstated.[171] Thereafter, the trial court reinstated the burglary (theft) conviction and sentenced the defendant on that conviction.[172] The defendant appealed again arguing that the reinstatement of the burglary (theft) conviction violated the Double Jeopardy Clause.[173] The DCCA rejected this argument, noting that the trial court's "dismissal of the intent to steal count under the merger doctrine was not on the merits."[174]

One other relevant point is the fact that the government may, under District law, "appeal an order which terminates the prosecution in favor of the defendant" so long as it "is not an acquittal on the merits."[175] So, for example, in *D.C. v. Whitley*, the DCCA asserted jurisdiction over a government appeal of a judge's *sua sponte* dismissal of a

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[167] *State v. Cloutier*, 286 Or. 579, 601 (1979). For at least one case where counsel for the defendant overlooked a meritorious merger argument, see *Medley v. United States*, 104 A.3d 115, 132 (D.C. 2014) ("Richardson does not argue that his convictions for ADW and ASBI merge with his conviction for AAWA, but we conclude for the foregoing reasons that they do merge."); *Carter v. United States*, 957 A.2d 9, 22 (D.C. 2008) (raising merger issue *sua sponte* as to co-appellant).

[168] *Garris v. United States*, 491 A.2d 511, 514–15 (D.C. 1985).

[169] 551 A.2d 1332, 1336 (D.C. 1988). *See, e.g., Byrd*, 500 A.2d at 1389 ("If the unvacated murder conviction is subjected later to a successful collateral attack, the trial court should consider favorably a government motion to reinstate the vacated murder conviction"); *Garris*, 491 A.2d at 515 ("[I]f the count chosen is reversed on grounds independent of the validity of the one vacated, a substitution would have to be made.").

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *United States v. Shorter*, 343 A.2d 569, 571 (D.C. 1975); *see* D.C. Code § 23-104 ("The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, except where there is an acquittal on the merits.").

conviction for want of prosecution, reasoning that "reversal of the dismissal order w[ould] require simple reinstatement of the guilty plea and no further proceedings to determine guilt or innocence."[176]

More generally, U.S. Supreme Court precedent appears to clearly dispense with any constitutional concerns that might arise from a regime in which trial judges conducted merger analyses at initial sentencing. Consider the following passage from *United States v. Wilson*:

> [W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended. In various situations where appellate review would not subject the defendant to a second trial, this Court has held that **an order favoring the defendant could constitutionally be appealed by the Government.** Since the 1907 Criminal Appeals Act, for example, the Government has been permitted without serious constitutional challenge to appeal from orders arresting judgment after a verdict has been entered against the defendant. *See, e.g., United States v. Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); *United States v. Green*, 350 U.S. 415, 76 S.Ct. 522, 100 L.Ed. 494 (1956); *Pratt v. United States*, 70 App.D.C. 7, 11, 102 F.2d 275, 279 (1939). **Since reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution.**
>
> **Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged.** *Forman v. United States*, 361 U.S. 416, 426, 80 S.Ct. 481, 487, 4 L.Ed.2d 412, 419 (1960). If reversal by a court of appeals operated to deprive the Government of its right to seek further review, disposition in the court of appeals would be 'tantamount to a verdict of acquittal at the hands of the jury, not subject to review by motion for rehearing, appeal, or certiorari in this Court.' *Ibid*. *See also United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 243, 78 S.Ct. 245, 251, 2 L.Ed.2d 234, 240 (1957).
>
> **It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable postverdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling.** Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could

[176] 934 A.2d 387, 389 (D.C. 2007) (citing *United States v. Wilson*, 420 U.S. 332, 353 (1975); *United States v. Wall*, 521 A.2d 1140, 1142 n.2 (D.C. 1987)).

> be corrected without subjecting him to a second trial before a second trier of fact.[177]

The foregoing passage from the *Wilson* decision seems to clarify, first, that the improper post-verdict dismissal of a conviction by a trial judge may be appealed by the government without offending the Double Jeopardy Clause so long as there is express statutory authorization to do so; second, that this dismissed conviction may be reinstated by the second tier of appellate review without offending the Double Jeopardy Clause; and third, that if such a conviction is improperly dismissed by the second tier of appellate review, the third tier of appellate review may reinstate it without offending the Double Jeopardy Clause.

Based on the above analysis, it appears that the largest hurdle confronting trial court resolution of merger issues in the District is not constitutional, but rather, pragmatic. Beyond the efficiency issues raised by the *Garris* decision, shifting the initial burden to conduct merger analyses to Superior Court judges might compel more sweeping procedural changes to current District practice. For example, in order to reliably implement such a system, it would probably be necessary to impose a formal requirement that judges provide on-the-record explanations of their sentencing decisions.[178] Further, one probable byproduct of a system of trial level merger analyses would be a greater imperative for government appeals (e.g., where the sentencing court inappropriately merges one or more offenses), which is a topic that has garnered considerable attention in the District.[179]

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[177] *United States v. Wilson*, 420 U.S. 332, 344–45 (1975).

[178] Under current District law "the [sentencing] judge [is not] required to provide an explanation for the sentence imposed." *Coles v. United States*, 682 A.2d 167, 173 (D.C. 1996). Which is not to say that Superior Court judges need not provide any information relevant to sentencing; District law recognizes that a "defendant has the right to be informed of [the] information" a trial court considers "in evaluating the appropriate sentence for a defendant." *Foster v. United States*, 615 A.2d 213, 220–21 (D.C. 1992). "This right," in turn, "is intertwined with a defendant's right to allocute and speak to the issue of appropriate punishment, a right which is acknowledged by statute and court rule, but ultimately is a fundamental one which implicates the due process clause." *Bradley v. D.C.*, 107 A.3d 586, 599–600 (D.C. 2015). Nevertheless, while the trial court must specify the facts upon which it is relying for a given sentence, it does not appear that the sentencing judge needs to provide any explanation of *why* a given sentence is being imposed based on those facts. *See also* D.C. Super. Ct. R. Crim. P. 32 ("*Pronouncement.* Sentence shall thereafter be pronounced . . . . *Judgment*. A judgment of conviction shall set forth the plea, verdict or finding, and the adjudication and sentence . . . .").

[179] *See, e.g., D.C. v. Fitzgerald*, 953 A.2d 288, 291 (D.C. 2008), *opinion amended on denial of reh'g*, 964 A.2d 1281 (D.C. 2009); *D.C. v. Whitley*, 934 A.2d 387, 388 (D.C. 2007). *See also* D.C. Code § 11-721(a) ("The District of Columbia Court of Appeals has jurisdiction of appeals from—(1) all final orders and judgments of the Superior Court of the District of Columbia . . . . (3) orders or rulings of the Superior Court of the District of Columbia appealed by the United States or the District of Columbia pursuant to section 23-104 or 23-111(d)(2)."); D.C. Code § 23-111(2) ("If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the prosecutor, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by law. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered."); D.C. Code § 23-104(c) ("The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant . . . as to one or more counts thereof, except where there is an acquittal on the merits.").

In the final analysis, then, both the District's current appellate-centric approach to adjudicating merger issues and a more conventional trial-level regime present their own set of costs and benefits. With that in mind, and given the distinctively procedural nature of the underlying issues, RCC § 22E-214 has been drafted in a manner that is susceptible to being implemented in accordance with either approach, thereby leaving the discretion to choose between these two systems in the same place that it currently exists: the province of the courts.[180]

The key provision, subsection (b), provides that an an actor may be "found guilty of 2 or more offenses that merge under [RCC § 22E-214]." However, a sentencing judge must either vacate all but one of the offenses that merge prior to sentencing, using the rule of priority in subsection (c), or else enter judgment and sentence the actor for the offenses that merge—provided that, if the latter course is followed, the convictions for all but, at most, one of those offenses shall be vacated after: (1) The time for appeal has expired; or (2) The judgment that was appealed from has been decided. This language in RCC § 22E-214 clarifies that the statute should not be construed as in any way constraining the number of offenses over which the fact finder may deliberate. Rather, the trier of fact may find the defendant guilty of two or more offenses for which sentencing merger is required under RCC § 22E-214.[181] The statute also provides that the merger analysis set forth in RCC § 22E-214 can either be used to vacate findings of guild before imposition of sentence by the trial court, or can be done after the expiration of appellate rights or affirmance on appeal. If the latter procedure is followed, the sentences for offenses that merge must be concurrent.[182]

The latter procedure is intended to provide Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the DCCA for resolution on direct review, should they so choose. At the same time, this provision would not preclude Superior Court judges from changing their current practice, and instead conducting merger analyses at initial sentencing, either. Rather, it is sufficiently flexible to accommodate a change in merger practice should District judges deem one to be appropriate.

Subsection (c) establishes a rule of priority for guiding judicial selection of merging offenses. Under this rule, where two or more offenses are subject to merger, the conviction that ultimately survives—whether at trial or on appeal—should be the "offense with the

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[180] One other alternative worth considering is that proposed by the Oregon Supreme Court in *State v. Cloutier*:

> A trial court might pronounce a judgment of conviction on each of the charges, indicating the sentence he would impose if the conviction stood alone but suspending its execution (or suspending imposition of sentence), and accompany the judgment on each but the gravest charge with an order that the judgment is vacated by its own terms whenever the time for appeal has elapsed or the judgment appealed from has been affirmed. Such an order would make it clear on the record that the conviction on the secondary charge retains no legal effect in the absence of a further order reviving it in case a successful appeal from the judgment on the gravest charge is not followed by a retrial on that charge.

286 Or. 579, 602–03 (1979).

[181] Provided, of course, that the defendant actually satisfies the requirements of liability for those offenses.

[182] Concurrent sentencing helps ensure that a defendant does not serve additional time pending an appeal, or waiting for the time to appeal to have expired.

highest statutory maximum term of incarceration."[183] However, "[i]f the offenses have the same statutory maximum term of incarceration," then "any offense that the court deems appropriate" may remain.[184] This rule of priority is consistent with current District law.

[183] RCC § 22E-214(d)(1).
[184] RCC § 22E-214(d)(2).

RCC § 22E-215. Judicial Dismissal for Minimal or Unforeseen Harms.

Explanatory Notes. RCC § 22E-215 codifies a judicial authority[1] to dismiss a prosecution if the actor's conduct, culpable mental state, and the attendant circumstances are insufficiently blameworthy to warrant the condemnation of a criminal conviction.[2] Although, strictly speaking, such actors may satisfy the minimum requirements of liability for a given offense, RCC § 22E-215 allows a judge to dismiss the prosecution of that offense[3] where doing so would be unjust under the circumstances. Barring the imposition of criminal liability in these situations improves the proportionality of punishments.[4]

Subsection (a) sets forth the scope of considerations that a judge can consider, and paragraphs (a)(1) – (a)(3) specify four situations which can justify dismissal of a

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[1] Rooted in ancient Roman law, the *de minimis* defense principally rests on the common law principle of *de minimis non curat lex*, which means "The law does not concern itself with trifles." Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 334–35 (2017); *see, e.g.,* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 258 (1966); *De Minimis Non Curat Lex*, BLACK'S LAW DICTIONARY (9th ed. 2009).

The RCC's codification of this provision is influenced by two main types of legislative sources.

The first and primary sources are Model Penal Code § 2.12 and those state statutes based on Model Penal Code § 2.12, which establishes that courts "shall dismiss" a prosecution if, "having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances," a judge finds one of three conditions to obtain. *See also* Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 335 (2017) (collecting statutes of four states and Guam, which employ a similar approach).

The second type of legislative sources are those statutes that afford courts the authority to dismiss a prosecution in furtherance of justice. Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 631 (2015) ("In the judicial branch, some state courts have the power to dismiss cases *sua sponte*. Acting 'in the furtherance of justice,' these courts can consider context, as well as the just or unjust application of laws."); *see, e.g.,* Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 332 (2017) (collecting statutes from 15 states and Puerto Rico, which employ this approach). In New York, for example, courts are empowered to dismiss a prosecution in furtherance of justice when "such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such [indictment] or count would constitute or result in injustice." N.Y. Crim. Proc. Law § 210.40 (enumerating factors to consider).

Codification of this provision is not intended to limit government authority to drop charges under similar circumstances. See Model Penal Code § 2.12 cmt. at 402. ("It is not meant to suggest that it is inappropriate for the prosecutor to have a parallel power to enter a nol pros without leave of court. It is inappropriate, however, to suggest that this is a power that can be exercised only by the prosecutor, as though he somehow had a patent upon wise decision in such matters. [internal citation omitted] Once a criminal case has formally begun, it is very much the court's business to see that a just disposition, which in appropriate cases may include a dismissal of the prosecution, is reached.").

[2] While the court already has the power to sentence for a nominal or no period of incarceration upon conviction (except if there should be a mandatory minimum sentence), this provision recognizes a judicial power to act at an earlier stage of proceeding. This power recognizes and provides a remedy for the fact that conviction alone may carry severe collateral consequences that are disproportionate to an actor's conduct in a particular case.

[3] A single count in a multi-count case may be dismissed under RCC § 22E-215.

[4] The most direct way of avoiding the disproportionate punishment addressed by RCC § 22E-215 would be to draft criminal statutes to exclude such actors from liability in the first place. However, as a practical matter, drafting offenses that solely extend to actors whose conduct and accompanying state of mind are sufficiently blameworthy to warrant the condemnation of a criminal conviction, without also creating gaps in coverage, is extremely difficult. While the offenses in the RCC's Special Part have been drafted to exclude insufficiently blameworthy actors to the extent possible, application of the general *de minimis* defense specified in this section is essential to facilitating the overall proportionality of the RCC.

prosecution. RCC § 22E-215 applies to the prosecution of any offense under the RCC.[5] Under the provision the court reviews the nature of the actor's alleged conduct, the actor's culpable mental state,[6] and the attendant circumstances—not just the circumstance elements that must be proven for the charged offense, but the circumstances surrounding the alleged crime generally. The scope of considerations is broad and includes both subjective and objective aspects of the crime and its surrounding circumstances. The term "in fact" is a defined term in RCC § 22E-207 that indicates no additional culpable mental state by the actor applies to any of the following terms.[7]

Paragraph (a)(1) codifies the first situation where judicial dismissal under RCC § 22E-215 may be appropriate. Specifically, paragraph (a)(1) refers to conduct that "was within a customary license or tolerance, neither expressly negatived by the person whose

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[5] This is consistent with Model Penal Code § 2.12 and comparable state statutes, which authorize a *de minimis* defense to any criminal charge (i.e. without regard to offense severity). *See, e.g.,* Model Penal Code § 2.12 ("The court shall dismiss *a[ny] prosecution*") (italics added); Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 380 (2017) ("While one might assume from their name that *de minimis* dismissals are limited to 'minor' alleged offenses, none of the *de minimis statutes* exclude any particular type of charge from their coverage."); *State v. Zarrilli*, 523 A.2d 284, 287 (Law. Div.), *aff'd*, 532 A.2d 1131 (App. Div. 1987) ("The *de minimis* statute applies to *all* prohibited conduct."); *State v. Vance*, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979) (recognizing the possibility of applying the *de minimis* doctrine in felony cases); Martin H. Belsky, Joseph Dougherty & Steven H. Goldblatt, *Three Prosecutors Look at the New Pennsylvania Crimes Code*, 12 DUQ. L. REV. 793, 807 (1974) (noting that "[de minimis] Section 312 gives the judiciary power to dismiss any prosecution at any stage or for any crime."); *see also State v. Fitzpatrick*, 772 A.2d 1093, 1096 (Vt. 2001) (indicating that "serious" charges do not preclude an in furtherance dismissal).

[6] Textually speaking, RCC § 22E-215's explicit inclusion of mental state considerations departs from Model Penal Code § 2.12 and comparable state statutes, which seem to largely emphasize the "objective harmfulness of the conduct charged to the social interest protected by the statute in question." Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 B.Y.U. L. REV. 51, 94–98 (1997); *but see* Model Penal Code § 2.12, cmt. at 402 (describing the *de minimis* defense as an "ameliorative device[]" for ensuring that outcomes reflect the "proper level of the defendant's culpability."). That said, numerous state judicial decisions interpreting these Model Penal Code-based *de minimis* statutes extend "beyond the objective aspect of the offending conduct and have also found subjective, mental elements to have bearing on the issue of triviality of harm or evil." *See also* Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 375-76 (2017) ("The traditional view within criminal law is that defendants' alleged motives are irrelevant to the question of liability. [Yet there exists a large] body of case law challenges that view. Again and again, one finds judges moved to dismiss in light of their assessment of defendants' motives. When those motives are ones esteemed as noble—when, for example, they are focused on the welfare of children—courts show no hesitation in deeming motive a ground for dismissal.").

For example, Hawaii's *de minimis* statute, while nearly identical to Model Penal Code § 2.12, is understood to implicitly incorporate various mental state-based factors, such as: "the background, experience and character of [an actor] which may indicate whether they knew of, or ought to have known, the requirements of [the prohibition violate[d]; the knowledge on the part of [an actor] of the consequences to be incurred by them upon the violation of the statute; [] the mitigating circumstances, if any, as to [an actor]; [] and any other data which may reveal the nature and degree of the culpability in the offense committed by [the actor]"). *State v. Park*, 55 Haw. 610, 617, 525 P.2d 586, 591 (1974) (interpreting Haw. Rev. Stat. Ann. § 702-236). And the New Jersey courts have offered a nearly identical reading of the state's Model Penal Code-based *de minimis* statute. *State v. Halloran*, 446 N.J. Super. 381, 386–87 (Law. Div. 2014) (interpreting N.J. Stat. Ann. § 2C:2-11); *see, e.g., State v. Cabana*, 315 N.J. Super. 84, 88 (Law. Div. 1997) (New Jersey's *de minimis* statute clearly "contemplates" a "threshold consideration of criminal culpability" which is "dependent upon the state of mind of the actor and [requires] a fact-sensitive analysis on a case by case basis.").

[7] For example, the actor need not be aware that they were acting pursuant to a customary license or that the legislature could not reasonably have envisioned the conduct at issue when creating the criminal offense.

interest was infringed nor inconsistent with the goal of the law defining the offense". This language is nearly identical to Model Penal Code § 2.12(1),[8] with only non-substantive language differences. Both RCC § 22E-215 and Model Penal Code § 2.12(1) would allow for dismissal when a neighbor who had previously been allowed to use a landowner's yard as a shortcut crossed land without first getting permission."[9] For various RCC offenses that involve lack of consent as an element,[10] or use the defined term "property of another" in RCC § 22E-701 (which in turn refers to consent), paragraph (a)(1) provides a mechanism to avoid liability when there was reliance on a customary license or tolerance that is not expressly refused.

Paragraph (a)(2) codifies two additional situations where judicial dismissal under RCC § 22E-215 may be appropriate in a particular case. The first situation is where the actor did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense. Such a mismatch between the formal articulation of an offense and the conduct of a particular case may arise in various ways.[11] One instance of such a mismatch addressed by this provision is when a person engages in a conspiracy, attempt, or similar inchoate offense, meeting all the elements, but there is little chance of success.[12] Another possibility that may occur under this provision is the occurrence of mitigating circumstances that so transform the character of the actor's conduct that it no longer fits the harm or evil targeted by the offense.[13] In determining whether the harm or evil sought to be prevented by the law is at issue in a particular case under this first prong of paragraph (a)(2), the court also may give weight to the attitude of the complainant with respect to the conduct.[14]

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[8] Model Penal Code § 2.12 (1) ("was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;").
[9] See Model Penal Code § 2.12 cmt. at 402-03; Commentary on Del. Reform Code § 209(a).
[10] RCC § 22E-1402, Criminal Restraint.
[11] *See* Stanislaw Pomorski, On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense, 1997 B.Y.U. L. Rev. 51, 73–74 (1997) (discussing this prong of the corresponding MPC de minimis provision and stating: "As a general rule, acts in violation of statutory norms display antisocial qualities. However, this is not always so. In some presumably exceptional cases, a discrepancy develops between the abstract, general legal assessment, on the one hand, and the specific, fact-bound, substantive assessment on the other; conduct generally prohibited may have no antisocial substance in its individual, concrete manifestation. In such situations the decision maker confronts two conflicting assessments: legal and substantive. Consistent with the substantive concept of crime, the substantive assessment is given primacy over the formal, legal one.").
[12] Commentary to Model Penal Code § 2.12(2) ("This is a generalization of the provision in Section 5.05(2), which-provides for attempt, solicitation and conspiracy-all inchoate offenses that the prosecution can be dismissed in extreme cases if the particular conduct charged is "so inherently unlikely to result or culminate in-the commission of a crime-that neither such conduct nor the actor presents a public-danger….").
[13] Mitigating circumstances such as those recognized in murder case law might provide a basis for dismissal under paragraph (a)(2) even in the absence of an available defense. For example, a parent who witnesses the killing of their child and immediately afterward punches and kicks at the murderer as they retreat may not meet the requirements for any general justification or excuse defense as to their assault. However, conduct under such mitigating circumstances may not be fairly said to address the socially-destructive harm or evil targeted by the assault statute.
[14] For example, if the complainant does not experience the actor's conduct as harmful, that may (but need not) be relevant to the court's judgment whether, despite meeting the technical requirements of an offense, the actor's conduct in a given case does not actually cause or threaten the harm or evil sought to be prevented by the law. *See, e.g.,* N.Y. Crim. Proc. Law § 170.40(1)(I) (McKinney 2007) (motion to dismiss in furtherance of justice includes judicial consideration of "where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion."). *See, generally,* Anna Roberts, *Dismissals As Justice,*

The second situation described in paragraph (a)(2) involves an actor who causes or threatens a harm so trivial that the condemnation of a criminal conviction would not be warranted under the circumstances. This kind of situation is most likely to arise in the context of prosecutions for low-level offenses, which effectively draw the line between criminal and non-criminal conduct—for example, the misdemeanor versions of theft, destruction of property, assault, and drug possession. For offenses of this nature, it is difficult to draft the objective elements (or *actus reus*) in a manner that captures only those forms of conduct deserving of criminal sanction without also extending to at least some forms of conduct that are insufficiently blameworthy to warrant the condemnation of a criminal conviction.[15] It is therefore necessary to provide actors who engage in such conduct with a means of escaping criminal liability in the event they are subject to a criminal prosecution. This situation may also arise, however, in felony offenses where the harm addressed by the offense was actually committed but the harm was so minor that a conviction for the felony would be disproportionate.[16]

Illustrative examples of this second type of situation in paragraph (a)(2) include: (1) a prosecution for theft premised on the defendant's having intentionally stolen a single piece of chewing gum from a convenience store; (2) a prosecution for offensive physical contact premised on the defendant's having intentionally brushed up against co-riders on public transportation in an effort to be the first to the door; (3) a prosecution for destruction of property premised on the defendant's having intentionally stepped on one flower in another person's garden; (4) a prosecution for drug possession premised on the defendant's having intentionally held a plastic bag with microscopic but measurable amounts of cocaine inside; or (5) a complicity-based prosecution for any of the above misdemeanors premised on the defendant's having purposely assisted or encouraged similar acts principally perpetrated by another.

Paragraph (a)(3) establishes that a fourth situation when judicial dismissal is justified is when the conduct cannot reasonably be regarded as envisioned by the legislature in forbidding the charged offense.[17] This provision functions as a sort of "rule of reason in the interpretation of [a] []statute."[18] Unusual or novel circumstances, which go beyond what the legislative intent underlying passage of a given criminal statute can fairly be

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69 Ala. L. Rev. 327, 330 (2017) (analyzing the common function of state statutes and judicial procedures allowing dismissals "in furtherance of justice" and "de minimis" prosecutions.").

[15] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 108 (Boston, Little, Brown & Co. 1881) ("The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them ….").

[16] The fact that certain conduct is too minor to warrant conviction under a given charge per RCC § 22E-215(a)(2) does not mean that a prosecution for that same conduct could not be successfully brought on another charge that is more appropriate. For example, while a minor harm may not warrant the condemnation of a felony conviction, the minor harm may warrant the condemnation of a misdemeanor conviction. Many RCC offenses are structured with lesser included offenses to provide prosecutorial discretion over which level of charge to bring.

[17] *Compare* Model Penal Code § 2.12(3) ("The Court shall dismiss a prosecution if," *inter alia*, "it finds that the defendant's conduct … presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense."); *Id.,* cmt. at 404 ("In a sense, this suggests to the court a rule of reason in the interpretation of the basic statute, as indeed do the other provisions of this section."); N.J. Stat. Ann. § 2C:2-11(c) (same); Haw. Rev. Stat. Ann. § 702-236(1)(c) (same).

[18] Model Penal Code § 2.12(3).

understood to reach, are within the scope of subsection (a)(3). (In contrast, where the defendant's conduct is merely a typical instance of a statutory violation of a particular offense, paragraph (a)(3) is inapplicable.) Paragraph (a)(3) also covers conflicts and gaps between statutes that the legislature is unlikely to have been aware. For example, there may be instances where an actor's conduct occurs in the presence of one or more mitigating circumstances that come close to, but ultimately fail to establish, one or more recognized justification or excuse defenses under Chapters 4 and 5 of the RCC. Or the actor's conduct occurs in the presence of circumstances that call deeply into question the voluntariness of the actor's conduct under RCC § 22E-203, but ultimately pass muster under the terms of that statute. In these situations, it may well be that the legislature cannot reasonably have foreseen the particular interaction between the instant offense and the other statutory provisions. In such an instance, continuing to hold an actor liable for the offense may not meet the legislative intent.

Subsection (b) of the statute imposes a special findings requirement for a dismissal.[19] Specifically, the court is required to "state its specific findings of facts… or findings of law under this section in open court or in a written decision or opinion."[20] In addition, subsection (b) specifies the relevant burden of proof for findings of fact in support

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[19] *See, e.g.,* Model Penal Code § 2.12 ("The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.") (citing subsection (3), which authorizes a *de minimis* dismissal when the defendant's conduct "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense"); *Id.*, cmt. at 404 ("Because the authority in Subsection (3) [is] stated in terms of such generality, it is appropriate to require that the court explain, in a written opinion, its reasons when exercising the authority that the subsection grants."); *see also* Paul H. Robinson, *Criminal Law Defenses*, 1 Crim. L. Def. § 67 at 1 ("The requirement of written reasons may be useful in many situations, but it seems particularly useful where, as here, the court is stating what it believes to be the legislature's intent. These statements permit the legislature to easily review the court's interpretation and to take legislative action to overrule it if the court's interpretation is incorrect."); *compare id.* at 1 CRIM. L. DEF. § 67 ("A few jurisdictions have extended this to require a written statement of reasons for a dismissal under any ground.") (collecting state statutes).

[20] This phrase should be construed in accordance with, the D.C. Superior Court Rules of Criminal Procedure. *Id.*, Rule 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its *specific findings of fact in open court or in a written decision or opinion.*") (italics added); *see, e.g., Saidi v. United States*, 110 A.3d 606, 612 (D.C. 2015) ("[S]pecial findings in a non-jury criminal trial inform an appellate court of the specific grounds relied on by the trial judge in reaching a verdict and enable the appellate court to undertake its review of the record with a clear understanding of the bases of the trial judge's decision.") (citations omitted).

Through such language, subsection (b) is also intended to further many of the same policy interests that underwrite the District's current approach to special findings. As the DCCA has observed:

> Special findings [] serve an important access to justice function and advance the goal of procedural fairness in the criminal justice system. A clear statement by a trial judge explaining the ruling in a case informs the parties of the reasons underlying the court's decision and provides critical assurance to an unsuccessful litigant that positions advanced at trial have been considered fairly and decided on the merits in accordance with governing law. The resulting increase in transparency promotes acceptance of the court's ruling and fosters compliance with its requirements.

Saidi, 110 A.3d at 612 (citing *United States v. Snow*, 484 F.2d 811, 812 (D.C. Cir. 1973) ("The requirement that a trial judge prepare findings which will cast light on his reasoning is not a trivial matter. It is an important element of fairness to the accused…. The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice.")).

of dismissal—preponderance of the evidence. There is no restriction as to when the court may dismiss a prosecution, and a court ruling to dismiss under RCC § 22E-215 need not await the end of a trial if sufficient facts or law sooner establish the appropriateness of dismissal.

Subsection (c) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. RCC § 22E-215 changes current District law by establishing a judicial mechanism for those actors whose conduct, culpable mental state, or surrounding circumstances establish that they are insufficiently blameworthy to warrant the condemnation of a criminal conviction. Barring the imposition of criminal liability in this way improves the proportionality of District law.

While current District case law does not recognize what is commonly called a "*de minimis"* defense, it provides some support for its adoption. Specifically, the D.C. Court of Appeals (DCCA) has, in two cases, recognized the potential benefits of a *de minimis* defense.

The first case, *Dunn v. United States*,[21] involved an animal rights activist convicted of simple assault based on his slight, non-harmful shoving of a security guard, which occurred during a protest.[22] On appeal, the defendant argued that the misdemeanor assault conviction should be overturned "because his violation of the law, if any, was *de minimis*."[23] The DCCA ultimately declined the defendant's invitation to accept this kind of "*de minimis* defense" to assault through "judicial decree."[24] In so doing, however, the *Dunn* court observed that:

> Similar minor violations of the assault statute may well happen every day, yet it is exceedingly rare for the U.S. Attorney's Office to get involved. Why, then, should Dunn not be able to argue that his shove was too minor to warrant a criminal penalty?
>
> The answer is that [the defendant] fails to cite any authority for a *de minimis* defense in the District. Some jurisdictions have recognized *de minimis*-type defenses, but they have done so through legislation[]. New York, for instance, has a statute that permits trial judges to dismiss certain criminal charges where "some compelling factor, consideration or circumstances clearly demonstrat[es] that conviction or prosecution of the defendant . . . would constitute or result in injustice." N.Y. Crim. Proc. Law § 170.40(1) (1979). And a few other states have adopted provisions based on Model Penal Code § 2.12 (2001), which "authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law." *Id.,* Explanatory Note; *see* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense,* 1997 B.Y.U. L. REV. 51 & n. 2; *see, e.g.,* N.J. Stat. Ann. 2C:2-11

[21] 976 A.2d 217 (D.C. 2009).
[22] Specifically, the defendant "moved his hands only five to six inches in striking" the victim. *Id.* at 222.
[23] *Id.*
[24] *Id.*

> (2005); Me. Rev. Stat. Ann. 17-A, § 12 (2006); 18 Pa. Cons. Stat. § 312 (1998). The D.C. Council, however, has not joined ranks with the "very limited" number of states that have adopted the defense.[25]

Accordingly, while recognizing the potential merits of a *de minimis* defense, the *Dunn* court nevertheless concluded that it "lack[ed] the power to give [defendant] the relief that he seeks" in the absence of explicit legislative authorization.[26]

The second relevant case, *Watson v. United States*,[27] involved a simple assault conviction arising from a marital dispute. After an aggravating experience at the DMV, the defendant and his wife engaged in a "heated conversation" in the parking lot during which "his wife flipped open her mobile telephone to make a call, and he grabbed the phone's flip top to stop her, accidently breaking it loose."[28] The defendant was thereafter prosecuted for simple assault.[29]

At trial, and after the close of the government's case, the defendant submitted a motion for judgment of acquittal, which the court ultimately denied finding that the government had established a *prima facie* case of simple assault:

> [W]hile [the trial judge] had difficulty determining exactly what had occurred outside the DMV, appellant's own testimony about grabbing and breaking the mobile telephone was enough to establish an assault under [prior DCCA precedent]. The [trial judge] further found that [the defendant's] grabbing of the telephone was deliberate, that it occurred in the context of an argument, that it was unprovoked, and that it constituted a battery in that it was a touching without consent.[30]

Next, the defendant appealed his conviction for simple assault to the DCCA, "arguing that the government failed to prove the elements of assault beyond a reasonable doubt."[31] All three of the judges on the panel rejected this argument; however, one of the three—Judge Schwelb—wrote a separate opinion concurring in the judgment but dissenting in part from the analysis.[32]

In his separate opinion, Judge Schwelb argued that the defendant's conduct "was, at most, a *de minimis* and inconsequential violation of the assault statute," such that it was "disproportionate and unjust to saddle [the defendant] with a criminal conviction under all of the circumstances of this case."[33] However, "[i]n light of [the DCCA's] recent decision in *Dunn v. United States,*" Judge Schwelb ultimately concluded that this "court lacks the power, in the absence of statutory authorization, to vacate Watson's conviction on *de*

[25] *Id.* at 222-23.
[26] *Id.* at 223.
[27] 979 A.2d 1254 (D.C. 2009).
[28] *Id.* at 1255.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1256.
[32] *See id.* at 1258.
[33] *Id.*

minimis grounds."[34] Nevertheless, Judge Schwelb also thought it important to explain why he believed that it would be "appropriate to propose a legislative remedy for this type of situation."[35] Specifically, Judge Schwelb suggested that:

> [T]he Council of the District of Columbia consider adopting the approach of the Model Penal Code (MPC) § 2.12 (2001), as several other jurisdictions have done, *see* Brent G. Filbert, Annotation: *Defense of Inconsequential or De Minimis Violation in Criminal Prosecution,* 68 A.L.R. 5th 299 (1999 & Supp. 2006), and that District of Columbia courts be authorized to dismiss criminal charges where the circumstances "clearly demonstrat[e] that conviction or prosecution of the defendant . . . would constitute or result in injustice." N.Y. Crim. Proc. Law § 170.40(1) (1979) (quoted in *Dunn,* at 223).[36]

In support of this proposal, Judge Schwelb's separate opinion provides a comprehensive overview of national legal trends (at the time) relevant to adoption of statutory *de minimis* provisions, beginning with the basis for many such provisions, Model Penal Code § 2.12, which "provides in pertinent part as follows":

> *De Minimis* Infractions.

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[34] *Id.* The defense originates from the common law maxim "de minimis non curat lex," which means that "the law does not concern itself with trifling matters." 68 A.L.R. 5th 299 (1999); *see Watson*, 979 A.2d at 1258 n.1.

[35] *Id.* On this point, Judge Schwelb observed that:

> Although proposing a legislative remedy to a problem raised in a particular case goes beyond a judge's conventional responsibilities, courts (or concurring or dissenting judges) occasionally do so in the interests of justice. "We have heretofore deemed it appropriate in an opinion to suggest statutory changes." *Zalkind v. Scheinman*, 139 F.2d 895, 898 n. 3(b) (2d Cir.1943) (Frank, J., joined by Learned Hand, J.) (citations omitted); *see also Moravian School Advisory Bd. v. Rawlins*, 70 F.3d 270, 279 (3rd Cir. 1995) (Becker, J., concurring in part and dissenting in part); *Am. Mach. & Metals, Inc. v. De Bothezat Impeller Co., Inc.*, 173 F.2d 890, 893 (2d Cir.1949) (Frank, J., dissenting); *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911) (Learned Hand, J.).

Watson, 979 A.2d at 1258 n.2.

[36] *Id.* at 1258–59. Judge Schwelb's separate opinion caught the eye of at least one commentator, who summarized it accordingly:

> [I]n a recent District of Columbia case, one concurring judge wished that the court were able to dismiss on grounds that the prosecution was *de minimis*. Give us what Hawaii and New Jersey have, he urged the legislature, as he was forced to go along with the affirmation of a conviction for snatching at a cell phone at the end of a long hot day at the Department of Motor Vehicles. "*De minimis non curat lex*" read the heading of his opinion, but his call to reclaim this principle went unheeded.

Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 338 (2017).

The Court shall dismiss a prosecution[37] if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction . . . .[38]

From there, Judge Schwelb's separate opinion proceeds to observe that:

> The exercise by a court of the power to dismiss a prosecution by resort to the maxim "*de minimis non curat lex*" is judicial in nature, and the vesting of that authority in the judicial branch does not contravene the doctrine of separation of powers. *State v. Park,* 55 Haw. 610, 525 P.2d 586, 592 (1974).
>
> The purpose of a *de minimis* statute is to remove "petty" infractions from the reach of the criminal law. *In re R.W.,* 855 A.2d 107, 109 (Pa. Super. Ct. 2004). Under these provisions, dismissal of a prosecution by the court is contemplated where no harm was done by the defendant either to the victim or to society. *Commonwealth v. Moses,* 350 Pa.Super. 231, 504 A.2d 330, 332 (1986). Dismissal is appropriate where the matter is too trivial to warrant the condemnation of a conviction, for "mere trifles or technicalities must yield to practical common sense and substantial justice." *State v. Brown,* 188 N.J.Super. 656, 458 A.2d 165, 169 (1983) (citation omitted). "The Legislature in recognition of the serious consequences which may attend a conviction has granted this dismissal option to avoid an injustice in a case of technical but trivial guilt." *Smith, supra* note 10, 480 A.2d at 241.
>
> The *de minimis* doctrine is designed to provide the court with discretion similar to that exercised by the police, prosecutors and grand jurors, who constantly make decisions as to whether it is appropriate to seek a conviction under the particular circumstances. *State v. Wells,* 336 N.J.Super. 139, 763 A.2d 1279, 1281 (2000). That discretion is appropriately exercised by the court, which is the institution best equipped to resolve such issues impartially. In exercising its discretion, the court may consider a wide variety of "attendant circumstances." *Park,* 525 P.2d

[37] As Judge Schwelb observes: "The statutes of at least two states provide that the court 'may' rather than 'shall' dismiss a prosecution if the conditions set forth in those statutes are met. *See* N.J. Stat. Ann. § 2C:2.11[]; Haw. Rev. Stat. § 702-236(1)." *Watson*, 979 A.2d at 1265 n.15.
[38] *Watson*, 979 A.2d at 1265.

> at 591; *Cabana,* 716 A.2d at 579 (defendant's conduct "under the de minimis statute is not viewed in isolation, but coupled with the surrounding circumstances which play an integral part herein to explain the what, why and how of defendant's intent.").[39]

Judge Schwelb's separate opinion also specifically focuses on the New Jersey Law Revision Commission's recommendation to adopt that state's *de minimis* statute, which highlighted that:

> [T]he police, prosecutors and grand jurors must frequently deal with the question whether particular conduct merits prosecution and conviction. The Commission surmised that some judges may also decline to convict defendants for technical violations if the conviction would bring about an absurd result. The Commission continued:
>
> > The drafters of the MPC summarize all of this as a "kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications." In order to bring this exercise of discretion to the surface and to be sure that it is exercised uniformly throughout the judicial system, [the *de minimis*] Section of the Code has been included.[40]

Based on the above analysis, Judge Schwelb's separate opinion proceeds to argue that the record in the *Watson* case itself "reflects the soundness of a policy which would permit a court to act as a gatekeeper, and, at least, to give serious consideration to vacating Watson's conviction."[41] In so doing, Judge Schwelb was careful not to "criticize the government for initiating the prosecution, for the accusation directed at Watson by his wife was not *de minimis,* and probable cause existed for charging an assault based on arm-twisting and the like."[42] Nevertheless, Judge Schwelb asserted that "once the judge had made his findings and rejected Ms. Sellers-Watson's most serious allegations, it was at least arguably unjust and disproportionate to burden Watson with a criminal conviction."[43]

With that in mind, and in closing, Judge Schwelb's separate opinion again specifically:

> recommends a legislative remedy in this case . . . because, in [his] view, the adoption of the relevant provisions of the MPC (or of the Hawaii and New Jersey variations of the MPC) would promote justice by protecting citizens from significant burdens attendant upon a criminal conviction when they have committed, at most, trifling and essentially harmless violations of the law. "Proportionality is of consummate importance in judicious adjudication." *Allen v. United States,* 603 A.2d 1219, 1227 (D.C. 1992) (*en*

[39] *Watson*, 979 A.2d at 1265–66.
[40] *Watson*, 979 A.2d at 1267.
[41] *Id.*
[42] *Id.*
[43] *Watson*, 979 A.2d at 1267-68.

banc), *cert. denied* 505 U.S. 1227, 112 S.Ct. 3050, 120 L.Ed.2d 916 (1992).[44]

Consistent with the above considerations of District law, national legal trends, and policy analysis, legislative adoption of a *de minimis* defense—codified here as RCC § 22E-215, minimal or unforeseen harms—is both appropriate and necessary under the circumstances.[45] Compelling considerations of legislative drafting further bolster this conclusion. Ideally, for example, the District's criminal statutes should be drafted sufficiently narrow as to exclude *de minimis* conduct from criminal liability in the first place. However, as a practical matter, drafting offenses that solely extend to actors whose conduct and accompanying state of mind are sufficiently blameworthy to warrant the condemnation of a criminal conviction, without also creating gaps in coverage, is extremely difficult. Therefore, while the offenses in the RCC's Special Part strive to achieve that goal to the extent possible, the employment of RCC § 22E-215 is essential to facilitating the overall proportionality of District law.

RCC § 22E-215 is based on, but departs in minor ways from, Model Penal Code § 2.12. Unlike Model Penal Code § 2.12, the RCC approach to a *de minimis* defense does two critical things. First, RCC § 22E-215 explicitly clarifies that mental state considerations are a central part of the *de minimis* analysis—whereas Model Penal Code § 2.12 is silent as to culpable mental states. Second, RCC § 22E-215 specifies a preponderance of the evidence standard for findings of fact in support of dismissal—in contrast to the Model Penal Code § 2.12, which does not specify any evidentiary burden on which dismissal must be based. Third, unlike Model Penal Code § 2.12 but following other states' codification of a *de minimis* defense, [46] RCC § 22E-215 states that the court "may" (rather than "shall") dismiss a case under the stated conditions. This clarifies the discretionary nature of the dismissal. [47] Fourth, the revised statute, like some other

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[44] *Id.*

[45] It should be noted that while only "four states (Hawaii, Maine, New Jersey, and Pennsylvania) and Guam enacted statutes based on MPC 2.12," "[f]ifteen states and Puerto Rico have enacted statutes that give the courts power to dismiss a prosecution in furtherance of justice." Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 332 n. 32 (2017) (collecting citations).

For a sense of the range of conduct to which *de minimis* statutes apply, consider the following dismissals; *State v. Akina*, 828 P.2d 269 (Haw. 1992) (giving shelter to a runaway teenager ("custodial interference")); *New Jersey v. Bazin*, 912 F. Supp. 106 (D.N.J. 1995) (verbal harassment); *State v. Zarrilli*, 523 A.2d 284 (N.J. Super. Ct. Law Div. 1987) (taking a single sip of beer by an underage boy attending a church function); *State v. Smith*, 480 A.2d 236 (N.J. Super. Ct. Law Div. 1984) (shoplifting three pieces of bubble gum worth 15¢); *State v. Nevens*, 485 A.2d 345 (N.J. Super. Ct. Law Div. 1984) (taking fruit from the premises of a buffet-type restaurant after paying for the meal); *Commonwealth v. Moll*, 543 A.2d 1221 (Pa. Super. Ct. 1988) (damaging a drainage pipe belonging to the town to prevent flooding of the defendant's land (mischief)); *Commonwealth v. Jackson*, 510 A.2d 1389 (Pa. Super. Ct. 1986) (riot and failure to disperse by prison inmates upon official order); *Commonwealth v. Houck*, 335 A.2d 389 (Pa. Super. Ct. 1975) (verbal harassment—calling the victim on the phone "morally rotten" and "lower than dirt"); *see also State v. Cabana*, 315 N.J. Super. 84, 716 A.2d 576 (Law Div. 1997), *aff'd without opinion*, 318 N.J. Super. 259, 723 A.2d 635 (App. Div. 1999) (defendant's conduct in striking a fellow politician's chin while waving a flier during a confrontation was an "offensive touching" not sufficiently serious to warrant prosecution for a simple assault).

[46] *See, e.g.,* Haw. Rev. Stat. Ann. § 702-236 (West); Me. Rev. Stat. tit. 17-A, § 12.

[47] Paul H. Robinson, *Criminal Law Defenses*, 1 Crim. L. Def. § 67 ("[U]nder Model Penal Code § 2.12 the court is directed to 'dismiss a prosecution' when the requirements of the defense are met. It can thus provide

authorities,[48] requires a judicial statement of reasons for a dismissal under any prong ((a)(1)-(a)(3)) of the revised statute rather than just the legislative intent prong in Model Penal Code § 2.12(3). These minor departures clarify and improve the operation of the provision.

not just a defense to conviction, but also a bar to prosecution. However, some jurisdictions have altered the Model Penal Code's 'shall dismiss' to a permissive 'may dismiss,' in an attempt to give the court broader discretion in the matter.") (collecting statutes).

[48] *See, e.g.,* Me. Rev. Stat. tit. 17-A, § 12.

RCC § 22E-216. Minimum Age for Offense Liability.

Explanatory Note. *This section establishes a minimum age for offense liability for the Revised Criminal Code (RCC). The RCC minimum age for offense liability statute establishes 12 as the minimum age for a child to be held liable for an offense. As criminal charges against children under 12 are otherwise barred by District law, the exception to liability for those under 12 applies to delinquency proceedings. The RCC minimum age for offense liability statute replaces the common law defense of* doli incapax *that may still be applicable in the District*

Subsection (a) specifies that an actor does not commit an offense[49] when the actor, in fact, is under 12 years of age. Paragraph (a) uses the defined term "in fact" to specify that there is no culpable mental state required as to the age of the actor. Per RCC § 22E-201, if there is any evidence of the statutory exclusion, the government must prove the absence of all elements of the exclusion beyond a reasonable doubt.

Subsection (b) specifies that when a person is liable for an offense based on the conduct of another, that person remains liable for the offense notwithstanding the fact that the conduct is committed by a person under 12 years of age. The subsection clarifies that the fact that one person is not liable because they are under 12 years of age, does not affect the offense liability of others based on the conduct of the 12 year old. For example, liability as an accomplice under RCC § 22E-210, for conspiracy under RCC § 22E-303, or for the contributing to the delinquency of a minor offense under RCC § 22E-4601 based on the conduct of another is the same regardless of the fact that the other person is under 12 and not themselves liable for an offense under subsection (a).

Subsection (c) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The RCC minimum age for offense liability clearly changes current District law in one main ways.*

The RCC developmental incapacity provision bars liability for any offense for all actors under 12 years of age but does not bar liability for those 12 or 13 years of age. The current D.C. Code is silent[50] as to whether there is any minimum age of liability for juvenile delinquency proceedings,[51] and there is no case law on point. However, the D.C.

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[49] As discussed below, the statute effectively precludes juvenile delinquency proceedings for persons under 12 years of age. *See* D.C. Code § 16–2301(7) ("The term 'delinquent act' means an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen.").

[50] The current D.C. Code is silent as to virtually all general defenses to criminal liability, including frequently used defenses such self-defense. These defenses exist solely as a matter of common law, statutorily recognized through the reception statute, D.C. Code § 45–401(a). The only general defense recognized in the D.C. Code is an insanity defense, which applies to juvenile delinquency and criminal proceedings. *See* D.C. Code § 24–501(c) ("When any person tried upon an indictment or information for an offense, or tried in the Family Division of the Superior Court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.").

[51] The D.C. Code contains jurisdictional provisions that refer to maximum ages for delinquency proceedings, but these jurisdictional provisions are silent as to any minimum age of liability. D.C. Code § 11–1101 states, in relevant part, that the Family Court of the Superior Court has jurisdiction over "proceedings in which a

Code "reception statute" broadly provides that the common law remains in force except insofar as it is "inconsistent with, or [] replaced by" statute.[52] At common law, the *doli incapax* rule provides that a child under age 7 is incapable of committing an offense,[53] and there is a rebuttable presumption that a child ages 7-13 is incapable of committing an offense.[54] There does not appear to be any statement by Congressional or District legislators that the creation of a juvenile delinquency system in the District or other legislation was intended to displace the common law *doli incapax* doctrine for children.[55]

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child, as defined in § 16-2301, is alleged to be delinquent, neglected, or in need of supervision." A "child" in turn is defined by D.C. Code § 16-2301(3) as "an individual who is under 18 years of age" while excluding certain 16- and 17-year-olds charged by the United States Attorney with certain crimes or charged with a traffic offense.

Recently, the Council specified in D.C. Code § 16–2320(c)(2) a minimum age of 10, for transfer of custody of delinquent children to the Department of Youth Rehabilitation Services (DYRS). *See* Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016" (Oct. 5, 2016) at 7-8 (citing other states' minimum age for delinquency adjudication but noting the bill only limits commitment to DYRS). This appears to be the first record of legislative discussion of a minimum age for criminal responsibility and does not address the applicability of a common law defense or address prosecution of children although this latter point was raised by a public witness. *See Statement of Tim Curry, Director of Training and Technical Assistance, National Juvenile Defender Center* (May 31, 2016) in Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016" (Oct. 5, 2016) at 364-365.

[52] D.C. Code § 45–401(a) ("The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code.").

[53] *See, Adams v. State*, 262 A.2d 69, 71-72 (Md. 1980) ("Since the Code of Hammurabi (circa 2250 B.C.) and down through the ages, society, under the law, has viewed and treated offenders of tender years in a light differently and more favorably than that accorded adults accused of breaching the law. Over the centuries and during the evolution of the common law of England, there emerged a rule of law governing 'the responsibility of infants' under which an individual below the age of seven years cannot be found guilty of committing a crime; an individual above fourteen years charged with a crime is to be adjudged as an adult; and between the ages of seven and fourteen there is a rebuttable presumption that such individual is incapable of committing a crime. In the absence of any pertinent legislative enactment in this State, the common law principles, as stated above, would appear to govern in Maryland and we so hold."); *Linkins v. Protestant Episcopal Cathedral Found. of the D.C.,* 187 F.2d 357, 360 (D.C. Cir. 1950) ("The common law, particularly as derived from the common law of Maryland, is the fundamental part of the law in this jurisdiction to which we look in the absence of statutory enactment." (internal citation omitted)). The only record the CCRC has located of *incapax doli* being used under the common law in the District dates to 1822. John Young, a 13-year-old "free boy" held three months in a "loathsome gaol" on a charge of theft, claimed to be *incapax doli* in a *habeas* petition to the District of Columbia Circuit Court. *See* Marguerite Ross Howell and Nicole Marcon Mazgaj, *The Southern Debate Over Slavery: Petitions to Southern county courts, 1775-1867* at 113 (2001).

[54] *Allen v. United States*, 150 U.S. 551, 558 (1893). This presumption was conclusive as to charges of rape and "the weight of the presumption was said to decrease as the child approached the age of discretion. 2 Subst. Crim. L. § 9.6(a) (3d ed.).

[55] To date, CCRC research has found no case law or legislative history on point and the agency's Advisory Group members have not provided any case law or legislative history indicating that the *doli incapax* doctrine is no longer good law. Notably, however, District case law does generally describe the juvenile delinquency system created by Congress—as far back as the first Juvenile Court in 1906—as intended to benefit juveniles and, accordingly, statutory language should be strictly construed insofar as it may lead to detention. *See, In re Poff,* 135 F. Supp. 224, 225 (D.D.C 1955) ("The original Juvenile Court Act enacted in the District of

Absent evidence that the juvenile delinquency system in District law was to replace the common law doctrine, it appears that the *doli incapax* doctrine remains current law in the District and while delinquency proceedings notwithstanding the apparent lack of any modern litigation or prosecutorial policy regarding the doctrine in the District. In contrast, the RCC minimum age for offense liability specifies that an actor does not commit an offense when the actor is a child under 12. This minimum age of responsibility is supported by recent brain science research on the capacity of young children[56] and criminological research indicating that involvement of young children in the juvenile justice system increases future criminal behavior.[57] A minimum age of 12 is consistent with minimum standards of international law[58] and recent state reforms.[59] This change improves the proportionality of the revised statutes.

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

The RCC minimum age for offense liability statute specifies that whenever an actor is liable for an offense based on the conduct of another person, the fact that the other person is a child under 12 (and not themselves liable for an offense under RCC § 22E-216(a)) does not relieve the actor of liability. The current D.C. Code is silent as to whether there is a minimum age of liability for an offense, let alone whether a person who is an accomplice

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Columbia in 1906, [], was devised to afford the juvenile protections in addition to those he already possessed under the Federal Constitution…In order that the beneficient purpose of the act may be effectuated, it should be construed liberally, except in-so-far as it purports to restrain the liberty of the child, in which case it should be strictly construed.[]" (internal citations omitted)); *see also United States v. Tucker*, 407 A.2d 1067, 1070 (D.C. 1979) ("Moreover, we believe that in view of the rehabilitative purposes of our juvenile justice system, D.C.Code 1973, s 16-2301(3) should be strictly construed against the prosecution and in favor of the person being proceeded against.").

[56] *See, e.g.,* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 356 (2003) ("Our results indicate that juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding."); *see also* Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016" (Oct. 5, 2016) at 3-4 (citing child development research indicating the differences in adolescent brain development).

[57] *See* Anthony Petrosino, Carolyn Turpin-Petrosino, and Sarah Guckenburg, *Formal System Processing of Juveniles: Effects on Delinquency,* No. 9 of Crime Prevention Research Review, U.S. Department of Justice, Office of Community Oriented Policing Services (2013) (examining the results of 29 randomized controlled trials, finding no evidence that formally moving juveniles through the juvenile justice system has a crime control effect and, in fact, processing increased delinquency); Barry Holman and Jason Zeidenburg, *Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* Justice Policy Institute (2013) (reviewing costs and effects of juvenile detention and alternatives).

[58] *See* United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice* (2007) at paragraph 32 ("From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.").

[59] *See, e.g.,* California and Massachusetts recently adopting a minimum age of 12. Cal. Welf. & Inst. Code § 602 (2019); Mass. Gen. Laws Ann. ch. 119, § 52 (2018). Note, however, that California law provides exceptions for murder and certain sex offenses. Cal. Welf. & Inst. Code § 602. The Massachusetts reform has been in operation long enough that analyses of its effects have been published, with favorable findings. *See* Massachusetts Juvenile Justice Policy and Data Board, *Early Impacts of "An Act Relative to Criminal Justice Reform,"* (Nov. 2019).

to,[60] conspires with,[61] or is otherwise liable for the actions of another remains liable when the other person is a young child who is immune from liability. There is no District case law on point. The District's current contributing to the delinquency of a minor (CDM) statute is clear that there is no defense to the crime that the "minor does not engage in" conduct described in the offense.[62] However, the elements of CDM require in relevant part for a person to "invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to…violate any criminal law of the District of Columbia,"[63] and it remains unclear whether the offense elements can be satisfied with regard to a very young child for whom it is legally impossible to violate a District criminal law. There is no case law on point. Resolving these ambiguities, the revised statute specifies that an actor who is otherwise liable for an offense based on the conduct of another remains liable for the offense even though the other is a person under 12 years of age who is not liable under subsection (a) of the statute. This change clarifies and improves the consistency and proportionality of the revised statutes.

[60] D.C. Code §22-1805 ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.").
[61] D.C. Code §22-1805a.
[62] D.C. Code §22-811(d).
[63] D.C. Code §22-811(a).

RCC § 22E-301. Criminal Attempt.

Explanatory Note. RCC § 22E-301 provides a comprehensive statement of general attempt liability under the RCC. This statement establishes the culpable mental state requirement and conduct requirement of a criminal attempt, the relationship between a criminal attempt and the target offense, and the penalties applicable to a criminal attempt. Section 301 replaces the District's current general attempt statute, D.C. Code § 22-1803.

Paragraphs (a)(1) and (a)(2) establish two basic culpability principles governing general attempt liability. The first principle, set forth in paragraph (a)(1), is that an attempt entails proof that the defendant "plans to engage in conduct constituting an offense."[1] Paragraph (a)(1) uses "in fact," a defined term in RCC § 22E-207 that here means there is no culpable mental state requirement that must be proven as to the actor planning to engage in conduct constituting an offense. This planning requirement is the foundation of attempt liability[2]; it communicates the basic tenet that attempting to commit an offense involves, among other things, being committed to a course of conduct that, if carried out, would[3] satisfy the objective elements of that offense.[4]

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[1] *See, e.g.,* Model Penal Code § 5.01(1)(c) (liability for incomplete attempt entails proof of, *inter alia*, "a course of conduct *planned* to culminate in his commission of the crime").

[2] *See, e.g.,* Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 109 (2014) ("Plans play various roles in making possible and effective organized behavior that takes place over extended periods of time."); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) (planning requirement, referred to as "future conduct intention," has "a critical independent role to play" in criminal code); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170 (1997) ("[T]he most coherent justification [for attempt liability] rests on the assumption that forming an intention to engage in future criminal conduct is itself a culpable act[.]").

[3] That is, assuming "the situation was as the actor perceived it," which is a requirement of the RCC criminal attempt statute and is discussed later in this commentary.

[4] *See, e.g.,* Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 755 (2012) (with a charge of attempted purposeful murder, "the key question is not (only) whether the actor desires the death of the victim, but whether he is committed to a course of conduct that would, if completed, bring about the death of the victim"); Gideon Yaffe, *Attempt, Risk-Creation, and Change of Mind: Reflections on Herzog*, 9 OHIO ST. J. CRIM. L. 779, 781 (2012) ("To attempt murder is to have an intention that commits one to causing another's death and to be guided by that intention in one's conduct.").

This planning requirement is largely implicit in the other elements of a criminal attempt. For example, to hold that a defendant arrested by the police two blocks away from a bank in possession of a mask and firearm was "dangerously close to completing" a bank robbery, see RCC § 22E-301(a)(4)(A), necessarily entails a determination that the defendant was planning to engage in conduct that, but for the police intervention, would have culminated in a bank robbery. Conversely, if the only reason the defendant's criminal scheme failed is because the bank manager, upon threat of death, was unable or unwilling to hand over physical currency, then the requisite plans would be established by the fact that the defendant's scheme was actually carried out.

This planning requirement is to be distinguished from the voluntariness requirement under RCC § 22E-203. The voluntariness requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed." Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994) . In contrast, the planning requirement, which implicates what is sometimes referred to as a "*future* conduct intention," "serves to show that the actor is planning to do more than what he has already done." *Id.*

In this sense, the term "planning" as employed in this section is substantively identical to the term "intent" under RCC § 22E-206, and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e. a person who, having been provoked, is stopped by police immediately

The second principle, set forth in paragraph (a)(2), establishes an additional aspect of the conduct requirement governing attempt liability—that the defendant's conduct must have been "reasonably adapted" to completion of the target offense.[5] This reasonable adaptation requirement is intended to limit attempt liability to those situations where there exists a basic relationship between the defendant's conduct and the criminal objective sought to be achieved.[6] Requiring the government to establish this basic relationship both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.[7] Per the rules of interpretation in RCC §

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prior to firing his weapon in retaliation has "planned" to kill). Paragraph (a)(1) of the RCC criminal attempt statute could have just as easily been drafted to state "intending to engage in conduct constituting [an] offense," however, that drafting would potentially cause confusion between the planning requirement and the culpability required of the target offense. *See* RCC § 22E-301(a)(2) (defendant must act "with the culpability required for the [target] offense").

For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e. whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator "planned to engage in conduct constituting" murder (i.e. whether the operator planned to demolish the building, which was in fact occupied). Use of the term "planning," as opposed to "with intent," in paragraph (a)(1) helps to distinguish these concepts.

[5] RCC § 22E-301(a)(2). This standard is drawn directly from D.C. Court of Appeals case law. *E.g., Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *Johnson v. United States*, 756 A.2d 458, 463 n.3 (D.C. 2000). However, numerous other jurisdictions employ comparable standards, whether through case law or by statute. *See* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1902-04 (1999) (collecting relevant legal authorities); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for an attempt that "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section").

[6] *See, e.g.,* Edwin R. Keedy*, Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954) (where "the means employed are not reasonably adapted to carry out" the actor's intent to commit a crime, an attempt conviction is not justified "for in such case there can be no damage or danger of damage"); Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 273 (2014) ("[I]t is difficult to see how a state could justify criminalizing [an attempt which lacks this basic relationship.] Criminalizing attempted murder by means of implausible causal theories seems dangerously close to criminalizing the sincere hope that somebody dies accompanied by the slightest act in this direction—for example, a diary entry. And this kind of infringement on a person's thoughts is not only unjust; it is unconstitutional.").

[7] Inherent impossibility is an issue in attempt prosecutions where the defendant "employs means which a reasonable man would view as totally inappropriate to the objective sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a)(4) at 2 (3d ed. Westlaw 2019); *see also* Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 564 (2008) (attempt liability should entail proof that the defendant was "a substantial threat to the interests that the law declaring X to be an offense seeks to protect"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under paragraph (a)(2), and, therefore, could constitute a (failure of proof) defense to attempt liability under the RCC. In practice, however, it will take more than a "routine miscalculation of attendant circumstances, as in cases of factual or hybrid [] impossibility," to call into question the necessary relationship between the defendant's conduct and the criminal objective sought to be achieved. *See* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999). Rather, only

22E-207, the "in fact" specified in paragraph (a)(1) applies to the elements in paragraph (a)(2) and there is no culpable mental state required for the fact that the actor engages in conduct that is reasonably adapted to completion of the offense. Paragraph (a)(3) requires that the defendant acts with "the culpability required for the [target] offense."[8] Pursuant to this principle, a defendant may not be convicted of a criminal attempt absent proof that he or she acted with, at minimum, the culpable mental state(s)[9]—in addition to any broader aspect of culpability[10]—required to establish that offense.[11] Per the rules of

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"an exceedingly unreasonable miscalculation of circumstances" would be relevant (insofar as impossibility is concerned) to the determination of whether the reasonable adaptation standard is met. *Id.*

So, for example, the fact that the defendant in an attempted murder prosecution tried to kill the victim by pulling the trigger on a broken firearm that she mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that a defendant in an attempted murder prosecution tried to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant—and ultimately preclude the attachment of attempt liability under the RCC criminal attempt statute. *See, e.g.,* Edwin R. Keedy*, Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 470 (1954) (where the defendant "invokes witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result") (collecting authorities).

[8] *See, e.g.,* Model Penal Code § 5.01(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime").

[9] It is possible, and may sometimes be necessary, to distinguish between an attemptor's state of mind as to: the planning requirement; the result elements of the target offense; and the circumstance elements of the target offense.

To illustrate, consider the situation of an individual who is arrested by police just as he's about to set off an explosive device near an unmarked metropolitan police department building in the middle of a work day. This individual is subsequently prosecuted for attempting to murder a police officer under a statute that prohibits: "(1) knowingly killing another person, (2) reckless as to whether the person is a police officer." On these facts, the defendant satisfies the planning requirement, namely, he planned to engage in conduct that, if carried out, would have resulted in the death of a police officer. Likewise, the defendant also seems to satisfy the culpable mental state governing the result element incorporated into prong (1), namely, he either desired to kill or was practically certain that his conduct would result in the death of a person (i.e. the unmarked building's occupants). Less clear (and also a separate question), however, is whether the defendant satisfies the culpable mental state governing the circumstance element incorporated into prong (2), namely, that he was aware of a substantial risk that he would kill a police officer (i.e. that one of the unmarked building's occupants was a police officer). Absent proof of such recklessness, which is required by the target offense, the defendant could not be convicted of attempting to murder a police officer. This commentary discusses elsewhere the treatment of culpability as to circumstance elements in the RCC criminal attempt statute

[10] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201 (culpability required defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201. And, of course, attempt liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203. *See* RCC § 22E-201 (voluntariness requirement also part of culpability required for an offense).

[11] Note that whereas the culpable mental state(s) governing the result element(s) of the target offense are subject to an additional principle of culpable mental state elevation under subsection (b), the culpable mental state(s) governing the circumstances element(s) of the target offense are not (discussed elsewhere in this commentary). This means that, with respect to circumstance elements, it is both "[necessary and] sufficient that the actor possessed the degree of culpability required to commit the target offense." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.09(C) (6th ed. 2012).

So, for example, "if D would be guilty of statutory rape on proof that he was reckless as to the girl's age (the attendant circumstance), then he may be convicted of attempted statutory rape if he was reckless,

interpretation in RCC § 22E-207, the "in fact" specified in paragraph (a)(1) applies to the elements in paragraph (a)(3) and there is no additional culpable mental state required for the fact that the actor acts with the culpability required for the offense.

Paragraph (a)(4) establishes that attempt liability under the RCC rests upon dangerous proximity to completion of the target offense. This addresses a complex issue of longstanding disagreement in the criminal law:[12] at what point has an actor, intending to commit an offense, made sufficient progress towards the completion of his or her criminal objective to be subject to attempt liability?[13] Under RCC § 22E-301(a)(4)(A), the requisite line between preparation and perpetration is crossed when an actor engages in conduct that is "dangerously close to completing that offense."[14] This threshold does not entail proof

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but not if he was negligent or innocent, as to the girl's age." *Id*. And, along similar lines, "[i]f the material element of the girl's age is one of strict liability, i.e. D may be convicted of statutory rape although he reasonably believed that she was old enough to consent, then he may also be convicted of attempted statutory rape although he lacked a culpable mental state as to this attendant circumstance." *Id.*; *see, e.g.,* Commentary on Haw. Rev. Stat. Ann. § 705-500 ("[I]t would be anomalous to hold that . . . the defendant's lack of intent with respect to an attendant circumstance precludes penal liability for the attempt," whereas "had the defendant succeeded, and the substantive crime been consummated, the defendant would be guilty of the substantive crime[.]"); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05(d) (6th ed. 2012) ("There is relatively little case law on point, but virtually all commentators agree that the ordinary specific-intent requirement of attempt law should not apply to attendant circumstances[.]").

[12] *See, e.g.,* O.W. HOLMES, JR., THE COMMON LAW 68 (1881) ("Eminent judges" have long "been puzzled where to draw the line" of where an attempt begins, "or even to state the principle on which it should be drawn . . . ."); *Mims v. United States*, 375 F.2d 135, 148 (5th Cir. 1967) ("Much ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparations ends and attempt begins").

[13] At the heart of the issue is the fact that the intentional perpetration of a crime "is the result of a six-stage process," which has been described accordingly:

> First, the actor conceives the idea of committing a crime. Second, she evaluates the idea, in order to determine whether she should proceed. Third, she fully forms the intention, i.e. resolves, to go forward and commit the crime. Fourth, she prepares to commit the crime, for example, by obtaining any instruments necessary for its commission. Fifth, she commences commission of the offense. Sixth, she completes her actions[.]

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.01 (6th ed. 2012)§ 27.01; *see* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 3.3.2 (2000).

It is well established that attempt liability is not supportable during the first three stages of the process. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.01 (6th ed. 2012) ("Until the third step occurs, the actor lacks a mens rea," and "[e]ven after the mens rea is formed, she is not punished . . . for thoughts alone."). Conversely, it is equally well established that once a person reaches the sixth stage, and has carried out all that he or she plans to do in order to consummate an offense, attempt liability is appropriate. *See, e.g., United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) (all who engage in last proximate act may be subject to attempt liability); Model Penal Code § 5.01 cmt. at 321 n.97 ("No jurisdiction operating within the framework of Anglo-American law requires that the last proximate act occur before an attempt can be charged."). The controversy over the conduct requirement governing criminal attempts thus focuses on "[a]ctivity in the middle ranges, i.e. after the formation of the *mens rea* but short of attainment of the criminal goal." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.01 (6th ed. 2012)

[14] The dangerous proximity standard is rooted in the writings of former U.S. Supreme Court Justice Oliver Wendell Holmes, and has subsequently been adopted by many jurisdictions, including the District of Columbia. *See, e.g., Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978) ("The act [necessary for attempt liability] must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained. This 'dangerous proximity' test, formulated by Justice Holmes, does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended.") (quoting CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT

that the actor carried out every part of his or her criminal scheme.[15] However, it does require that the actor have taken more than a mere "substantial step" towards completion of the target offense.[16] In evaluating whether the dangerous proximity standard is met, the

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OF COLUMBIA, No. 4.04 (2d ed. 1972)); *Com. v. Bell*, 455 Mass. 408, 425 (2009) (discussing genesis of dangerous proximity standard); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 3.3.2-4 (2000) (discussing relevant policy and philosophical considerations).

Explicitly, the dangerous proximity standard addresses *incomplete attempts*, which involve situations where an attempt fails because external events frustrate a person from carrying out all that he or she planned to do. *See* Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 901 n.59 (2007) ("An incomplete attempt would be one where the shot has not yet been fired, but the actor has done enough to be liable for an attempt—say, buying the gun, loading it, pursuing the victim, aiming and preparing to fire."). Implicitly, however, this standard also covers *complete attempts*, which involve situations where the person has, in some sense, done everything he or she plans to do, yet the target offense is not consummated by virtue of an accident on behalf of the person. *Id.* ("A classic completed attempt is the shoot-and-miss scenario, where no further act is need beyond firing the shot; the attempt fails only because of the inaccuracy of the shot.").

[15] So, for example, an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under this standard. *See Jones*, 386 A.2d at 312 (upholding attempt liability on such facts). Along similar lines, the dangerous proximity standard could also be established in the following illustrative contexts: (1) the attempted murder prosecution of a person whose pistol accidentally slips from that person's hand and breaks as he or she, with the intent to kill, is walking towards the front door of the victim's residence; (2) the attempted felony assault prosecution of a person who suffers a debilitating heart attack minutes before he or she plans to walk across the street and repeatedly beat, with the intent to cause significant bodily injury, a neighbor mowing her front lawn; and (3) the attempted arson prosecution of a person who is arrested at the site of a building she intends to burn down upon exiting her vehicle with flammable materials in her trunk.

[16] This means that conduct which satisfies the Model Penal Code's widely adopted substantial step standard may nevertheless fail to provide the basis for attempt liability under the revised criminal attempt statute. *See, e.g.,* Model Penal Code § 5.01(1) (attempt liability where, *inter alia*, defendant engages in an "act or omission constituting a *substantial step* in a course of conduct planned to culminate in his commission of the crime") (italics added); *id.* § 5.01(2) (enumerating situations that, "if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law" under the "substantial step" standard). Indeed, the drafters of the Model Penal Code developed the substantial step standard for the express purpose of "broadening liability" beyond that provided for under common law tests such as the dangerous proximity standard. Model Penal Code § 5.01, cmt. at 294; *see id*. at 333 (enumerated situations in subsection (2) will support "convictions on the basis of circumstances that courts have considered insufficient").

At the heart of the Model Penal Code's expansion of attempt liability was a belief that "[c]onduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others." *Id.* at 294, 331. In accordance with this line of reasoning, the drafters of the Model Penal Code argued that attempters present "a special danger," who must "be made amenable to the corrective process that the law provides," without regard to proximity to completion. *Id.* at 294, 331.

These policy arguments are "a reflection of the so-called rehabilitative ideal," which has been described as a "future-oriented predictively based theory of guilt and of punishment" under which "personal dangerousness justifies the decision to prohibit attempts equally as much as it justifies sentencing and correctional decisions." Paul R. Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 384 (1986). While popular during the mid-twentieth century, the "rehabilitative ideal, of which the concept of dangerousness is a cornerstone, has [more] recently undergone a rather painful process of demystification." Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 235 (1978). That is, "[t]he optimistic view . . . that we are able to diagnose an individual's dangerous propensities and to treat him effectively . . . has given way to widespread skepticism." *Id.*

focus should be placed on closeness to completion considered in light of "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension."[17] Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (a)(1) applies to the elements in subparagraph (a)(4)(A) and there is no culpable mental state required for the fact that the actor comes dangerously close to completing the offense.

Paragraph (a)(4) also codifies an alternative formulation of the dangerous proximity standard, which is articulated in terms of the actor's view of the situation. This reframing addresses yet another complex criminal law issue of longstanding disagreement[18]: is impossibility—i.e. the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant—a defense to attempt liability?[19]

This skepticism is clearly reflected in, for example, the recently completed Model Penal Code Sentencing Project, which retreats from the dangerousness-based rationales at the heart of many of the original Code's provisions (including the substantial step standard), based upon a recognition that:

> There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders. Any sentencing policy based on predictions of future misconduct will yield a significant number of "false positives"—that is, individuals who have been classified as dangerous when, in fact, they would not reoffend if released or would commit only minor crimes.

Model Penal Code: Sentencing § 6.06 PFD (2017); *see, e.g.,* Model Penal Code: Sentencing § 1.02(2) TD No 1 (2007) ("[I]t is not reasonably feasible to pursue the goal of incapacitation of dangerous offenders through the confinement of individuals who pose little or no risk of serious reoffending."); Hoeber, *supra* note 13, at 386 (questioning whether the MPC drafters "can explain why personal dangerousness should nevertheless continue to be thought an appropriate basis for criminalizing attempts").

[17] *Com. v. Kennedy*, 170 Mass. 18, 22 (1897) (Holmes, J.):

> Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison, even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes.

[18] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) ("Many pages of court opinions and scholarly literature have been filled in a largely fruitless effort to explain and justify the difference between factual and legal impossibility. Perhaps no aspect of the criminal law is more confusing and confused than the common law of impossible attempts"); Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 789 (1940) ("Whoever has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate.").

[19] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of attempt liability. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a) (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012). In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e. these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises when a person whose intended end constitutes a crime is precluded from consummating that crime because of circumstances unknown to her or beyond her control. Illustrative scenarios include: (1) a pickpocket who is unable to consummate the intended theft because, unbeknownst to her, she picked the pocket of the wrong victim (namely, one whose wallet is missing); and (2) a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions.

The RCC largely answers this question in the negative through RCC § 22E-301(a)(4)(B), which authorizes the fact-finder to evaluate whether the dangerous proximity standard is met based on "the situation . . . as the actor perceived it."[20] Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.[21] Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in

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The second category is *pure legal impossibility*, which arises where a person acts under a mistaken belief that the law criminalizes his or her intended objective. For an illustrative scenario, consider the attempted statutory rape prosecution of a 44-year-old male who: (1) has consensual sexual intercourse with someone he knows to be 17 years of age; (2) in a jurisdiction that sets the age of consent for intercourse at 16; (3) while mistakenly believing the age of consent in that jurisdiction to be 18. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) ("This is a mirror image of the usual mistake-of-law case, in which an actor believes that her conduct is lawful, but it is not. [In this context,] "D believed that he was violating a law, but he was wrong," [thereby raising the following question:] "If ignorance of the law does not ordinarily exculpate, may it nonetheless inculpate?").

The third category is *hybrid impossibility*, which arises where an actor's goal is illegal, but commission of the offense is impossible due to a factual mistake regarding the legal status of some attendant circumstance that constitutes an element of the charged offense. Illustrative scenarios include: (1) the prosecution of a defendant who sends illicit photographs to a person he believes to be an underage female, but who is actually an undercover police officer, for attempted distribution of obscene material to a minor; and (2) the prosecution of a defendant who purchases what he believes to be stolen property in a sting operation, but which property is not in fact stolen, for attempted receipt of stolen property.

The fourth category of impossibility is *inherent impossibility*, which arises where the actor "employs means which a reasonable man would view as totally inappropriate to the objective sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a)(4) (3d ed. Westlaw 2019). Inherent impossibility can take the form of pure factual impossibility, such as, for example, where a person attempts to kill by a fantastic superstitious practice or by throwing red pepper in the eyes of another. And it can also take the form of hybrid impossibility, such as, for example, where a person, with intent to kill a person, shoots at what is obviously a manikin or statute. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility is that the "attemptor's actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

[20] *See, e.g.,* Model Penal Code § 5.01(1)(c) ("[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person engages in conduct that would satisfy the *actus reus* requirement "*under the circumstances as he believes them to be*[.]"). Note that the phrase "the situation [] as the person perceived it," for purposes of the subjective approach incorporated into RCC § 22E-301(a)(4)(B), does *not* include a defendant's (inculpatory) mistaken belief that his or her (innocent) conduct is criminalized, as is discussed elsewhere in this commentary.

[21] Specifically, the subjective approach incorporated into RCC § 22E-301(a)(4)(B) renders pure factual and hybrid impossibility claims immaterial. For example, under the RCC it would not be a defense to attempted murder that: (1) the would-be victim was already dead, provided that the defendant mistakenly believed the person to be alive at the moment he pulled the trigger; or that (2) the murder weapon was empty, provided that the defendant mistakenly believed it be loaded. Nor would it preclude liability for attempted theft under the RCC that: (1) the owner of the target property consented to its taking, provided that the defendant mistakenly believed it to be absent; or that (2) the safe targeted by the defendant is empty, provided that the defendant mistakenly believed it be filled with valuable objects. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019) ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) (same).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. However, this does not hinge on RCC § 22E-301(a)(4)(B), or any other provision in section 301. *See generally* Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of*

paragraph (a)(1) applies to the elements in subparagraph (a)(4)(B) and there is no culpable mental state required for the fact that the actor would have come dangerously close to completing the offense if the situation as was the actor perceived it to be.

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal attempt as it relates to the result elements (if any) of the target offense. Whereas subsection (a) generally clarifies that an attempt conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "actor must intend to cause all result elements required for the offense."[22] The latter requirement incorporates a principle of culpable mental state elevation applicable whenever the target

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Mike Bayles, 12 LAW & PHIL. 33 (1992). Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012); *see* Model Penal Code § 5.01 cmt. at 318 ("It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after a loss against the Washington Nationals, the Oriole Bird—the Baltimore Orioles mascot—places a local District steak in the garbage, he is not guilty of committing any offense. Nor could the Oriole Bird be convicted of an attempt to commit an imaginary offense of this nature although he honestly believed such conduct to be prohibited by the D.C. Code. *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations."). Along similar lines (and perhaps more realistically), an actor is not guilty of a criminal attempt if, unknown to her, the legislature has repealed a statute that she believes that she is violating. "For example, if D attempts to sell 'bootleg' liquor after the repeal of the Prohibition laws, she is not guilty of an attempt even though she is unaware of their repeal." *Id.*.

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified the RCC criminal attempt provision, which is discussed elsewhere in this commentary.

[22] *See, e.g.,* Model Penal Code § 5.01(1)(b) ("[W]hen causing a particular result is an element of the crime," a person is guilty if he "does or omits to do anything with the purpose of causing or *with the belief* that it will cause such result without further conduct on his part[.]") (italics added); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.09(c) (6th ed. 2012) (this provision of the Model Penal Code, while explicitly addressing complete attempts, "implicitly" applies to incomplete attempts) (citing Model Penal Code § 5.01 cmt. at 305 n.17 (paragraphs (b) and (c) are to be "read in conjunction with [one another]")); *Cf.* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 n.301 (1983) ("'Belief' is the conditional form of 'know,' [which] is required here because in an impossible attempt the actor cannot 'know' that he will cause the result, since he in fact cannot.").

Note that RCC § 22E-301(b) expresses a principle of *intent* elevation, not *purpose* elevation. This means that (for example) if "the actor's purpose were to demolish a building and, knowing that persons were in the building and that they would be killed by the explosion, he nevertheless detonated a bomb that turned out to be defective, he could be prosecuted for attempted murder even though it was no part of his purpose that the inhabitants of the building would be killed." Model Penal Code § 501 cmt. at 305 (For both purposeful and knowing attempts, "a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur. The absence in one instance of any desire for the forbidden result is not, under these circumstances, a sufficient basis for differentiating between the two types of conduct involved."); Commentary on Haw. Rev. Stat. Ann. § 705-500 (same).

offense is comprised of a result that may be satisfied by proof of a non-intentional mental state (i.e. recklessness or negligence), or none at all (i.e. strict liability).[23] To satisfy this threshold culpable mental state requirement, the government must prove that the defendant acted with either a *practically certain belief*[24] that the prohibited result would occur, or,

[23] Which is to say, subsection (b) dictates that, "[w]here criminal liability rests on the causation of a prohibited result, the actor must have an intent to achieve that result even though violation of the substantive offense may require some lesser *mens rea*." Commentary on Haw. Rev. Stat. § 705-500 (quoting Prop. Mich. Rev. Cr. Code, comments at 82). This principle of culpable mental state elevation *does not* preclude the government from charging attempts to commit target offenses subject to non-intentional culpable mental states. However, to secure an attempt conviction for such offenses, proof that the accused acted with the intent to cause the required results is necessary. *Id.* ("A person charged with the substantive crime of manslaughter may be liable as a result of [] recklessness causing death, but the same recklessness would not be sufficient if the victim did not die and the actor were only charged with attempt; here, the state would have to show an intent to achieve the prohibited end result, death of the victim.").

This limitation on reckless and negligent attempt liability (as to result elements) precludes a wide range of endangerment activities, including, perhaps most notably, risky driving, from being treated as attempts to commit serious crimes (e.g., homicide). *See, e.g.,* Model Penal Code § 5.01, cmt. at 304 ("[T]he scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility."); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1033 (1998) (observing that such treatment would open the "floodgates to attempt liability").

To illustrate, consider how reckless attempt liability could authorize many instances of consciously risky driving to be charged as multiple counts of attempted manslaughter: (1) as to *actus reus*, the reckless driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others; and (2) as to *mens rea*, that same driver has consciously disregarded a substantial risk of death as to every pedestrian he or she passes on the road. Along similar lines, acceptance of negligent attempt liability could transform many instances of inadvertently risky driving into multiple counts of attempted negligent homicide along similar lines: (1) as to a*ctus reus*, the negligent driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others; and (2) as to *mens rea*, that same driver should have been aware that he or she was creating a substantial risk of death as to every pedestrian he or she passes on the road.

Subsection (b), by requiring proof of (at minimum) intent as to result elements, rejects these recklessness and negligence-based theories of attempt liability. *See, e.g.,* Model Penal Code § 5.01(1)(b) (excluding such theories through belief culpability threshold); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.3 (3d ed. Westlaw 2019) ("Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed."); Commentary on Haw. Rev. Stat. § 705-500 ("Reckless driving . . . does not constitute attempted manslaughter."); *State v. Holbron*, 904 P.2d 912, 920, 930 (Haw. 1995) ("We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter."). And, according to the same reasoning, subsection (b) would also preclude attempt liability premised on the aggravated forms of recklessness at issue in depraved heart murder and aggravated assault. *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.09 (6th ed. 2012) ("For example, if D blindfolds herself and fires a loaded pistol into a room that she knows is occupied, she may be convicted of murder if someone is killed. Such a killing, although unintentional, is malicious (the mens rea of murder), because it evinces a reckless disregard for the value of human life. However, if D's reckless act does not kill anyone in the room, almost all jurisdictions would rule that she is not guilty of attempted murder."); Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. Colo. L. Rev. 879, 882 (2007) ("In nearly all jurisdictions to consider the question [of whether attempted enhanced reckless murder exists], courts have held that no such offense exists.").

[24] RCC § 22E-206 (definition of intent as to result elements).

When formulating jury instructions for an attempt to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance element), the term "intent," as defined in RCC § 22E-206, should instead be substituted for the term knowledge. This substitution is appropriate given

alternatively, that the defendant *consciously desired* to cause that result.[25] It is not necessary to prove that the actor caused the required result elements.

Subsection (c) clarifies the relationship between a criminal attempt and the target offense. Specifically, this provision establishes that the government may, as an alternative to proving the requirements set forth in subsections (a) and (b), secure a conviction for an attempt by proving that the defendant satisfies the elements of the target offense itself.[26] In that case, however, subsection (c) also establishes that the accused may not be convicted of both the completed offense and an attempt to commit the same based on the same act or course of conduct.[27]

Subsection (d) establishes the penalties for criminal attempts under the RCC: a fifty percent decrease in the maximum term of imprisonment and fine applicable to the target offense,[28] after the application of any penalty enhancements.

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that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206, Explanatory Note.

[25] RCC § 22E-206 (definition of purpose as to result elements).

[26] This alternative basis of attempt liability serves three related functions. First, it clarifies that failure to consummate the target offense is *not* an element of an attempt. *See, e.g., Richardson v. State*, 390 So. 2d 4, 5 (Ala. 1980) ("Although the crime of attempt is sometimes defined as if failure were an essential element, the modern view is that a defendant may be convicted on a charge of attempt even if it is shown that the crime was completed.") (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019)). Second, it avoids any procedural complications that might result from the fact that a criminal attempt is not always a lesser-included offense of the target offense in light of the principle of culpable mental state elevation set forth in subsection (b). *See, e.g.,* WAYNE R. LAFAVE & GERALD ISRAEL, 6 CRIM. PROC. § 24.8(e) (4th ed. Westlaw 2017) ("When attempt carries a more demanding *mens rea* than a completed offense, it may not be considered a lesser included offense.") (citing, *e.g., People v. Bailey*, 54 Cal.4th 740 (2012)). And third, it provides greater flexibility for reaching appropriate sentencing outcomes in individual cases. *Cf. Com. v. LaBrie*, 473 Mass. 754, 764 (2016) ("[R]equiring the government to prove failure as an element of attempt would lead to the anomalous result that, if there were a reasonable doubt concerning whether or not a crime had been completed, a jury could find the defendant guilty neither of a completed offense nor of an attempt.") (quoting *United States v. York*, 578 F.2d 1036, 1039 (5th Cir. 1978)).

[27] *See, e.g.,* Model Penal Code §§ 1.07(1)(a), (1)(b), and (4)(b) (barring convictions for general inchoate offense and target offense); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 84 (Westlaw 2019) ("It is almost universally the rule that a defendant may not be convicted of both a substantive offense and an inchoate offense designed to culminate in that same offense."). This merger principle is similarly established in RCC § 22E-214. *See* RCC § 22E-214 (barring multiple convictions for an attempt or solicitation to commit an offense and the target offense when arising from the same course of conduct).

[28] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.04(b)(1) (6th ed. 2012) ("At common law and in most jurisdictions today, an attempt to commit a felony is considered a less serious crime and, therefore, is punished less severely, than the target offense."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(c) (3d ed. Westlaw 2019) (modern attempt legislation typically grades attempts at "one degree below the object crime.") (collecting statutes). This penalty reduction is to be contrasted with the Model Penal Code approach, which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of attempt penalty equalization—which was a stark departure from prevailing common law trends—on the basis of the same dangerousness-based rationale that motivated their endorsement of the substantial step standard. *See, e.g.,* Model Penal Code § 5.05, cmt. at 490 ("To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan."). However, as discussed *supra* note 13, this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.,* Model

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

Relation to Current District Law. RCC § 22E-301 clarifies, improves the proportionality of, and fill in gaps in the District law of criminal attempts.

The D.C. Code provides for attempt liability in a variety of ways. Most prominently, the D.C. Code contains a general attempt penalty provision that applies to a relatively broad group of offenses.[29] Additionally, the D.C. Code contains a variety of semi-general attempt penalty provisions, which create attempt liability for narrower groups of offenses with related social harms.[30] Finally, some specific offenses in the D.C. Code individually provide for attempt liability by incorporating the term "attempt" as an element of the offense.[31]

The District's recognized "patchwork of attempt statutes"[32] presents two main problems. The first is that it fails to clearly communicate the elements of a criminal attempt. In no place, for example, does the D.C. Code define the term attempt. This statutory silence has effectively delegated to District courts the responsibility to establish the contours of attempt liability. Over the years, the DCCA has issued numerous opinions and proffered a variety of statements relevant to determining the contours of attempt liability under District law. The case law in this area reflects the piecemeal evolution of doctrine over more than a century: it is sometimes ambiguous, occasionally internally inconsistent, and has never been clearly synthesized into a single analytical framework. Nonetheless, a holistic reading of District authority reveals basic and fundamental principles governing the contours of attempt liability. Consistent with the interests of

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Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of attempt penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *See, e.g.,* Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why only a minority of "modern American codes that are highly influenced by the Model Penal Code" equalize penalties for criminal attempts. Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 320 (1994) ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to."). And it may also provide at least a partial explanation for why, "even when the legislature imposes similar sanctions for attempts and completed crimes, in practice the punishment for an attempt is less than the punishment for a consummated crime." Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 319 n.44 (1996) (citing GLANVILLE WILLIAMS, TEXTBOOK ON CRIMINAL LAW 404 (2d ed. 1983)).

[29] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished . . . .").

[30] *E.g.*, D.C. Code § 22-1837 (setting forth attempt penalties for the human trafficking related offenses); D.C. Code § 22-3018 (setting forth attempt penalties for the sexual offenses).

[31] *E.g.*, D.C. Code § 22-2601 (prison escape); D.C. Code § 22-951(c)(1)(a) (forcible gang participation).

[32] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

clarity and consistency, RCC § 22E-301 translates these principles into a detailed statutory framework.

The second main problem reflected in the District's attempt statutes is that they lack a consistent grading principle. For example, some District attempts are subject to statutory maxima that are many orders of magnitude below the statutory maxima governing the completed offense. Other District attempts, in contrast, are subject to the same statutory maxima governing the completed offense. And still other District attempt statutes are subject to statutory maxima pegged to, but half as severe as, the statutory maxima applicable to the completed offense. Viewed collectively, then, the D.C. Code manifests at least three fundamentally different patterns in how it grades attempts, without any discernible rationale for the variances. This produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate. Consistent with the interests of consistency and proportionality, RCC § 22E-301 changes District law by adopting a uniform approach to grading attempts at one half the severity of the completed offense.

A more detailed analysis of District attempt law and its relationship with RCC § 22E-301 is provided below. It is organized according to five main topics: (1) the culpable mental state requirement governing as attempt; (2) the definition of an incomplete attempt; (3) impossible attempts; (4) the relationship between an attempt and the completed offense; and (5) attempt penalties.

RCC § 22E-301(a) & (b): Relation to Current District Law on Culpable Mental State Requirement. Subsections (a) and (b) codify, clarify, and fill in gaps reflected in District law governing the culpable mental state requirement of an attempt.

The DCCA has addressed the culpable mental state requirement of an attempt on a handful of occasions. While unclear and, in at least one important sense, contradictory, pertinent case law generally supports two propositions: (1) a principle of culpable mental state elevation applies to the results of the target offense when charged as an attempt; and (2) a principle of culpable mental state equivalency applies to the circumstances of the target offense when charged as an attempt. Subsections (a) and (b) respectively codify each of these principles.

Most of the DCCA case law relevant to the culpable mental state of an attempt focuses on whether a principle of culpable mental state elevation applies to the results of the target offense. On this issue, there exists two different lines of cases: one which points towards a principle of culpable mental state elevation and another in support of a principle of culpable mental state equivalency. This "inconsistency" in District law was recently recognized in, and summarized by, Judge Beckwith's concurring opinion in Jones v. United States.[33] Three aspects of Judge Beckwith's analysis, abstracted in the accompanying footnote, are worth highlighting.[34]

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[33] 124 A.3d 127, 132–34 (D.C. 2015); *see also Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (discussing *Jones*).

[34] Judge Beckwith observes, in relevant part:

> In *Sellers v. United States*, 131 A.2d 300 (D.C. 1957), the Municipal Court of Appeals for the District of Columbia defined the elements of attempt as follows: "any overt act done with intent to commit the crime and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime." *Id.* at 301 (quoting 14 Am. Jur.,

Criminal Law, § 65, p. 813). Thirty years later, in *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987), this court upheld the appellant's conviction for attempted taking property without right after concluding that the record contained sufficient evidence that she intended to steal a dress because of her "apparent dissemblance in folding the blue dress and concealing it inside her sweater, as well as her change of story about what she had done with the dress." *Id.* at 1375. Appellant's specific intent to commit a crime was central to the court's holding, even though the underlying crime required only general intent to commit the act constituting the crime. *See Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975).

Then in *Ray v. United States*, 575 A.2d 1196 (D.C. 1990), we stated that "[e]very completed criminal offense necessarily includes an attempt to commit that offense." *Id.* at 1199 (holding that appellant was guilty of the "attempted-battery" type of assault even though the evidence showed a completed battery). In reaching this conclusion, *Ray* did not grapple with *Wormsley's* premise that an attempt requires specific intent. We later applied *Ray* to an attempted threats charge . . . in *Evans v. United States*, 779 A.2d 891 (D.C. 2001), holding that the government could charge attempted threats "even though it could prove the completed offense." *Id.* at 894. In other words, the government needed only to prove general intent to sustain a conviction for attempted threats. *See also Jenkins v. United States*, 902 A.2d 79, 87 (D.C. 2006) (noting that *Evans* analyzed threats as a general intent crime). While the court in *Evans* acknowledged *Wormsley's* holding on attempt, *Wormsley* did not control its analysis. Relying principally on *Ray*, the court explained that "[o]ur decisions have repeatedly held that 'a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'" *Evans*, 779 A.2d at 894 (quoting *Ray*, 575 A.2d at 1199).

In *Smith v. United States*, 813 A.2d 216 (D.C. 2002), this court recognized the difficulty of the attempt issue, stating that "[t]o speak of 'specific intent' in the context of a prosecution for attempted anything is, in our view, somewhat misleading." *Id.* at 219. The court reiterated *Wormsley's* premise that "[t]he only intent required to commit the crime of attempt is an intent to commit the offense allegedly attempted." *Id.* (citing *Wormsley*, 526 A.2d at 1375). But the court also stated that "[o]ur decision in *Evans* necessarily means that when an attempt is proven by evidence that the defendant committed the crime alleged to have been attempted, the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime." *Id.* (citing *Evans*, 779 A.2d at 894). The court then held that there was sufficient evidence of attempted second-degree cruelty to children when the appellant "intended to commit the acts which resulted in . . . the grave risk of injury" to the child, even though he did not intend to injure the child. *Id.* at 219–20.

Yet while *Evans* continues to feature prominently in our case law, other recent cases have required specific intent for an attempt conviction. For example, in *Brawner v. United States*, 979 A.2d 1191 (D.C. 2009), the court held that for an attempted escape conviction, the government must prove "the mental state of intending to commit the underlying offense," that is, "intent to escape," even though a charge for a completed escape did not involve such intent. *Id.* at 1194. And in *Dauphine v. United States*, 73 A.3d 1029 (D.C. 2013), this court held that animal cruelty is a general intent crime but nonetheless stated that "where the government charges an individual with attempt, as it did here, the government must demonstrate that the defendant possessed the intent to commit the offense allegedly attempted." *Id.* at 1033 (citation and internal quotation marks omitted). We held that the record contained sufficient evidence that the "appellant acted with intent to commit the crime of cruelty to animals," and we affirmed her conviction. *Id.*

The *Wormsley-Brawner-Dauphine* line of cases requiring the government to prove specific intent to commit the crime intended appears to be in direct tension with the *Evans-Smith* line of cases that does not require such proof . . .

124 A.3d at 133–34.

First, although the discussion in Judge Beckwith's concurring opinion is framed around whether an attempt requires proof of "a specific intent to commit the unlawful act,"[35] the primary import of the relevant case law she discusses relates to whether the culpable mental state governing the results of the target offense must be elevated to one of "intent" when charged as an attempt. So, for example, while proof of recklessness as to the alternative results of second-degree child cruelty[36]—actually harming a child or creating a grave risk of harm to a child—will suffice to satisfy the completed offense, must the government prove an intent to cause such harm or, at the very least, an intent to create a risk of such harm in order to secure a conviction for attempted second-degree child cruelty?[37]

Second, although DCCA case law points in different directions on this issue, the reading that best synthesizes the relevant authorities is that a principle of culpable mental state elevation applies to attempts, but that this principle is subject to an exception when the government proceeds on a theory that the offense attempted was actually completed. In support of this reading is the fact that the reported opinions that involve traditional attempt prosecutions (i.e. decisions implicating conduct that falls short of completion)—what Judge Beckwith refers to as the *Wormsley-Brawner-Dauphine* line of cases—seem to favor a principle of culpable mental state elevation, while the conflicting reported opinions—what Judge Beckwith describes as the *Smith-Evans* line of cases—involve attempt prosecutions premised upon proof that the target offense was actually completed.[38]

In the latter context, it is not surprising that the DCCA has held that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime."[39] "To hold otherwise," after all, "would create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[40] What the *Smith-Evans* line of cases does not discuss, however, are the consequences of this position—separate and apart from ensuring that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[41]

For example, if the culpable mental state requirement governing the results of an attempt is identical to that of the target offense, then it means that the government may charge, and a defendant may be convicted of, reckless or negligent attempts—such as, for example, attempted depraved heart murder, attempted involuntary manslaughter, or

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[35] *Jones*, 124 A.3d at 132-33 (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

[36] *See* D.C. Code § 22-1101(b)(1) ("A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly . . . Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child . . . .").

[37] *See generally Smith v. United States*, 813 A.2d 216 (D.C. 2002).

[38] *Compare Jones*, 124 A.3d at 134 n.4 ("As the elements of a crime are determined by what offense the government charges, not by what evidence it presents at trial, *Evans* and *Smith* cannot be distinguished from *Wormsley, Brawner,* and *Dauphine* on the ground that the government proved a completed offense in the former cases and an attempted offense in the latter."), *with* D.C. SUPER. CT. R. CRIM. P. 31(c) ("A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right."). For further discussion of the relevant issues, see the discussion in this commentary for RCC § 22E-301(b).

[39] *Smith*, 813 A.2d at 219.

[40] *Id.*; *see, e.g.*, *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Jones*, 124 A.3d at 129-31.

[41] *Evans,* 779 A.2d at 894 (quoting *Ray,* 575 A.2d at 1199).

attempted vehicular homicide. (Indeed, under the *Smith-Evans* view, wherein the government need only prove that the defendant "intended to commit the acts" that would constitute the offense, even strict liability attempts would seem to provide a viable basis for liability.[42]) However, one does not see such theories of liability, which would entail proof that the defendant recklessly or negligently attempted to kill, being raised by the government or accepted by District courts—indeed, the *Jones* court itself appears to tacitly disclaim offenses such as "attempted involuntary manslaughter or attempted negligence."[43]

Perhaps this explains why, in those cases that involve traditional attempt prosecutions, one sees the DCCA articulating a principle of culpable mental state elevation as to results. Illustrative is *Brawner v. United States*.[44]

At issue in *Brawner* was the culpable mental state governing the result of *attempted* prison escape, the departure from physical confinement. This issue was central to the case "[b]ecause appellant was apprehended within the jail, as opposed to outside the facility," thereby requiring "the government [to proceed] on an attempted escape theory."[45] At trial, "[t]he defense's theory of the case was that appellant lacked the intent to escape and so could not be convicted of attempted escape."[46] On appeal, the defendant "argue[d] that the trial court's failure to instruct the jury that the government was required to prove [t]his intent to leave the jail warrant[ed] reversal."[47]

In adjudicating this claim, the *Brawner* court determined that the culpable mental state requirement governing *attempted* prison escape was "distinguishable" from that of the completed offense. "[A]ttempted escape, like other inchoate offenses, requires the mental state of intending to commit the underlying offense."[48] Therefore, the DCCA concluded, "in a trial for attempted escape," that "the government must prove what the defendant was attempting to do, and, therefore, must prove intent to escape."[49]

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[42] *Smith*, 813 A.2d at 219. As discussed in the Commentary on RCC § 22E-205(a), an intent to engage in conduct is synonymous with voluntarily having engaged in an act or omission. Robinson, *supra* note 2, at 864. However, requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability. *See, e.g., Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J., concurring) (noting that the "intent to act" interpretation of simple assault, if taken literally, would allow "the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability"). Consider, for example, how the intent-to-act interpretation suggested in *Smith* would play out in the context of an attempted aggravated assault prosecution premised on the following facts. Imagine that D's plan is to fire a paintball gun into what appears to be an abandoned building to impress his friends. Although D *reasonably believes* the building to be unoccupied, it is actually occupied by a family. If D fires the paintball gun into the building and causes serious bodily injury to someone inside, he couldn't be convicted of aggravated assault, D.C. Code § 22-404.01, since he does not *consciously disregard* an extreme risk of death or serious bodily injury, see *Perry v. United States*, 36 A.3d 799, 816 (D.C. 2011). Nevertheless, the intent-to-act interpretation suggested in *Smith* would appear to indicate that a conviction for *attempted aggravated assault* would be appropriate in this situation—after all, D surely "intended to engage in the acts that caused the serious bodily injury."

[43] *See Jones*, 124 A.3d at 130 (apparently agreeing with the defendant that "[i]t makes no sense to speak of attempted involuntary manslaughter or attempted negligence," but noting that "[t]his maxim is irrelevant here because the misdemeanor offense of threats *does* require intent to act—intent to utter statements that constitute a threat").

[44] 979 A.2d 1191 (D.C. 2009).

[45] *Id.* at 1193.

[46] *Id.*

[47] *Id.* at 1192.

[48] *Id.* at 1194.

[49] *Id.*

The third, and final, point is that the precise contours of the principle of culpable mental state elevation supported by the *Wormsley-Brawner-Dauphine* line of cases is unclear in an important sense—namely, what does "intent" mean? For example, "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of belief that one's conduct is practically certain to cause a result.[50] That said, intent is also sometimes used as a synonym for purpose, in which context proof of a practically certain belief *would not* provide an adequate basis for liability.[51]

Although the DCCA's understanding of intent (frequently referred to as "specific intent") is generally ambiguous,[52] the interpretation most consistent with the case law is the traditional understanding, namely, that "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."[53]

The DCCA's robust but conflicting body of case law on the culpable mental state requirement applicable to the results of an attempt stands in contrast with the small, but essentially uniform, body of District authority on circumstances. In this context, the relevant authorities indicate that a principle of culpable mental state equivalency applies to the circumstances of an attempt.

For example, the DCCA's recent decision in *Hailstock v. United States* clarifies that the culpable mental state requirement governing the circumstance of attempted misdemeanor sexual abuse (MSA), absence of permission, is no different than that applicable to the completed version of the offense—both can be satisfied by proof of something akin to negligence[54]

Likewise, the DCCA's recent decision in *Fatumabahirtu v. United States* suggests the same is true with respect to the circumstance of illegal use under the District's sale of drug paraphernalia (SDP) offense—whether charged as an attempt or as a completed offense, the relevant circumstance can be satisfied by proof of something akin to negligence regarding the relevant circumstance.[55]

The District's statutory scheme applicable to child sex abuse offenses similarly support the conclusion that circumstances are not subject to a rule of culpable mental state elevation.[56] For example, whether prosecuted as an attempt or as a completed offense,

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[50] *United States v. U.S. Gypsum Co*., 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987).
[51] *See* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 5.2 (3d ed. Westlaw 2019).
[52] *See, e.g.*, *Wormsley*, 526 A.2d at 1375; *Brawner*, 979 A.2d at 1194 (discussing *United States v. Bailey*, 444 U.S. 394, 405 (1980) and Model Penal Code § 2.02, cmt. at 125); *Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*); *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984); *Perry v. United States*, 36 A.3d 799, 816-17 (D.C. 2011).
[53] *Tison*, 481 U.S. at 150.
[54] *Hailstock v. United States*, 85 A.3d 1277, 1282 (D.C. 2014). That is, both MSA and attempted MSA can be satisfied by proof that the defendant "knew or should have known that he did not have the complainant's permission to engage in the sexual act or sexual contact." *Id.*
[55] *Fatumabahirtu v. United States*, 26 A.3d 322, 336 (D.C. 2011). That is, both SDP and attempted SDP can be satisfied by proof that the defendant "knew or reasonably should have known that the buyer would use these items to inject, ingest, or inhale a controlled substance." *Id.*
[56] D.C. Code §§ 22-3008 to 22-3010.01.

"mistake of age" is not a defense to sex crimes involving children.[57] In practical effect, this means that the circumstance of age remains a matter of strict liability even when an attempt to commit a child sex abuse offense is charged.[58]

In accordance with the above analysis of District law, RCC § 22E-301(a) and (b) codify the culpable mental state requirement of attempt as follows. RCC § 22E-301(a)(3) establishes that the culpable mental state requirement governing an attempt necessarily incorporates "the culpability required for the [target] offense." Pursuant to this principle, a defendant may not be convicted of a criminal attempt absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any other broader aspect of culpability—governing the results and circumstances required to establish that offense.

Thereafter, RCC § 22E-301(b) codifies a general principle of culpable mental state elevation, rooted in the *Wormsley-Brawner-Dauphine* line of cases, applicable to results.[59] At the same time, RCC § 22E-301(b) also fills in a key ambiguity left unresolved by the *Wormsley-Brawner-Dauphine* line of cases—what level of elevation is required for results. This provision establishes that acting with the intent to cause any results will suffice.

Finally, the absence of a comparable provision governing circumstances, when viewed in light of RCC § 22E-301(a), clarifies that circumstances are *not* subject to a comparable principle of culpable mental state elevation, but rather, are subject to the principle of culpable mental state equivalency reflected in pertinent District authorities.

RCC § 22E-301(a)(4)(A): Relation to Current District Law on Incomplete Attempts. Subparagraph (a)(4)(A) codifies, clarifies, and fills in gaps reflected in District law governing incomplete attempts.

It is well-established under District law that a person who plans to commit an offense must do more than "mere[ly] prepar[e]" to commit an offense; further progress toward a criminal objective is required to prove an attempt.[60] It is also clear, moreover, that once a person has carried out her criminal plans and all that remains to be seen is whether her efforts were successful (i.e. engaged in a complete attempt), liability may attach.[61] Less clear, however, is the point at which the line between mere preparation and actual perpetration has been crossed, such that police intervention prior to completion may lead to an attempt charge. On this issue of an incomplete attempt, the DCCA has, over the years, articulated a variety of standards. However, viewed as a whole and in relevant context, DCCA case law indicates that the dangerous proximity standard reflects current District law. Subparagraph (a)(4)(A) incorporates that standard into the RCC.

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[57] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.");

[58] *See In re E.F.*, 740 A.2d 547, 550 (D.C. 1999) ("Nothing in the present statutory scheme implies that the Council of the District of Columbia, in revising the definition of sexual crimes against children, meant to impose a knowledge requirement not theretofore in existence.").

[59] The primary concern addressed by the *Evans-Smith* line of cases—avoiding "the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime," *Smith,* 813 A.2d at 219—is explicitly addressed by RCC § 22E-301(c), discussed elsewhere in this commentary.

[60] *See, e.g.*, *Johnson v. United States*, 756 A.2d 458, 463 n.3 (D.C. 2000); *Dauphine v. United States*, 73 A.3d 1029, 1033 (D.C. 2013).

[61] *See, e.g., Washington v. United States*, 965 A.2d 35, 43 n.24 (D.C. 2009); *Riley v. United States*, 647 A.2d 1165, 1172 (D.C. 1994).

The earliest incomplete attempt standard endorsed by a local District court is the so-called probable desistance test. Originally adopted in the Municipal Court of Appeals for the District of Columbia's decision in *Sellers v. United States*, this test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime."[62]

Although the *Sellers* decision predates the creation of the DCCA, the probable desistance standard enunciated has been referenced by the DCCA on multiple occasions.[63] At the same time, the DCCA has also "often noted [that the probable desistance] formulation . . . is imperfect."[64] The DCCA's critique of this standard is understandable when viewed in relevant context: not only does the probable desistance test improperly suggest that "failure is . . . an essential element of criminal attempt,"[65] but, as a variety of legal authorities have observed, there simply "exists no basis for making . . . judgments [of] when desistance is no longer probable or when the normal citizen would stop."[66] In practice, then, the closeness of the actor's conduct to completion is ultimately the only foundation for making the threshold determination of the likelihood of desistance.[67]

Proximity of this nature is, in turn, more explicitly addressed by the second incomplete attempt standard reflected in District authorities, the dangerous proximity test. Originally adopted by the DCCA in *Jones v. United States*, this standard requires proof of an "act [that goes] beyond mere preparation and [which carries] the criminal venture forward to within dangerous proximity of the criminal end sought to be attained."[68]

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[62] *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957) (emphasis added). At issue in *Sellers* was whether the defendant had committed an attempt to arrange prostitution services on the following facts: (1) the defendant had "originated [a] proposition" to two MPD officers; (2) "specified the price per girl and the amount of [the defendant's] commission": and (3) "secured an acceptance" on that commission. *Id.* The *Sellers* court further noted, in setting forth the probable desistance standard, that whether "preparation . . . progress[es] to the point of attempt . . . is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 301.

[63] *See, e.g.*, *Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers*, 131 A.2d at 301).

[64] *In re Doe*, 855 A.2d 1100, 1107 n.11 (D.C. 2004). This may explain the fact that the standard is omitted from the District's jury instructions on criminal attempts. *See* D.C. Crim. Jur. Instr. § 7.101.

[65] *In re Doe*, 855 A.2d at 1107 n.11 (citing *Evans*, 779 A.2d at 894).

[66] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.4 (3d ed. Westlaw 2019) (collecting authorities).

[67] *See id.* As the drafters of the Model Penal Code observe: "[I]n actual operation the probable desistance test is linked entirely to the nearness of the actor's conduct to completion, this being the sole basis of unsubstantiated judicial appraisals of the probabilities of desistance. The test as applied appears to be little more than the physical proximity approach." Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 589 (1961).

[68] *Jones*, 386 A.2d at 312 (quoting D.C. Crim. Jur. Instr. § 4.04 (2d ed. 1978)). At issue in *Jones* was whether to uphold an attempted robbery conviction against multiple defendants that had planned a bank robbery, but were stopped by police prior to execution of their plan. The defendants in the case "had made careful plans as to the role of each in the robbery, including the nature of each of their disguises, and had conducted a dry run on the preceding day." *Id.* Thereafter, they "launched their plans [at the appointed time], going their respective ways toward the location of the bank in three cars[,] . . . armed with shotguns and other weapons as they entered a busy downtown area in the middle of a business day, and had disguised themselves as construction workers." *Id.* at 312-13. At the point in which the defendants were apprehended, one defendant was "approaching the target bank and was but a block away when the police intervened," while another "was proceeding toward the bank according to plan and was no further than four blocks away, turning back only when he heard police sirens and concluded that something had gone wrong." *Id.* at 313. Applying the dangerous proximity test, the DCCA determined that an attempt had occurred. *See id*. The *Jones* court further clarified that this test "does not require that appellants have commenced the last act sufficient to

Since *Jones*, the dangerous proximity test seems to have become the most authoritative standard reflected in District law. For example, this standard is routinely relied upon by the DCCA.[69] And it is also central to the District's jury instructions on criminal attempts, which, apart from the general statement that the accused "must have done more than prepare to commit" the target offense, makes the dangerous proximity standard the District's sole approach to dealing with incomplete attempts.[70]

Jury instructions aside, there is one additional conduct requirement that is occasionally referenced in District case law, the substantial step test. Originally developed by the drafters of the Model Penal Code to expand attempt liability beyond that provided for under the proximity-based standards, this test would allow for an attempt conviction to rest upon proof of a "substantial step in a course of conduct planned to culminate in his commission of the crime."[71]

The earliest reference to the substantial step test was made in the 2004 case of *In Re Doe*, where the DCCA observed by way of dicta in a footnote that "the day may come when we reexamine and, perhaps, reformulate, the way we speak of the kind of 'act' that is required for a criminal attempt," in adherence to "the formulation favored by the Model Penal Code and adopted in a number of jurisdictions . . . ."[72] Thereafter, a decade later, the DCCA specifically referenced the substantial step test in the course of formulating the standard governing an incomplete attempt in a pair of 2014 decisions, *Hailstock v. United States*[73] and *Mobley v. United States*.[74] However, neither of these references appears to have changed District law's reliance on the dangerous proximity test.

Perhaps most notable is the fact that both of these decisions reference the substantial step test in the context of *defining the dangerous proximity test*. For example, in *Hailstock*, the DCCA explained that:

> [t]he test of dangerous proximity of completing a crime is met where, except for some interference, a defendant's overt acts would have resulted in commission of the completed crime . . . or where the defendant has taken a substantial step toward commission of the crime[.][75]

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produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended." *Id.* at 312.

[69] *See, e.g.*, *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992); *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005); *Nkop v. United States*, 945 A.2d 617, 620 (D.C. 2008); *Johnson*, 756 A.2d at 463 n.3; *Euceda v. United States*, 66 A.3d 994, 1000 (D.C. 2013); *Fortune v. United States*, 59 A.3d 949, 960 (D.C. 2013); *Gee v. United States*, 54 A.3d 1249, 1271 (D.C. 2012).

[70] As section 7.101 of the District's criminal jury instructions reads:

> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . [Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime]. [Name of defendant] must have done more than prepare to commit [specify crime]. **His/her act must have come dangerously close to committing the crime.** [You may convict the defendant of an attempt to commit a crime even if the evidence shows the crime was completed.]

[71] Model Penal Code § 5.01(1)(c).

[72] 855 A.2d at 1107 n.11.

[73] *Hailstock v. United States*, 85 A.3d 1277, 1283 (D.C. 2014).

[74] *Mobley v. United States*, 101 A.3d 406, 425 (D.C. 2014).

[75] *Hailstock*, 85 A.3d at 1282-83.

Thereafter, the DCCA in *Mobley* articulated precisely the same standard quoting from *Hailstock*.[76]

The intended meaning of the hybrid formulation announced in *Hailstock* and *Mobley*—which appears to be a novelty both inside and outside of the District—is far from clear. Traditionally, for example, the dangerous proximity test and substantial step test are understood to constitute distinct and competing approaches to resolving the same issue.[77]

At minimum, it is unlikely that either decision intended to supplant the dangerous proximity test with the substantial step test. It is well established under District law, for example, that the DCCA does not "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it."[78] Yet the relevant conduct in both *Hailstock*[79] and *Mobley*[80] appears to easily satisfy the traditional understanding of the dangerous proximity test reflected in prior case law. Therefore, neither decision seems appropriately situated to supplant that test with a broader standard.

Finally, any inference that the foregoing references to the substantial step test were intended to change District law is belied by more recent decisions, which clearly endorse the standard articulation of dangerous proximity test—without reference to the substantial step test—as reflecting current District law.[81]

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[76] *Mobley*, 101 A.3d at 424-25.

[77] *See, e.g.*, Model Penal Code § 5.01 cmt. at 329; PETER W. LOW, CRIMINAL LAW 459 (3d ed. 2009).

[78] *In re D.T.,* 977 A.2d 346, 352 (D.C. 2009) (quoting *Alpert v. Wolf*, 73 A.2d 525, 528 (D.C. 1950)).

[79] At issue in *Hailstock* was, *inter alia*, whether the evidence supported a finding of attempted sexual contact in a situation where "[a]ppellant entered the bedroom where [the victim] was resting and got onto the bed with her," and, "[e]ven after [the victim] said 'no' to appellant's expressed intent to 'get down' with her and even after she pushed him away, appellant continued in his efforts, pulling on her robe and touching her breast in the process." 85 A.3d at 1283. On these facts, the defendant came dangerously close to "engag[ing] in a sexual act or sexual contact" with the victim under circumstances in which the defendant "should have [had] knowledge or reason to know that the act was committed without [the victim's] permission," D.C. Code § 22-3006. *See Hailstock*, 85 A.3d at 1283 ("The evidence in this case satisfied these tests.").

[80] At issue is *Mobley* was, *inter alia*, whether the evidence supported a finding of attempted tampering in a situation where appellant, after speaking with a co-defendant spoke over the phone about the specific location of a gun that had been used in the commission of multiple crimes and was thereafter tossed away in the vicinity of a housing complex, went to the spot and expended significant effort searching for the gun with the intent of disposing of it. 101 A.3d at 424-25. On these facts, the defendant was dangerously close to "alter[ing], destroy[ing], mutilat[ing], conceal[ing], or remov[ing]" the gun "with intent to impair its integrity or its availability for use in the official proceeding," D.C. Code § 22-723—assuming, at least, the situation was as the person perceived it, see *Mobley*, 101 A.3d at 425 ("[R]easonable jurors could infer that except for Mr. Bartlett finding a gun, Mr. Thompkins's act of searching for it in the spot where it was thrown would have been successful.")

[81] For example, the DCCA in *Corbin v. United States* recently explained that the court has "adopted the 'dangerous proximity' theory of attempt," summarizing the current state of District law as follows:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained. This "dangerous proximity" test, formulated by Justice Holmes, does not require that appellants have commenced the last act sufficient to produce the crime but focuses instead on the proximity of appellants' behavior to the crime intended. *Jones v. United States,* 386 A.2d 308, 312 (D.C. 1978) (footnote omitted). "[M]ere preparation is not an attempt, but preparation may progress to the point of attempt. Whether

Consistent with the foregoing analysis of District authorities, the dangerous proximity test appears to most accurately reflect current District law. It is directly codified by subparagraph (a)(4)(A).

RCC §§ 22E-301(a)(2) and 22E-301(a)(4)(B): Relation to Current District Law on Impossibility. Paragraph (a)(2) and subparagraph (a)(4)(B) codify, clarify, and fill in gaps reflected in District law governing impossible attempts.

Under District law, two basic propositions concerning the limits of attempt liability seem clear. First, impossibility is generally not a defense to an attempt charge—i.e. the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is generally irrelevant for purposes of attempt liability. Second, there is a requirement that a person's conduct must be reasonably adapted to completion of the target offense in order to support attempt liability. Paragraph (a)(2) and subparagraph (a)(4)(A) codify both of these principles.

The most significant decision on impossibility is the DCCA's opinion in the 2004 case of *In re Doe*, where the court rejected the applicability of an impossibility defense to the offense of attempted enticement of a child through an exceptionally circuitous route.[82] Procedural issues aside, at the heart of the case is the defendant's argument that it is "legally impossible" to commit attempted enticement of a child under District law where the intended victim is (unbeknownst to the perpetrator) not a child.[83]

In resolving the appellant's claim, the *In re Doe* court was careful to distinguish, at the outset, between "factual impossibility," which arises where "the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant," and "legal impossibility," which "arises only when the

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it has is a question of degree which can only be resolved on the basis of the facts in each individual case." *Id.* at 313 n.2. It is sufficient for the government to prove that "except for some interference," defendant's "overt act done with the intent to commit a crime . . . would have resulted in the commission of the crime." *Evans v. United States,* 779 A.2d 891, 894 (D.C. 2001).

120 A.3d 588, 602 n.20 (D.C. 2015).

[82] 855 A.2d 1100, 1101 (D.C. 2004). At issue in *In re Doe* was whether the trial court's determination that the accused had to register as a sex offender under the District of Columbia's Sex Offender Registration Act of 1999 ("SORA") was appropriate. *Id.* at 1106. This determination, in turn, was based upon the court's assessment that the accused's earlier conviction in federal court for violating 18 U.S.C. § 2423(b) by traveling in interstate commerce for the purpose of engaging in a sexual act with a person under eighteen years of age "involved conduct that would constitute" or was "substantially similar" to District offense that would require registration under SORA. *Id.* at 1102; *see* D.C. Code § 22-4001(6) & (8). Notably, however, the accused's prior federal conviction arose from a sting operation: he sought to rendezvous with an undercover officer posing as a fourteen-year-old girl. *In re Doe*, 855 A.2d at 1102. Notwithstanding this wrinkle, CSOSA and the Superior Court nevertheless determined that the federal offense involved conduct that was "substantially similar" to the conduct described by, *inter alia*, the registration offense of attempted enticement of a child in violation of D.C. Code § 22-3010 and D.C. Code § 22-3018. *Id.* at 1104. Under that District offense, a person attempts to entice a "child"—defined as "a person who has not yet attained the age of 16 years," D.C. Code § 22-3001(3)—when that person, "being at least 4 years older than a child, [attempts to] take[] that child to any place, or entices, allures, or persuade[] a child to go to any place for the purpose of committing" an act of sexual abuse, D.C. Code § 22-3010.

[83] *In re Doe*, 855 A.2d at 1106.

defendant's objective is to do something that is not a crime."[84] Whereas the former claim is "not a defense" to an attempt charge, the latter claim "remains a defense to an attempt offense."[85] (It is important to point out, however, that this narrow construal of legal impossibility does little more than protect defendants from being convicted of attempts to commit imaginary crimes.)

Consistent with the foregoing classification scheme, the *In re Doe* court noted that the defendant's argument raised an issue of factual impossibility (albeit one with a legal dimension): where the actor intends to commit enticement of a child, but commission of the offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance (here, the age of the victim), should that mistake provide grounds for exoneration?

The DCCA answered this question in the negative, stating that—consistent with the general rule governing factual impossibility—the court had "no reason to think that it would be a defense in the District of Columbia to a charge of attempted enticement of a child that the defendant was fooled because his target was in reality an undercover law enforcement officer."[86] After all, as the *In re Doe* court reasoned, "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same."[87]

The broad rejection of an impossibility defense reflected in *In re Doe* is similarly in accordance with older DCCA case law construing drug statutes. For example, in *Seeney v. United States*, the DCCA clarified that "the defense of impossibility is not available to one charged with the crime of attempted [narcotics offenses] under the District of Columbia Code."[88] Which is to say, as the DCCA further clarified in *Fields v. United States*, that proof of "the defendant's belief that he was dealing in controlled substances," rather than proof that the substances implicated are in fact controlled substances, will suffice to establish an attempt conviction in this context.[89]

Also consistent with a broad rejection of an impossibility defense under District law are two District statutes, trafficking in stolen property (TSP) and receiving stolen property (RSP), which seem to legislatively endorse a similar approach to that reflected in the foregoing cases.[90] More specifically, under each statute, convictions for the completed offenses of TSP and RSP may rest on a mistaken belief that property at issue was stolen,

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[84] *Id.* (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019)).

[85] *In re Doe*, 855 A.2d at 1106. These principles are also recognized in the commentary to § 7.101 of the District's criminal jury instructions, which observes that "factual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense" under District law, while "legal impossibility"—that is, "where a defendant's objective 'is to do something that is not a crime'"—is the only form of impossibility that may constitute an offense under District law.

[86] *In re Doe*, 855 A.2d at 1106.

[87] *Id.*

[88] 563 A.2d 1081, 1083 (D.C. 1989).

[89] 952 A.2d 859, 865 (D.C. 2008).

[90] *See* D.C. Code § 22-3231(b) ("A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen"); D.C. Code § 22-3232(a) ("A person commits the offense of receiving stolen property if that person buys, receives, possesses, or obtains control of stolen property, knowing or having reason to believe that the property was stolen.").

even if it wasn't stolen (as is the case in sting operations), and, therefore, consummation of the target harm was practically impossible. This is articulated, *inter alia*, through identical provisions clarifying that for each offense "[i]t shall not be a defense . . . [that] the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be."[91]

It's important to note that while the foregoing authorities indicate that District law reflects what the DCCA has deemed "[t]he modern and better rule . . . [that] impossibility is not a defense when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law,"[92] there is one aspect of District law that potentially complicates the foregoing analysis. This is the well-established requirement of reasonable adaptation.

Originally articulated by the DCCA in *Jones v. United States* alongside the court's endorsement of the dangerous proximity test, this requirement entails proof that the defendant's conduct have been "reasonably adapted to the accomplishment of [the target offense]."[93] Since *Jones*, this "reasonably adapted" language has been recited in many DCCA attempt opinions.[94] And it is also a central part of the District's jury instructions on attempts.[95]

Notwithstanding its pervasiveness, however, neither any published DCCA opinion nor the commentary to the District's criminal jury instructions appears to explain the significance of the requirement. Instead, all that District authority reveals is that: (1) the reasonable adaptation requirement seems to be part of the conduct requirement of an attempt; and (2) that it is most important where impossibility—such as, for example,

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[91] D.C. Code § 22-3231(c); D.C. Code § 22-3232(b); *see also German*, 525 A.2d at 607 (noting that, with respect to RSP, the "same acts could be punished under [the District's general] attempt statute" even without the foregoing subjective specification reflected in D.C. Code § 22-3232(b), on the grounds that impossibility is not a defense to an attempt charge).

[92] *In re Doe*, 855 A.2d at 1106 (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019)).

[93] More specifically, the DCCA in *Jones v. United States* endorsed the formulation provided in "Criminal Jury Instructions for the District of Columbia, No. 4.04 (2d ed. 1972)" which read:

> An attempt consists of an act which is done with the intent to commit a particular crime and is reasonably adapted to the accomplishment of that end. The act must go beyond mere preparation and must carry the criminal venture forward to within dangerous proximity of the criminal end sought to be attained.

386 A.2d 308, 312 (D.C. 1978).

[94] *See, e.g., Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Robinson*, 608 A.2d at 116; *Johnson*, 756 A.2d at 464; *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996); *Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *Doreus v. United States*, 964 A.2d 154, 158 (D.C. 2009); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015).

[95] As section 7.101 of the District's criminal jury instructions reads:

> The elements of the crime of attempted [specify crime], each of which the government must prove beyond a reasonable doubt, are that . . . . **[Name of defendant] did an act reasonably adapted to accomplishing the crime of [specify crime].**

attempted drug prosecutions premised upon the defendant's belief that the object possessed was a controlled substance—is at issue.[96]

Both of the foregoing general propositions are consistent with common law authorities, which more clearly describe the requirement as a limitation on the general rejection of a factual impossibility defense to an attempt charge. As one commentator summarizes the common law approach: where "the means employed are not reasonably adapted to carry out" the actor's intent to commit a crime, an attempt conviction is not justified "for in such case there can be no damage or danger of damage."[97] This means, for example, that if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[98] Nor, according to the same reasoning, can "[s]triking a man with a small switch [] constitute an attempt to murder him."[99]

To be sure, there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon "inherently impossible" attempts of this nature "seldom confront the courts."[100] Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to completion of an offense.[101] The implication, then, is that where a defendant's conduct is *not* reasonably adapted to completion of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.[102]

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[96] For example, in *Seeney v. United States*, the DCCA determined that the "defense of impossibility is not available to one charged with the crime of attempted possession with intent to distribute controlled substances under the District of Columbia Code." 563 A.2d at 1083. Which in turn led the court to hold the following:

> With respect to the offense of *attempted* possession with intent to distribute . . . it is not necessary to establish that the substance a defendant attempted to possess was the proscribed substance. The government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance, and the requisite criminal intent.

Id. Thereafter, in *Thompson v. United States* the DCCA held that:

> [The foregoing] rule, applied in *Seeney* to attempted PWID, is equally applicable to a case involving attempted distribution . . . In an attempt case involving a purported illegal drug, what *Seeney* teaches is that the government is not required to prove the identity of the substance in question, but rather conduct by the defendant that is reasonably adapted to the accomplishment of the crime of [distribution] and the requisite criminal intent . . . This is no different from what must be proved in any case in which the defendant is charged with an attempt to commit a crime: an intent to commit the crime and the performance of some act toward its commission.

678 A.2d at 27.

[97] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954).

[98] *Id.* at 470 (collecting citations).

[99] *Id.*

[100] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019).

[101] *See, e.g., Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27.

[102] This conclusion is also consistent with the DCCA's policy rationale for generally rejecting impossibility defenses. For example, in *In re Doe*, the DCCA rejected an impossibility defense on the rationale that

Paragraph (a)(2) codifies the foregoing District authorities in a manner that better clarifies the interrelationship of the relevant principles. First, paragraph (a)(2) places an important, if narrow, limitation on the dangerous proximity requirement: the person's conduct must, at minimum, be "reasonably adapted to completion of the offense." Consistent with relevant DCCA case law and the common law underpinnings of the reasonable adaptation requirement, this language demands that there exist some minimum relationship between the accused's criminal plans and the objective sought to be achieved. Where, in contrast, this relationship is lacking—such as where the defendant has engaged in an inherently impossible attempt—liability cannot attach.

Second, subparagraph (a)(4)(B) incorporates what the DCCA has deemed "[t]he modern and better" approach to impossibility, namely, to recognize that "impossibility is not a defense [to a charge of criminal attempt] when the defendant's actual intent (not limited by the true facts unknown to him) was to do an act or bring about a result proscribed by law."[103] It does so, however, in an accessible and simple manner: rather than relying on confusing classification-based distinctions between legal and factual impossibility, the critical issue is whether the person's conduct satisfied the dangerous proximity standard when the situation is viewed as the actor perceived it.

RCC § 22E-301(c): Relation to Current District Law on Relationship Between Completed Offense and Attempt. Subsection (c) codifies, clarifies, and fills in a gap reflected in District law governing the relationship between a completed offense and a criminal attempt.

The D.C. Code is silent on the relationship between the elements of an attempt and the elements of a completed offense, which has effectively submitted the topic to the discretion of the DCCA.[104] The relevant case law establishes that the government may secure an attempt conviction based upon proof that the target offense was actually completed. Subsection (c) expressly codifies this legal proposition.

Under DCCA case law, it is well-established that "a person charged with an attempt to commit a crime may be convicted even though the evidence shows a completed offense, not merely an attempt.'"[105] This policy, as promulgated by the DCCA, is understood to rest on two basic underlying principles: (1) "failure is not an essential element of criminal

"[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same." 855 A.2d at 1106. Where, however, a person attempts to commit a crime by means not otherwise reasonably adapted to commission of the target offense—for example, where the defendant's sole means of enticing a child is by performing a witchcraft ceremony in his own home—this rationale does not hold since the person's conduct and dangerousness seem qualitatively different.

[103] *In re Doe*, 855 A.2d at 1106 (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019)).

[104] Note, however, that D.C. Super. Ct. R. Crim. P. 31(c) establishes that: "A defendant may be found guilty of any of the following: (1) an offense necessarily included in the offense charged; (2) an attempt to commit the offense charged; or (3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right."

[105] *Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001); *see, e.g., United States v. Fleming,* 215 A.2d 839 (D.C. 1966); *Ray v. United States*, 575 A.2d 1196, 1199–200 (D.C. 1990).

attempt"[106]; and (2) "[a]n attempt is a lesser-included offense of the completed crime."[107]Potentially problematic, however, is the DCCA's second rationale: that proof of a completed offense may substitute for proof of an attempt *because* an attempt is a lesser-included offense (LIO) of the completed crime

At the heart of the issue is the legal standard by which the DCCA determines when one offense is an LIO of another offense, the so-called elements test.[108] Under the elements test, the DCCA analyzes "whether the statutory elements of the lesser offense are contained within those of the greater charged offense."[109] Which is to say that one offense is an LIO of another offense when (and only when) "the greater offense cannot be committed without also committing the lesser."[110] In practice, "the determination [of] whether an offense is a 'lesser included' offense of an allegedly 'greater' offense is made by comparing the statutory elements of the two offenses," without regard to the facts of a case.[111]

Viewed through the elements test, an attempt often will be an LIO of the completed offense, but not always, assuming it is subject to a principle of culpable mental state elevation. Under this principle, the government must prove that the accused acted with the intent to cause any result required by the target offense, regardless of whether a lower culpable mental state, such as recklessness or negligence, will suffice to establish the completed offense. Based solely on a comparison of statutory elements, then, it is not always the case that an attempt—occasionally subject to a higher culpable mental state—is an LIO of the completed offense under a principle of culpable mental state elevation.[112]

In accordance with the following analysis, the DCCA's reliance on the elements test has produced a line of cases that appear to reject a principle of culpable mental state elevation applicable to attempts in the interests of ensuring that proof of a completed offense can substitute for proof of an attempt.

Illustrative is *United States v. Smith*.[113] The defendant in *Smith* was prosecuted for attempted second-degree child cruelty on a theory that the defendant recklessly committed the *completed* offense.[114] On appeal, the defendant argued that, in light of the fact that an attempt was charged, "the government was required, but failed, to prove that he specifically intended to injure his child" pursuant to a principle of culpable mental state elevation.[115] The DCCA ultimately rejected this argument, deeming that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed

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[106] *Evans,* 779 A.2d at 894; *see, e.g., In re Doe*, 855 A.2d 1100, 1107 (D.C. 2004); *Ray*, 575 A.2d at 1199–200 (citing *United States v. Dupree*, 544 F.2d 1050, 1052 (9th Cir.1976) and *United States v. Jacobs,* 632 F.2d 695, 697 (7th Cir. 1980)).
[107] *Evans,* 779 A.2d at 894; *see, e.g., Ray*, 575 A.2d at 1199; *Washington v. United States*, 965 A.2d 35, 42 (D.C. 2009).
[108] *See, e.g., Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001); *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997); *see Schmuck v. United States*, 489 U.S. 705, 716 (1989).
[109] *Mungo*, 772 A.2d at 245.
[110] *Warner v. United States*, 124 A.3d 79, 85 (D.C. 2015).
[111] *Id.*; *see also Mungo*, 772 A.2d at 245 ("Although simple assault is not defined by the statute, analysis under the 'elements" test for lesser-included offenses is still appropriate and the elements to be examined are those found in the common law definition of assault.")
[112] *See, e.g.,* WAYNE R. LAFAVE & GERALD ISRAEL, 6 CRIM. PROC. § 24.8(e) (4th ed. Westlaw 2017).
[113] 813 A.2d 216, 219 (D.C. 2002).
[114] *See id.*
[115] *Id.*

crime."[116] "To hold otherwise," after all, would "create the anomalous result that appellant could be convicted of the completed crime . . . but, on the same facts, could not be convicted of an attempt to commit that same crime."[117]

Viewed in context, the holding in *Smith* (and comparable cases) is not surprising.[118] Assuming the practice of allowing proof of the completed offense to suffice for an attempt rests upon a strict comparison of the statutory elements alone, then application of a principle of culpable mental state elevation would indeed be problematic. At the same time, however, application of the principle of *culpable mental state* equivalency implied in these cases in a broader context is even more problematic. Were it true, for example, that "the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime,"[119] regardless of the situation, then attempt charges premised on theories of recklessness, negligence, or even strict liability would be viable in the District. And this in turn would provide for expansive liability in derogation of both DCCA case law and nearly universal national legal trends.[120]

Fortunately, the foregoing tension is easily resolvable by adopting a statutory provision clarifying that proof of the completed offense is an explicitly authorized means of proving an attempt. By establishing that the elements of the completed offense constitute a viable alternative basis for establishing attempt liability, this kind of legislative statement obviates the relevant LIO-related complications arising in cases where the government seeks to prove an attempt—otherwise subject to a generally applicable principle of culpable mental state elevation, see RCC § 22E-301(b)—with evidence of the completed offense. Consistent with the interests of clarity, consistency, and the preservation of current District law, then, subsection (c) provides this legislative statement.

RCC § 22E-301(d): Relation to Current District Law on Attempt Penalties.

Subsection (d) establishes a uniform and proportionate grading scheme for criminal attempts, which clarifies, simplifies, and changes District law.

The D.C. Code's general attempt penalty statute, D.C. Code § 22-1803, establishes a default penalty framework for attempt offenses comprised of two basic rules.[121] First,

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[116] *Id.*

[117] *Id.*

[118] The DCCA has likewise relied on similar reasoning to uphold convictions for attempts to commit so-called general intent crimes, such as simple assault and threats, based upon facts indicating that the completed offense had been committed—but in the absence of proof of an elevated mental state beyond the "general intent" necessary for the underlying offense. *See Ray v. United States*, 575 A.2d 1196, 199 (D.C. 1990); *Jones v. United States*, 124 A.3d 127, 129-31 (D.C. 2015).

[119] *Evans*, 779 A.2d at 894.

[120] *See, e.g.,* Model Penal Code § 5.01, cmt. at 304 ("[T]he scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or negligently created a risk of any result whose actual occurrence would lead to criminal responsibility."); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1033 (1998) (observing that such treatment would open the "floodgates to attempt liability"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.3 (3d ed. Westlaw 2019) ("Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed."); Commentary on Haw. Rev. Stat. § 705-500 ("Reckless driving . . . does not constitute attempted manslaughter."); *State v. Holbron*, 904 P.2d 912, 920, 930 (Haw. 1995) ("We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter.").

[121] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March

attempts to commit offenses other than "crimes of violence" are punishable by a maximum of 180 days incarceration, $1000 fine, or both.[122] And second, attempts to commit "crimes of violence"[123] are punishable by a maximum of 5 years incarceration, $12,500 fine, or both.[124]

The District's general attempt penalty statute also explicitly recognizes an exception to these two default rules: any attempt offense "made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901" (hereafter, "1901 Code") is subject to the penalties specified in the relevant statutory provisions.[125] This reflects the fact that the 1901 Code explicitly made several kinds of attempts punishable in a manner different from the default penalty, which at the time was set at one-year imprisonment or a $1,000 fine, or both.[126]

For example, two common felonies in the 1901 Code were defined in a manner that effectively punished attempted versions of the offense the same as completed versions of

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3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both.").

[122] *See* D.C. Code § 22-3571.01(4) (setting fines at "$1,000 if the offense is punishable by imprisonment for 180 days, or 6 months, or less but more than 90 days").

[123] D.C. Code § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.").

[124] *See* D.C. Code § 22-3571.01(6) (setting fines at "$12,500 if the offense is punishable by imprisonment for 5 years or less but more than one year").

[125] D.C. Code § 22-1803.

[126] *See* D.C. Code § 906 (1901); Act of March 3, 1901, ch. 19, § 906, 31 Stat. 1321, 1337 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this chapter [Chapter 19], shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both."). Since being enacted in 1901, the District's general attempt penalty statute has undergone two substantive policy revisions. Most importantly, in 1994, the D.C. Council amended it to establish separate default penalty rules for attempts to commit non-violent crimes—subject to a maximum of 180 days incarceration and/or a $1000 fine—and for attempts to commit violent crimes—subject to a maximum 5 years incarceration and/or a $5,000 fine. *See* OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, 1994 District of Columbia Laws 10-151 (Act 10–238), sec. 105, § 906 (1994). These changes occurred as part of a larger effort to increase judicial case processing by reducing the penalties for more than 40 offenses to make them non-jury demandable (i.e. subject only to a bench trial by a judge rather than a jury) under D.C. Code § 22-705. *See* CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY, JAMES E. NATHANSON, *Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994*, at 3-4 (January 26, 1994) [hereinafter *Judiciary Committee Report*]. Supported by both the D.C. Superior Court and Office of the United States Attorney, the 1994 Act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date." *Id.* Subsequently, in 2012, the D.C. Council raised the maximum fine for attempts to commit violent crimes from $5,000 to $12,500 consistent with the Criminal Fine Proportionality Amendment Act. *See* CRIMINAL FINE PROPORTIONALITY AMENDMENT ACT of 2012, 2012 District of Columbia Laws 19-317 (Act 19-641), sec. 101 (2012); *see also* D.C. Code § 22-1803; D.C. Code § 22-3571.01.

the offense, namely, attempted arson,[127] and attempted malicious destruction of property.[128] And attempted robbery had its own statutory provision subject to a penalty in derogation from the default rule.[129] Accompanying these three explicit exceptions to the 1901 Code's default penalty rule for criminal attempts were three implicit exceptions: "assault-with-intent to" (AWI) crimes,[130] which were enacted to allow "a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end."[131]

The 1901 Code's explicit and implicit statutory exceptions to the default penalty for attempts have undergone little or no change to date.[132] At the same time, many other offense-specific exceptions to the general attempt penalty statute have been added to the D.C. Code over the last century.

Some of these exceptions are communicated through the penalty provisions governing attempts to commit individual or certain groupings of offenses. Illustrative provisions include the D.C. Code provisions setting forth penalties for attempts to commit: (1) various human trafficking related offenses[133]; (2) various sexual abuse-related

[127] D.C. Code § 820 (1901); Act of March 3, 1901, ch. 19, § 820.
[128] D.C. Code § 848 (1901); Act of March 3, 1901, ch. 19, § 848; *see also* D.C. Code § 824 (1901); Act of March 3, 1901, ch. 19, § 824 (unlawful entry of property).
[129] D.C. Code § 811 (1901); Act of March 3, 1901, ch. 19, § 811.
[130] *See* D.C. Code §§ 804-06 (1901); Act of March 3, 1901, ch. 19, §§ 804-06.
[131] *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011). These AWI offenses effectively created a complementary form of attempt liability, which subjected actors to greater punishment for unconsummated conduct that reached the point of an assault. Both AWIs and criminal attempts punish an unconsummated intent to commit a criminal offense; the only difference is that, whereas a criminal attempt requires proof of conduct that is dangerously close to committing that offense, an AWI offense requires proof of a simple assault.
[132] Like the 1901 Code's attempted arson, malicious destruction of property, and robbery provisions, the 1901 Code's AWI offenses also still "remain on the books to this day" in essentially the same form. *Perry*, 36 A.3d at 810-11. First, there is D.C. Code § 22-401—the current version of § 803 of the 1901 Code—which subjects "any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery . . . . to imprisonment for not less than 2 years or more than 15 years." Second, there is D.C. Code § 22-402—the current version of § 804 of the 1901 Code—which subjects any "assault with intent to commit mayhem . . . . to imprisonment for not more than 10 years." And third, there is D.C. Code § 22-403—the current version of § 805 of the 1901 Code—which subjects an "assault[] with intent to commit any other offense . . . . [to] not more than 5 years." Only minor modifications have been made to these offenses since their enactment. For example, §§ 804 and 805 of the 1901 Code are essentially identical to §§ 22-402 and 403 of the current D.C. Code. And § 803 of the 1901 Code, currently reflected in D.C. Code § 22-401, has only been lightly revised: the offense of assault with intent to commit "rape" has been replaced with the related offenses of assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, and assault with intent to commit child sexual abuse. Other than that, the AWI offenses currently contained in Title 22 are substantively the same as those enacted in 1901.
[133] *See* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")

offenses[134]; (3) various drug-related offenses[135]; (4) manufacture or possession of a weapon of mass destruction[136]; and (5) use, dissemination, or detonation of a weapon of mass destruction.[137]

Other exceptions to the general attempt penalty statute are communicated through incorporation of the term "attempts" into the definition of a given offense, effectively providing that an attempt to commit that offense is subject to the same punishment as the completed offense.[138] Illustrative provisions in the D.C. Code include the statutory

[134] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

[135] *See* D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[136] *See* D.C. Code § 22-3154(b) ("A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.")

[137] *See* D.C. Code § 22-3155(b) ("A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.").

[138] These fully inchoate attempt offenses are to be distinguished from the District's partially inchoate attempt offenses, which incorporate the term "attempt" into a statutory definition, but apply it to only some of the elements in that offense, such as the District's carjacking statute. *See* D.C. Code § 22-2803 (a)(1) ("A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle."); *see also Corbin v. United States*, 120 A.3d 588 (D.C. 2015) (interpreting the phrase "or attempts to do so" to apply only to the force or violence requirement, such that proof that the defendant actually took the vehicle is necessary for a conviction brought under this statute (rather than attempted carjacking, brought under the District's general attempt statute)). Other statutes potentially subject to this kind of partially inchoate reading include: D.C. Code § 22-851 (Protection of district public officials); D.C. Code § 22-1211 (Tampering with a detection device); D.C. Code § 22-1404 (Falsely impersonating public officer or minister); D.C. Code § 22-1409 (Use of official insignia; penalty for unauthorized use); D.C. Code § 22-1713 (Corrupt influence in connection with athletic contests); D.C. Code § 22-1835 (Unlawful conduct with respect to documents in furtherance of human trafficking); D.C. Code § 22-1836 (Benefitting financially from human trafficking); D.C. Code § 22-2707 (Procuring; receiving money or other valuable thing for arranging assignation); D.C. Code § 22-3237.02 (Identity theft); D.C. Code § 22-3251 (Extortion); D.C. Code § 22-3535(f) (Voyeurism); and D.C. Code § 50-2201.05b (Fleeing from law enforcement).

definitions of (1) enticing a child or minor,[139] (2) voter fraud,[140] and (3) public assistance fraud.[141]

Collectively, the District's "patchwork of attempt statutes"[142] presents two main problems: (1) it lacks a consistent grading principle; and (2) it is confusingly communicated. With respect to the first problem, at least three fundamentally different grading patterns appear to be reflected in the penalties governing attempts to commit both crimes of violence and non-violent crimes under the D.C. Code.

The first grading pattern, which might be referred to as a "substantial punishment discount," is reflected in the numerous District attempt offenses subject to statutory maxima that are many orders of magnitude below the statutory maxima governing the completed offense. Most often, this kind of substantial punishment discount is produced by a straightforward application of the general attempt penalty statute's default rules.[143]

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[139] *See* D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b)("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[140] *See* D.C. Code § 1-1001.14(a) ("Any person who shall register, or attempt to register, or vote or attempt to vote under the provisions of this subchapter and make any false representations as to his or her qualifications for registering or voting or for holding elective office, or be guilty of violating § 1-1001.07(d)(2)(D), § 1-1001.09, § 1-1001.12, or § 1-1001.13 or be guilty of bribery or intimidation of any voter at an election, or being registered, shall vote or attempt to vote more than once in any election so held, or shall purloin or secrete any of the votes cast in an election, or attempt to vote in an election held by a political party other than that to which he or she has declared himself or herself to be affiliated, or, if employed in the counting of votes in any election held pursuant to this subchapter, knowingly make a false report in regard thereto, and every candidate, person, or official of any political committee who shall knowingly make any expenditure or contribution in violation of subchapter I of Chapter 11 of this title, shall, upon conviction, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.").

[141] *See* D.C. Code § 4-218.01(a) ("Any person who, with the intent to defraud, by means of false statement, failure to disclose information, or impersonation, or by other fraudulent device, obtains or attempts to obtain or any person who knowingly aids or abets such person in the obtaining or attempting to obtain: (1) any grant or payment of public assistance to which he is not entitled; (2) a larger amount of public assistance than that to which he or she is entitled; (3) payment of any forfeited grant of public assistance; or (4) a public assistance identification card; or any person who with intent to defraud the District aids or abets in the buying or in any way disposing of the real property of a recipient of public assistance shall be guilty of a misdemeanor and shall be sentenced to pay a fine of not more than $500, or to imprisonment not to exceed one year, or both.").

[142] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

[143] As noted above, the relevant legislative history underlying the Omnibus Criminal Justice Reform Amendment Act of 1994 indicates that the default rule for non-crimes of violence was set at 180 days to ensure they were non-jury demandable, and, therefore, to increase judicial efficiency. *See* CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY, JAMES E. NATHANSON, *Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994*, at 3-4 (January 26, 1994) [hereinafter *Judiciary Committee Report*] (noting that the act was intended to "relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow for more felony cases to be scheduled at an earlier date"). At first glance, this seems to explain the substantial punishment discount applied to grade attempts to commit non-crimes of violence. As discussed below, however, the penalties governing many attempts to commit non-crimes of violence under the D.C. Code reflect fundamentally different grading patterns—namely, a proportionate punishment variance or equalized punishment. Likewise, the penalties governing attempts to commit crimes of violence under the D.C. Code also reflect all three of these fundamentally different grading patterns.

A substantial penalty discount is perhaps most clearly reflected in the grading of attempts to commit various non-violent crimes. For example, whereas the statutory maxima for felony property offenses such as first degree theft,[144] first[145] and second degree[146] fraud, first degree receiving stolen property,[147] first degree financial exploitation of a vulnerable adult or elderly person,[148] unauthorized use of a motor vehicle,[149] and blackmail[150] (not involving a threat of violence[151]) range between 5 and 10 years, an attempt to commit any of those offenses is subject to the 180 day default rule governing attempts to commit non-crimes of violence under the general attempt penalty statute.[152] Likewise, the 10 year statutory maxima applicable to second degree cruelty to children[153] as well as the 20 year statutory maximum applicable to felony threats[154] are also reduced to 180 days under the first default rule.[155] (Neither of these offenses is a crime of violence.[156])

A pattern of substantial punishment discounting also can be seen in the penalties governing a wide range of attempts to commit crimes of violence. For example, whereas

[144] D.C. Code § 22-3212(a) ("Any person convicted of theft in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is $1,000 or more.").
[145] D.C. Code § 22-3221(a)(1) ("Any person convicted of fraud in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is $1,000 or more . . . .").
[146] D.C. Code § 22-3221(b)(1) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is $1,000 or more . . . .").
[147] D.C. Code § 22-3232(c)(1) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 7 years, or both, if the value of the stolen property is $1,000 or more.").
[148] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . When the value of the property or legal obligation is $1,000 or more, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 10 years, or both.").
[149] D.C. Code § 22-3215(d)(1) ("[A] person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both.").
[150] D.C. Code § 22-3252 (b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").
[151] *See* D.C. Code § 23-1331(4).
[152] D.C. Code § 22-1803.
[153] D.C. Code § 22-1101(b)(2) ("Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").
[154] D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").
[155] *See* D.C. Code § 22-1803.
[156] *See* D.C. Code § 23-1331(4).

first-degree murder[157] and second-degree murder[158] are both potentially subject to a sentence of life in prison under the D.C. Code, an attempt to commit either of those offenses is subject to 5 year default rule governing attempts to commit crimes of violence under the general attempt penalty statute.[159] Likewise, the 30 year statutory maxima applicable to kidnapping[160] and first degree burglary,[161] as well as the 15 year statutory maxima applicable to first degree cruelty to children[162] and second degree burglary[163] are also reduced to 5 years under the second default rule.[164] And the District's stand-alone attempted robbery statute effectively reduces the 15 year statutory maximum applicable to the completed offense[165] to 3 years for an attempt.[166]

These substantially discounted attempt penalties are to be contrasted with those that reflect a grading pattern that might be referred as "equal punishment," namely, they subject attempts to the same statutory maximum governing the completed offense. The D.C. Code is comprised of numerous attempt offenses that effectively equalize the sanction for attempts, though the D.C. Council has authorized this outcome in a variety of ways.

Most explicit is the District's semi-general penalty provision for drug crimes, D.C. Code § 48-904.09, which broadly states that all attempted drug crimes may be punished as seriously as completed drug crimes.[167] In practical effect, this means that, *inter alia*, an attempt to manufacture, distribute, or possess, with intent to manufacture or distribute, a

[157] D.C. Code § 22-2104(a)("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release . . . .").
[158] D.C. Code § 22-2104(c) ("Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life . . . .").
[159] *See* D.C. Code § 22-1803. Note, however, that the District's most severe AWI statute partially softens this discount by applying a 15 year statutory maximum to attempted murders that progress to the point of an assault. *See* D.C. Code § 22-401.
[160] D.C. Code § 22-2001 ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years.").
[161] D.C. Code § 22-801(a) ("Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.").
[162] D.C. Code § 22-1101(c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 15 years, or both.").
[163] D.C. Code § 22-801(b) ("Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.").
[164] *See* D.C. Code § 22-1803.
[165] D.C. Code § 22-2801 ("Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").
[166] D.C. Code § 22-2802 ("Whoever attempts to commit robbery, as defined in § 22-2801, by an overt act, shall be imprisoned for not more than 3 years or be fined not more than the amount set forth in § 22-3571.01, or both.").
[167] D.C. Code § 48-904.09 ("Any person who attempts . . . to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt . . . .")

Schedule I or II controlled substance is subject to the same 30 statutory maximum governing the completed offense.[168]

A pattern of equal punishment is also apparent in those District offenses that statutorily incorporate the term "attempts" into their statutory definition. This includes property offenses such as arson[169] malicious destruction of property,[170] and extortion[171] all of which, by virtue of incorporating the term attempts into their offense definition, subject attempts to the same 10 year statutory maximum applicable to the completed offense.[172] It also includes prison escape[173] and enticing a child[174] which ensure, through similar means, that attempts to commit those offenses are subject to the same 5 year statutory maxima governing the completed versions of those offenses.[175]

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[168] *See* D.C. Code § 48-904.01(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[169] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[170] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own, of the value of $1,000 or more, shall be fined not more than the amount set forth in § 22-3571.01 or shall be imprisoned for not more than 10 years, or both, and if the property has some value shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[171] D.C. Code §§ 22-3251(a)-(b) ("A person commits the offense of extortion if . . . That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or . . . That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right . . . Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.").

[172] Arson is a crime of violence, MDP is not a crime of violence, and extortion is sometimes a crime of violence. *See* D.C. Code § 23-1331(4).

[173] D.C. Code §§ 22-2601(a)-(b) ("No person shall escape or attempt to escape from [specified institutions] . . . . Any person who violates subsection (a) of this section shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both . . . .").

[174] D.C. Code § 22-3010(a) ("Whoever, being at least 4 years older than a child or being in a significant relationship with a minor, (1) takes that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02, or (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both."); D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts (1) to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact, or (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact shall be imprisoned for not more than 5 years or may be fined not more than the amount set forth in § 22-3571.01, or both.").

[175] *See also* D.C. Code § 22-3302(a)(1) ("Any person who, without lawful authority, shall enter, or attempt to enter, any private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor,

A great many other District attempt offenses exhibit a pattern of equal punishment through more convoluted means. For example, the District's while armed enhancement applies the same flat 30 year statutory maximum add-on to numerous crimes, without regard to whether the underlying crime is completed or merely attempted, through the D.C. Code's definition of "crimes of violence" and "dangerous crimes."[176] In addition, attempts to commit the least severe forms of theft,[177] fraud,[178] receiving stolen property,[179] financial exploitation of a vulnerable adult or elderly person,[180] and assault[181] are all subject to the same penalty as the completed offense by virtue of the default 180 day rule applicable to non-violent crimes in the general attempt statute.[182] And similarly, an attempt to commit blackmail[183]—when committed in a manner so as to render it a crime of violence[184]—is subject to the same statutory maximum applicable to the completed offense pursuant to the 5 year default rule governing crimes of violence under the general attempt statute.[185]

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and on conviction thereof shall be punished by a fine of not more than the amount set forth in § 22-3571.01, imprisonment for not more than 180 days, or both.").

[176] More specifically, D.C. Code § 22–4502(a)(1) establishes that anyone who commits a violent or dangerous crime:

> May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses . . . and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years . . . .

See also D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking.").

[177] D.C. Code § 22-3212(b) ("Any person convicted of theft in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.").

[178] D.C. Code § 22-3222(b)(2) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.").

[179] D.C. Code § 22-3232(c)(2) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both, if the stolen property has some value.").

[180] D.C. Code § 22-936.01(a)("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . . When the property or legal obligation has some value, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 180 days, or both.").

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

[182] *See* D.C. Code § 22-1803.

[183] D.C. Code §§ 22-3252(a)-(b) ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens [to do one of three kinds of acts] . . . . Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[184] *See* D.C. Code § 23-1331(4).

[185] *See* D.C. Code § 22-1803.

Perhaps most confusingly and contradictory, however, is that equal punishment appears in a handful of District statutes which, textually speaking, authorize attempts to be punished *more severely* than the completed offense. For example, whereas the completed version of assault with significant bodily injury is subject to a 3 year statutory maximum,[186] an attempt to commit that offense appears to be subject to a statutory maxima of 5 years pursuant to the general attempt penalty statute's default rule for crimes of violence.[187] And whereas the completed versions of unlawful entry of a motor vehicle[188] and taking property without right[189] are subject to 90 days in prison, an attempt to commit either of those offenses appears to be subject to the 180 day default rule for non-violent crimes under the general attempt penalty statute.[190] Notwithstanding these textual anachronisms, however, District case law appears to preclude a defendant from receiving a sentence for an attempt greater than that authorized for the completed offense.[191] Consequently, these statutes also reflect a pattern of equal punishment.

The District's attempt statutes manifest one other important grading pattern, which is both harsher than a substantial punishment discount but more lenient than equal punishment—what might be referred to as a "proportionate punishment discount." This pattern is reflected in many of the District's more recent attempt offenses, which are subject to a statutory maximum that is pegged to, and is half as severe as, the statutory maximum applicable to the completed offense.

One illustrative example is the semi-general attempt penalty provision incorporated into the Anti-Sexual Abuse Act of 1994,[192] which sets attempt penalties at "1/2 of the maximum prison sentence authorized for the [completed] offense."[193] In practical effect, this applies a proportionate punishment discount to a wide range of sex offenses, including

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[186] DC. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[187] *See* D.C. Code § 22-1803.

[188] D.C. Code § 22-1341 ("It is unlawful to enter or be inside of the motor vehicle of another person without the permission of the owner or person lawfully in charge of the motor vehicle. A person who violates this subsection shall, upon conviction, be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both.").

[189] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property without right shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 90 days, or both.").

[190] *See* D.C. Code § 22-1803.

[191] In *United States v. Pearson*, the D.C. Municipal Court of Appeals indicated that where the maximum statutory penalty for attempt is higher than the penalty for the completed crime, the court cannot *sentence* the defendant to a penalty higher than the statutory maximum penalty for the completed offense. *United States v. Pearson*, 202 A.2d 392, 393-94 (D.C. 1964). Specifically, the court held that a defendant convicted of attempted petit larceny could not be sentenced to a higher penalty than the maximum penalty for the completed offense. The court declined to declare the attempt statute invalid but suggested that Congress may want to rewrite the penalties and suggested the statute's validity may come into question only where, unlike in *Pearson,* a defendant is sentenced to a greater penalty than the maximum for the completed offense. *Id.*

[192] *See* ANTI-SEXUAL ABUSE OF 1994, D.C. Law 10-257, § 217, 42 DCR 53 (May 23, 1995).

[193] *See* D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.")

second,[194] third,[195] and fourth degree sexual abuse,[196] second degree child sexual abuse,[197] first[198] and second degree[199] sexual abuse of a minor, and first[200] and second degree[201] sexual abuse of a secondary education student.

Another illustrative example is the similar semi-general attempt penalty provision incorporated into the Prohibition Against Human Trafficking Amendment Act of 2010.[202] That provision also sets attempt penalties at "1/2 the maximum term otherwise authorized for the [completed] offense."[203] In practical effect, this applies a proportionate penalty discount to a wide range of human trafficking offenses, including attempts to commit forced labor,[204] trafficking in labor or commercial sex acts,[205] sex trafficking of children,[206] unlawful conduct with respect to documents in furtherance of human trafficking,[207] and benefitting financially from human trafficking.[208]

The D.C. Council has also, on occasion, applied a proportionate punishment discount to individual offenses through specific attempt penalty provisions. For example, the District's aggravated assault statute—enacted in 1994 as part of the Omnibus Criminal Justice Reform Amendment Act[209]—contains a specific attempt penalty provision halving the 10 year statutory maximum governing the completed offense to 5 years.[210]

Viewed as a whole, then, the District's approach to grading criminal attempts does not reflect any consistent principle of punishment: the D.C. Code manifests at least three fundamentally different patterns in how it grades attempts, without any discernible rationale for the variances. In practical effect, this produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

At the same time, these potential disproportionalities are not immediately apparent given the second fundamental flaw reflected in the District law of attempts, namely, its

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[194] *See* D.C. Code § 22–3003.
[195] *See* D.C. Code § 22–3004.
[196] *See* D.C. Code § 22–3005.
[197] *See* D.C. Code § 22–3009.
[198] *See* D.C. Code § 22–3009.01.
[199] *See* D.C. Code § 22–3009.02.
[200] *See* D.C. Code § 22–3009.03.
[201] *See* D.C. Code § 22–3009.04.
[202] *See* PROHIBITION AGAINST HUMAN TRAFFICKING AMENDMENT ACT of 2010, D.C. Law 18-239, § 107, 57 DCR 5405 (October 23, 2010).
[203] *Compare* D.C. Code § 22-1837(a)(1) ("[W]hoever violates § 22-1832, § 22-1833, or § 22-1834 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 20 years, or both.") *with* D.C. Code § 22-1837(d) ("Whoever attempts to violate § 22-1832, § 22-1833, § 22-1834, § 22-1835 or § 22-1836 shall be fined not more than 1/2 the maximum fine otherwise authorized for the offense, imprisoned for not more than 1/2 the maximum term otherwise authorized for the offense, or both.")
[204] *See* D.C. Code § 22–1832.
[205] *See* D.C. Code § 22–1833.
[206] *See* D.C. Code § 22–1833.
[207] *See* D.C. Code § 22–1835.
[208] *See* D.C. Code § 22–1836.
[209] *See Perry v. United States*, 36 A.3d 799, 814 (D.C. 2011) (citing OMNIBUS CRIMINAL JUSTICE REFORM AMENDMENT ACT OF 1994, D.C. Law 10–151 (Aug. 20, 1994)).
[210] *Compare* D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both.") *with* D.C. Code § 22-404.01(c) ("Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.").

disorganized approach to codification. For example, notwithstanding the fact that the District's general attempt statute is worded in a way which suggests that the 1901 attempt penalty exceptions remain the only exceptions to the current default penalty rules, the reality is that the D.C. Code is littered with statutory attempt provisions that establish penalties in derogation from these rules. Further, the manner in which these exceptions are communicated is quite inconsistent: some are communicated through individual penalty provisions incorporated into a single offense; others are communicated through semi-general attempt penalty provisions that apply to groups of offenses; and still other exceptions are communicated by including the word "attempt" in the definition of the offense. And on top of all of this complexity rests the District's AWI offenses, which add yet another "unnecessary" layer of confusion to the grading of criminal attempts provided by the D.C. Code.[211]

RCC § 22E-301(d) endeavors to remedy these issues by establishing a clear and consistent approach to grading attempts, which renders offense penalties more proportionate. First, subsection (d)adopts a single generally applicable grading principle: a proportionate penalty discount under which the statutory maximum and fine for an attempt is set at one-half of the statutory maximum and fine of the completed offense. Subsection (d) also specifies that the maximum penalty for criminal attempt shall be decreased by 50% *after* application of any penalty enhancements to the target offense.

The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses.

To the extent the RCC penalty scheme changes current District law, the changes enhance the proportionality of the District's statutorily authorized punishments. And to the extent that the D.C. Council has, in many of its more recently enacted statutes, applied a proportionate punishment discount, they are supported by current District law.

[211] As the DCCA observed in *Perry v. United States*, AWI offenses have been rendered "unnecessary" by the "[m]odern grading of attempt according to the gravity of the underlying offense." *Perry*, 36 A.3d at 825 (citation and quotation omitted). Specifically, AWI offenses were originally created to supplement the "relatively trivial sanctions" afforded by criminal attempt offenses employed at common law. Model Penal Code § 211.1 cmt. at 181-82. Since then, however, the District, along with every other jurisdiction in America, has come to realize that attempts can themselves be graded more seriously, contingent upon the severity of the target offense WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 16.2 (3d ed. Westlaw 2019).

RCC § 22E-302. Criminal Solicitation.

Explanatory Note. RCC § 22E-302 provides a comprehensive statement of general solicitation liability under the RCC.[1] This statement: (1) establishes the culpable mental state requirement and conduct requirement of a criminal solicitation; (2) addresses the import of an uncommunicated solicitation; and (3) specifies the penalties applicable to a criminal solicitation. § 22E-302 replaces the District's current general solicitation statute, D.C. Code § 22-2107.

Subsection (a) specifies the required elements for a criminal solicitation. First, paragraph (a)(1) requires that the actor "purposely commands, requests, or tries to persuade another person to engage in or aid the planning or commission of specific conduct." "Purposely" is a defined term in RCC § 22E-206 that here means that the actor must consciously desire that he or she commands, requests, or tries to persuade another person to engage in specific conduct. Paragraph (a)(1) further requires that if the conduct is carried out, "in fact" the conduct will constitute an offense or an attempt to commit an offense. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the conduct, if carried out, will constitute an offense or an attempt to commit an offense.

Paragraph (a)(2) states that a criminal solicitation incorporates "the culpability required for the [target] offense."[2] Pursuant to this principle, a defendant may not be convicted of a criminal solicitation absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any broader aspect of culpability[3]—required to establish that offense.[4] Per the rules of interpretation in RCC § 22E-207, the "in fact"

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[1] Many of the same conceptual and policy issues addressed in this commentary entry are also discussed—sometimes more comprehensively—in the commentary accompanying criminal conspiracy, RCC § 22E-303.

[2] *See, e.g.,* Model Penal Code § 5.02(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime"); *Mizrahi v. Gonzales*, 492 F.3d 156, 160–61 (2d Cir. 2007) ("[Culpability] of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019) ("[W]here the prohibited result involves special circumstances as to which a *mens rea* requirement is imposed, the solicitor cannot be said to have intended that result unless he personally had this added mental state.") (citing *Porter v. State*, 455 Md. 220, 166 A.3d 1044 (2017) (because murder requires proof of malice, solicitation of murder also requires proof of malice)).

[3] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201 (culpability required defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201 ("'Culpability required' includes . . . Any other aspect of culpability specifically required for an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, solicitation liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203. *See* RCC § 22E-201 (voluntariness requirement also part of culpability required for an offense).

[4] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the command, request, or efforts at persuasion (hereinafter, "request") at issue in all solicitation prosecutions, and which is discussed later in this commentary..

Generally speaking, solicitation liability entails proof that the accused: (1) "intended," by his or her request, to have the solicitee engage in conduct planned to culminate in an offense; and (2) "intended," through that request, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.,* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The*

specified in paragraph (a)(1) applies to the elements in paragraph (a)(2) and there is no (additional) culpable mental state required for the fact that the actor acts with the culpability required for the offense.

Subsection (a) establishes the nature of the act required for general solicitation liability.[5] In so doing, it recognizes three types of attempted influence, each of which may

Model Penal Code and Beyond, 35 STAN. L. REV. 681, 754–55 (1983); *State v. Garrison*, 40 S.W.3d 426, 432-34 (Tenn. 2000) (discussing dual intent requirements of solicitation). Here and in the following examples "intent" is used in the way common in many jurisdictions, equivalent to the RCC term "purpose."

To illustrate how these "dual intent" requirements fit together, consider the following scenario. Police receive a report that a janitor working at a District of Columbia government building, S, intends to murder a plain-clothes police officer, V, who is standing immediately outside the building's uncovered loading dock area conducting investigative work. According to this tip, S's plan is to have a large object thrown off the back end of the thirtieth floor balcony, thereby killing V upon impact. Soon thereafter, two officers arrive at the thirtieth floor balcony, at which point they hear S instruct a more junior janitor, X, to drop an old, out-of-use television off the right side of the balcony. Given that V is, in fact, located immediately below the right side of the balcony, the police immediately intercede, thereby preventing X from engaging in conduct that would result in death to V. If S later finds himself in D.C. Superior Court charged with soliciting the murder of a police officer, can he be convicted? The answer to this question depends upon whether S's state of mind fulfills both of the dual intent requirements governing general solicitation liability.

For example, if S had misspoken, and meant to instruct X to drop the old, out-of-use television off the *left* (rather than *right*) side of the balcony, below which there is an unaccompanied trash receptacle, then neither requirement is met: S did not intentionally request that X engage in conduct, which, if carried out, would have resulted in V's death; nor did S act with the intent that, through his request, anyone be killed, let alone a police officer.

Alternatively, if S did mean to ask X to drop the TV off the right side of the balcony, but was completely unaware that V (or any other person) was located below the drop point (e.g., because S believed another unaccompanied trash receptacle was located below the right side, too), then the first requirement is met: S intentionally requested that X engage in conduct, which, if carried out, would have resulted in V's death. But the second requirement is not met: S did not intend, through his request, to cause the death of anyone, let alone a police officer.

Lastly, if S had asked X to drop the TV off the right side of the balcony, while aware of V's presence below, in order to seek retribution against the same officer responsible for disrupting a drug conspiracy S was involved with years ago, then S fulfills both requirements: S intentionally requested that X engage in conduct, which, if carried out, would have resulted in V's death; and S also intended, through that request, to actually kill a police officer. (Note: if S intended to kill V but lacked awareness that V was a police officer, then the second intent requirement would not be met—although S intended to kill someone, S did not intend to kill a *police officer*.)

[5] Over the years, "[c]ourts, legislatures and commentators have utilized a great variety of words to describe the required acts for solicitation." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019); *see, e.g.,* Model Penal Code § 5.02, cmt. at 372 n.25 (collecting different statutory formulations). That said, the essence of the crime is "trying to persuade another to commit a crime that the solicitor desires and intends to have committed." Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 29 (1989); *see* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019) ("[T]he essence of the crime of solicitation is asking a person to commit a crime"); *People v. Nelson*, 240 Cal. App. 4th 488, 496 (2015) ("The essence of criminal solicitation is an attempt to induce another to commit a criminal offense.").

satisfy the RCC criminal solicitation statute.[6] The first, and strongest, is a "command,"[7] which implies an order or direction, commonly by one with some authority over the other.[8] Less strong, but just as direct, is a "request,"[9] which occurs when one person explicitly asks another person to engage in specified conduct.[10] The third form of influence contemplated in paragraph (a)(1) is "tr[ying] to persuade,"[11] which covers less direct means of communication.[12]

Importantly, none of these forms of attempted influence entail proof that the solicitee *actually* agreed, consented, or was persuaded to engage in the solicited conduct,[13]

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[6] These varying forms of influence may, in turn, be communicated directly or by an intermediary, through words or gestures, via threats or promises, and occur either before or at the actual time the crime is being committed. It is therefore, immaterial, for purposes of solicitation liability, whether the rational or emotional support is communicated orally, in writing, or through other means of expression. *E,g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019) (well-established that "solicitation c[an] be committed by speech, writing, or nonverbal conduct); *State v. Johnson*, 202 Or. App. 478, 483-84 (2005) (rejecting "the proposition that the state must produce the actual words used by the solicitor (or, for that matter, that words must be used)"). Nor is proof of a "quid pro quo" between the solicitor and the party solicited necessary. *E,g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019); *Johnson*, 202 Or. App. at 483-84 (2005) (rejecting "the proposition that the state must prove that the solicitor offered the solicitee a quid pro quo").

[7] *See, e.g.,* Model Penal Code § 5.02(1) (basing solicitation liability on a "command[]"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(c) n.88 (3d ed. Westlaw 2019) (collecting statutes in accordance).

[8] Such as, for example, where S, the mob boss, orders X, the loyal lieutenant, to kill V for his failure to make good on an outstanding debt owed to S. Note that "command" does not entail any actual influence on the recipient, so it would be immaterial for purposes of section 302 that X declined to follow through on the order to kill V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[9] *See, e.g.,* Model Penal Code § 5.02(1) (basing solicitation liability on a "request[]"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(c) n.88 (3d ed. Westlaw 2019) (collecting statutes in accordance).

[10] Such as, for example, where S, the loyal lieutenant, asks X, the mob boss, to order a hit on V for his failure to make good on an outstanding debt to S. Note that "request" does not entail any actual influence on the recipient, so it would be immaterial for purposes of the RCC criminal solicitation statute that X declined to grant S's request to kill V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[11] *See, e.g.,* Colo. Rev. Stat. § 18-2-301(1) (basing solicitation liability on an "attempt[] to persuade another person"); *State v. Jensen*, 164 Wash. 2d 943, 951 (2008) ([T]he *actus reus* . . . solicitation is an *attempt* to persuade another to commit a specific offense."); 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 371 (1970) (attempt to persuade formulation should avoid liability in "equivocal situations too close to casual remarks or even to free speech"); *compare* Model Penal Code § 5.02(1) (basing solicitation liability on "encourage[ment]"); Model Penal Code § 5.02(1), cmt. at 372 ("'Encourages' is the most expansive of these terms and encompasses actors who bolster the fortitude of those who have already decided to commit crimes, so long as the encouragement is done with the requisite criminal purpose."); *id.* at 372 n.25 (collecting statutes in support of both formulations).

[12] Such as, for example, where S, the cousin of mob boss X, sends X a letter with a comprehensive and detailed list of reasons of why X should order a hit on V, but which does not expressly request or command X to do so. Note that "trying to persuade" (in contrast to "persuades") does not entail any actual influence on the recipient, so it would be immaterial for purposes of the RCC criminal solicitation statute that X was not, in fact, persuaded by S's case for killing V. *See also* RCC § 22E-302(c) (addressing uncommunicated solicitations).

[13] It is therefore immaterial under the RCC criminal solicitation statute that the solicitee rejects the solicitation, or verbally agrees but does not actually intend to commit the crime—such as, for example, where the solicitee is an undercover police officer feigning intent. *E.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012). This is to be contrasted with the bilateral understanding of conspiracy reflected in the RCC conspiracy statute, which requires proof that the defendant "and at least one other person" actually agree to commit a crime. RCC § 22E-303. For example, if S asks X to engage in or aid the planning or commission of criminal

let alone that any of the relevant parties (i.e. solicitor or solicitee) engaged in an overt act (or any other conduct) in furtherance of the solicitation.[14] Rather, under the RCC criminal solicitation statute, a solicitation is complete the moment the request, command, or efforts at persuasion has been expressed by the defendant.

Subsection (a) also addresses three fundamental issues concerning the scope and applicability of general solicitation liability. The first relates to the relationship between solicitation and complicity, namely, whether soliciting another person to act as an accomplice provides the basis for general solicitation liability. Subsection (a) establishes, in relevant part, that general solicitation liability is appropriate under the RCC where the defendant asks another person to "aid the planning or commission" of criminal conduct.[15] This alternative formulation clarifies that solicitations to assist with or otherwise facilitate the planning or commission of a crime, no less than solicitations to directly engage in the requisite criminal conduct, provide an adequate basis for general solicitation liability, provided that the other requirements of the RCC criminal solicitation statute are met.[16]

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conduct, and X agrees, then a criminal conspiracy has been formed under the RCC conspiracy statute. But if X doesn't agree, then there's no conspiracy between S and X under the RCC's bilateral approach. However, S is guilty of solicitation under the RCC criminal solicitation statute. *Compare Allen v. State*, 91 Md.App. 705, 605 A.2d 960 (1992) (observing that a "solicitee's acquiescence to a solicitation, even if lawfully made by an undercover agent, does not make the *solicitee* guilty of solicitation").

[14] *See, e.g., People v. Cheathem*, 658 N.Y.S.2d 84, 85 (1997); *People v. Burt*, 288 P.2d 503, 505 (Cal. 1955). For this reason, a criminal solicitation is "the most inchoate of the anticipatory offenses." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019); *see, e.g., State v. Jensen*, 195 P.3d 512, 517 (Wash. 2008); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015); Model Penal Code § 5.02 cmt. at 365-66. The following analysis is illustrative:

> Assume that *A* wishes to have his enemy *B* killed, and thus—perhaps because he lacks the nerve to do the deed himself—*A* asks *C* to kill *B*. If *C* acts upon *A*'s request and fatally shoots *B,* then both *A* and *C* are guilty of murder. If, again, *C* proceeds with the plan to kill *B*, but he is unsuccessful, then both *A* and *C* are guilty of attempted murder. If *C* agrees to *A*'s plan to kill *B* but the killing is not accomplished or even attempted, *A* and *C* are nonetheless guilty of the crime of conspiracy. But what if *C* immediately rejects *A*'s homicidal scheme, so that there is never even any agreement between *A* and *C* with respect to the intended crime? Quite obviously, *C* has committed no crime at all. *A,* however, because of his bad state of mind in intending that *B* be killed and his bad conduct in importuning *C* to do the killing, is guilty of the crime of solicitation.

WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019).

[15] *See, e.g.,* Model Penal Code § 5.02(1)("A person is guilty of solicitation to commit a crime if . . . he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or *would establish his complicity in its commission or attempted commission*.") (italics added);" WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019) (It is "sufficient that A requested B to get involved in the scheme to kill C in any way which would establish B's complicity in the killing of C were that to occur.").

[16] In this sense, solicitation liability runs parallel with conspiracy liability under RCC § 22E-303, which similarly criminalizes agreements to aid in the planning or commission of a crime. *See also* Model Penal Code § 5.03(1)(b) (conspiracy liability where one person "agrees to *aid* [an]other person or persons in the planning or commission of [a] crime") (italics added); *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he *adopt the goal of furthering or facilitating the criminal endeavor*. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.") (italics added).

The second issue focuses on the relationship between the defendant's state of mind and the conduct being solicited.[17] Subsection (a) establishes, in relevant part, that general solicitation liability only applies to those who act with the purpose of bringing about conduct planned to culminate in an offense.[18] This "purposive attitude" also constitutes the foundation of the culpability required both accomplice liability and the general inchoate crime of conspiracy.[19] It can be said to exist when a person, through his or her request, *consciously desires* to facilitate or promote conduct planned to culminate in an offense.[20]

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[17] The nature of this relationship "is crucial to the resolution of the difficult problems presented when a charge of [solicitation or conspiracy] is leveled against a person whose relationship to a criminal plan is essentially peripheral":

> Typical is the case of the person who sells sugar to the producers of illicit whiskey. He may have little interest in the success of the distilling operation and be motivated mainly by the desire to make the normal profit from an otherwise lawful sale. To be criminally liable, of course, he must at least have knowledge of the use to which the materials are being put, but the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end. In this case conflicting interests are involved: that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes.

Model Penal Code § 5.03, cmt. at 404.

[18] *See, e.g.,* Model Penal Code § 5.02(1) (solicitation liability entails proof of must "the purpose of promoting or facilitating the commission of the crime"); *Id.*, Explanatory Note ("A purpose to promote or facilitate the commission of a crime is required, together with a command, encouragement or request to another person that he engage in specific conduct that would constitute the crime . . . "); ." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019) ("Virtually all of the more recently enacted solicitation statutes" appear to have endorsed the position that a conscious desire to promote or facilitate criminal conduct is necessary).

This purpose requirement *does not* extend to whether the solicited conduct is, in fact, illegal or otherwise constitutes an offense. *See also* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.2(c) (3d ed. Westlaw 2019) (accomplice cannot "escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[19] *See, e.g., United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.) ("[Every definition of complicity requires that the defendant in] some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, 'abet,' carry an implication of *purposive attitude* towards it.") (italics added); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940) (Hand, J.) ("There are indeed instances . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; *but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.") (italics added); Model Penal Code § 5.02 cmt. at 371 (noting that the same purpose requirement governing complicity and conspiracy is also applicable to solicitation).

[20] *See generally* RCC § 22E-206 (purposely defined). The following scenario is illustrative. X is considering whether to rob a bank on his own, which would require a fast car and a small firearm, both of which X lacks. X relays his conundrum over the phone to his friend, S, who happens to own a vehicle and firearm of this nature. Having been informed of this, S proposes the following arrangement: S will lend X his car and gun in return for a ten percent stake in the profits from the bank robbery. X is initially uncertain about whether the robbery or arrangement is good idea, but S makes a very persuasive case for both positions. X asks for a few days to think about S's proposal, but soon thereafter the police—who had tapped A's phone, and thus

The corollary to this purpose requirement is that general solicitation liability is not supported under the RCC criminal solicitation statute where a defendant's primary motive in making a request is to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[21] And this is so even if the defendant knew that his or her solicitation was likely to facilitate or promote a criminal scheme.[22]

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overheard the conversation—arrest both S and X. On these facts, S may be held liable for solicitation because S, through his efforts at persuasion, consciously desired to facilitate and promote specific conduct, which, if carried out, would have constituted robbery.

That a solicitor must have the purpose to facilitate or promote conduct planned to culminate in an offense does not preclude convictions for knowledge-based theories of liability concerning the result elements of the target offense. The following example involving environmental activists S and X is illustrative. S asks X to help him blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. S is practically certain that V will die from the blast, though S would very much prefer that V not be injured. The police intercede soon after S communicates the request, thereby saving V's life. On these facts, S may be convicted of solicitation to commit (knowing) murder, premised on the fact that S's request was accompanied by: (1) a *desire* for X to aid conduct, which, if carried out, would have culminated in murder; and (2) S's *awareness as to a practical certainty* that such conduct would result in V's death. *See also* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 (1983) ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 926 (1959)) ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see also* Model Penal Code § 5.03 cmt. at 408 ("[I]t would not be sufficient [for conspiracy], as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it.").

[21] *See, e.g., Falcone*, 109 F.2d at 581 (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 353 (1985) (absent a purpose requirement, the criminal law would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 5.03 cmt. at 406 (observing that "the complicity provisions of the Code" require "a purpose to advance the criminal end," and deeming "the case" for this resolution to be an "even stronger one" in the context of conspiracy, such that "[a] conspiracy does not exist [under the Code] if a provider of goods or services is aware of, but fails to share, another person's criminal purpose").

[22] The commentary accompanying Model Penal Code § 5.02 states, in relevant part:

> It is not enough for a person to be aware that his words may lead to a criminal act or even to be quite sure they will do so; it must be the actor's purpose that the crime be committed. The language of the section may bar conviction even in some situations in which an actor does hope that his words will lead to commission of a crime. Suppose a young man seeks out a pacifist and asks for advice whether he should violate his registration obligation under the selective service laws. This particular pacifist believes all cooperation with the selective service system to be immoral and he so advises the young man. Although he may hope that the young man will refuse to register, his honest response to a request for advice might not be thought to constitute a purpose of promoting or facilitating commission of the offense. If he were tried it would be a question of fact whether his advice evidenced purpose.

Model Penal Code § 5.02 cmt. at 371.

Neither awareness of, nor indifference towards, another person's criminal plans are sufficient to satisfy the purpose requirement incorporated into subsection (a).[23]

The third issue is the relevance of impossibility to general solicitation liability—i.e. the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant.[24] Subsection (a) establishes, in relevant part, that

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[23] To illustrate, consider the following modified version of the scenario presented *supra* note 21. S is in dire need of money to pay for his sick child's medical bills, so he decides to sell his expensive sports car. S begins calling friends to see if anyone has interest in purchasing it, which would save S the time of listing it. S subsequently calls X. At the start of the conversation, X tells S that he is considering robbing a bank on his own, and will need a fast car to carry out the plan. S says that he thinks the envisioned robbery would be a terrible idea, but that, as it turns out, he was actually calling X to see if X had any interest in purchasing S's sports car, which would likely serve as an excellent get-away vehicle. S offers to sell X the car for market value, and X tentatively accepts subject to a later inspection. Soon thereafter, however, the police—who had tapped X's phone, and thus overheard the proposal—arrest both S and X. On these facts, S cannot be held liable for soliciting to commit robbery because, *inter alia*, A did not consciously desire to facilitate or promote X's criminal conduct. Instead, S's purpose was to raise money for his child's medical bills, and to save himself the hassle of having to list and sell the vehicle on his own. That S knew the sale of his car to X would facilitate the bank robbery, and was arguably indifferent as to X's criminal conduct, would not support liability under the RCC criminal solicitation statute.

[24] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of solicitation liability. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012). In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e. these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises where the object of the solicitation cannot be consummated because of circumstances unknown to the solicitor or beyond his or her control. The following situations are illustrative: (1) S asks X to pickpocket V's jacket, believing it to contain valuable items, when it is actually empty; and (2) S asks X to shoot into the bedroom where V customarily sleeps, believing V to be there, when V is, in fact, on vacation.

The second category of impossibility is *pure legal impossibility*, which arises where the solicitor acts under a mistaken belief that the law criminalizes his or her intended objective (e.g., solicitation of a lawful act). The following situation is illustrative. S, a 50 year-old male, asks X to arrange a sexual encounter with Z, a 20 year-old woman. S knows X is 20; however, X also believes that the age of consent is 21—when, in fact, it is 18. Therefore, X believes himself to be soliciting aid for a statutory rape.

The third category is *hybrid impossibility*, which arises where the object of the solicitation constitutes a crime, but commission of the target offense is impossible due to a factual mistake regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense. The following situations are illustrative: (1) S asks X to purchase property on the black market, believing it to be stolen, when, in fact, the property is part of a sting operation; and (2) S asks X to arrange consensual sexual relations with V, believing V to be a nine year-old child, when, in fact, V is an undercover police officer posing as a young child.

The fourth category of impossibility is *inherent impossibility*, which arises where one person solicits another to commit a crime by "employing means which a reasonable man would view as totally inappropriate to the objective sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a)(4) (3d ed. Westlaw 2019). The following situations are illustrative: (1) S asks X to kill V via incantation or voodoo; (2) S asks X to perform sex acts with V, a manikin that S believes to be a 9 year-old child. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility is that the defendant's "actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

It should be noted that the law of impossibility is relatively underdeveloped in the context of solicitation liability. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019). Courts rarely seem to publish opinions addressing impossibility issues outside the attempt context, and, even when they do, those

solicitations to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general solicitation liability.[25] This reference to attempts imports the broad abolition of impossibility claims employed in the RCC's general attempt provision into the solicitation context.[26] Under this approach, it is generally immaterial that the proposed criminal scheme could never have succeeded under the circumstances.[27] So long as the solicitor sought to bring about conduct that would have culminated in the target offense if "the situation was as [solicitor] perceived it" then solicitation liability may attach,[28]

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opinions shy away from the "lengthy explorations of the distinction between [different kinds of] impossibility" that characterize attempt jurisprudence. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019). Rather, courts are more likely to generally state—as the U.S. Supreme Court recently observed in *United States v. Williams*—that "impossibility of completing the crime because the facts were not as the defendant believed is not a defense [to solicitation]" and move on. *United States v. Williams*, 553 U.S. 285, 300 (2008).

[25] *See, e.g.,* Model Penal Code § 5.02(1) (solicitation liability where one person asks "another person to engage in specific conduct that would constitute such crime or *an attempt to commit such crime*") (italics added). Here's how the drafters of the Model Penal Code explain the significance of this language:

> It ordinarily should not be necessary to charge an actor with soliciting another to attempt to commit a crime, since a rational solicitation would seek not an unsuccessful effort but the completed crime; the charge, therefore, should be one of solicitation to commit the completed crime. But in some cases the actor may solicit conduct that he and the party solicited believe would constitute the completed crime, but that, for reasons discussed in connection with the defense of impossibility in attempts, does not in fact constitute the crime. Such conduct by the person solicited would constitute an attempt under Section 5.01, and the actor would therefore be liable under Section 5.02 for having solicited conduct that would constitute an attempt if performed.

Model Penal Code § 5.02, cmt. at 373-74; *see also* Model Penal Code § 5.03 cmt. at 421 ("[If an] actor agrees that he or another will engage in conduct that he believes to constitute the elements of the offense, but that fortuitously does not in fact involve those elements, he would under this section be guilty of an agreement to attempt the offense, since attempt liability could be made out under [the MPC's general attempt provision] if the contemplated conduct had occurred.").

[26] Under RCC § 22E-301(a)(4)(B), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing the offense if the situation was as the actor perceived it." Paragraph (a)(3) further requires that the person's conduct must have been "reasonably adapted to completion of that offense."

[27] *See* RCC § 22E-301(a), Explanatory Note.

[28] RCC § 22E-301(a)(4)(B). Specifically, the subjective approach incorporated into RCC § 22E-302(a) renders pure factual and hybrid impossibility claims immaterial. For example, under the RCC it would not be a defense to solicitation to commit murder that: (1) the intended victim was already dead, provided that the solicitor mistakenly believed the person to be alive; or that (2) the murder weapon provided by the solicitor to the hit man was inoperable, provided that the solicitor mistakenly believed it be operable. Nor would it preclude liability for solicitation to commit murder under the RCC that: (1) the solicitee is *unable* to commit the target offense—such as, for example, when S sends a letter to a well-regarded hit man, X, soliciting the murder of V, only to discover that X is in a coma due to a near-fatal car accident; or that (2) the solicitee is *unwilling* to commit the target offense—such as, for example, when S asks X to commit a murder for hire, only to discover that X is an undercover officer merely posing as a willing participant in a criminal offense. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019) ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); *United States v. Devorkin*, 159 F.3d 465, 468 (9th Cir. 1998) ("It is not a defense" to solicitation that "the person solicited *could not commit the crime*, or . . . *would [not] have* committed the crime solicited.") (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019)).

provided that the requested course of conduct was at least "reasonably adapted" to commission of the target offense.[29]

Subsection (b) establishes the target offenses subject to general solicitation liability. It establishes that only an offense against persons as defined in Subtitle II of Title 22E, or a felony property offense as defined in Subtitle III of Title 22E, may provide the basis for general solicitation liability. Solicitations that involve other forms of prohibited conduct (e.g., prostitution) may be criminalized under specific provisions in the RCC. But the general inchoate crime of solicitation codified in the RCC criminal solicitation statute only

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In contrast, pure legal impossibility remains a viable theory of defense under the RCC. *See supra* note 25 (defining this category). However, this does not hinge on RCC § 22E-301(a)(4)(B), or any other provision in section 301. Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012); *see* Model Penal Code § 5.01 cmt. at 318 ("[If] the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after losses against the Washington Nationals, the Oriole Bird, the Baltimore Orioles mascot, and Phillie Phanatic, the Philadelphia Phillies mascot, together place a local District steak in the garbage, neither is guilty of committing any offense. Nor could the Oriole Bird be convicted of soliciting an imaginary offense for asking the Phillie Phanatic to place a District steak in the garbage, although the Oriole Bird honestly believed such conduct to be prohibited by the D.C. Code. *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations.").

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in paragraph (a)(2) of RCC § 22E-301.

[29] RCC § 22E-301.

Inherent impossibility is an issue in solicitation prosecutions where S asks X to commit an offense by "employing means which a reasonable man would view as totally inappropriate to the objective sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a)(4) (3d ed. Westlaw 2019). *See also* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999) (recognition of inherent impossibility defense to attempt most strongly supported by relevant case law, statutes, and commentary); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for a solicitation that "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under RCC § 22E-301, and, therefore, could constitute a (failure of proof) defense to solicitation liability under the RCC.

For example, the fact that the defendant in a solicitation to murder prosecution asked another person to kill the victim by pulling the trigger on a broken firearm that the defendant mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that the defendant in a solicitation to murder prosecution asked another person to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant to evaluating the reasonable adaptation standard—and ultimately preclude the attachment of solicitation liability under the RCC criminal solicitation statute. *See, e.g.,* Edwin R. Keedy*, Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 470 (1954) (where the defendant "invokes witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct "cannot constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result.") (collecting authorities).

applies to offenses against persons and felony property offenses in the RCC.[30] Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable

[30] That RCC § 22E-302 only applies to a limited set of offenses in contrast with RCC §§ 22E-301 and 303 of the RCC, which respectively criminalize attempts and conspiracies to commit *any* criminal offense. *See* RCC §§ 22E-301, 303.

This limitation on general solicitation liability generally corresponds with the District's prior general solicitation statute, which only applies to crimes of violence. *See Omnibus Public Safety Act of 2006*, 2006 DISTRICT OF COLUMBIA LAWS 16-306 (Act 16–482), as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610 ("Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both."). With the exception of the lowest gradation of burglary, the approach of the RCC criminal solicitation statute to apply to all offenses against persons and felony property offenses includes all the conduct under the current D.C. Code definition of a "crime of violence" under § 23-1331(4). The RCC criminal solicitation statute goes further, however, including liability for serious property offenses and an array of offenses against persons, many of which are quite serious (e.g. human trafficking). The limitation not to extend solicitation further, to all crimes, also respects the fact that solicitation is, given its status as the "most inchoate of the anticipatory offenses," a particularly "controversial offense." *E.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019) (quoting *State v. Jensen*, 164 Wash.2d 943, 195 P.3d 512 (2008); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012).

Some have argued, for example, that "a mere solicitation to commit a crime, not accompanied by agreement or action by the person solicited, presents no significant social danger." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(b) (3d ed. Westlaw 2019); *see* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 116(1989); ("By placing an independent actor between the potential crime and himself, the solicitor has both reduced the likelihood of success in the ultimate criminal object and manifested an unwillingness to commit the crime himself."). The "extremely inchoate nature of the crime" has also led others to question general solicitation liability on the basis that it essentially "punish[es] evil intent alone." Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 116 (1989); *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012) ("According to Glanville Williams, the purpose of the offense is to enable police to 'nip criminal tendencies in the bud.' In fact, however, his metaphor would be more accurate if he had stated that its purpose is to nip criminal tendencies at the stem."). And finally, even those who generally support expansive solicitation liability admit that the basic "risk[s] inherent in the punishment of almost all inchoate crimes"—namely the possibility "that false charges may readily be brought, either out of a misunderstanding as to what the defendant said or for purposes of harassment"—are even more pronounced in the solicitation context given that "the crime may be committed merely by speaking." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(b) (3d ed. Westlaw 2019; *see, e.g., People v. Lubow*, 29 N.Y.2d 58, 66, 272 N.E.2d 331 (1971) ("[T]here are dangers in the misinterpretation of innuendos or remarks which could be taken as invitations to commit sexual offenses."); 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 372 (1970) ("[E]ven for persons trained in the art of speech, words do not always perfectly express what is in a man's mind. Thus in cold print or even through misplaced emphasis, a rhetorical question may appear to be a solicitation. The erroneous omission of a word could turn an innocent statement into a criminal one.").

The controversial nature of solicitation liability is also reflected in national legal trends. Although the drafters of the Model Penal Code recommended criminalizing solicitations to commit "any offense" under section 5.02(1) of the MPC, "[t]he majority of jurisdictions only regard as criminal the solicitation of the more serious crimes." Commentary on Haw. Rev. Stat. Ann. § 705-510. More broadly, there remains considerable variation in American criminal codes concerning the scope and availability of general solicitation liability.

> Even in those jurisdictions with modern recodifications, it is not uncommon for there to be no statute making solicitation a crime, [and in] those states with solicitation statutes, there is considerable variation in their coverage. Some extend to the solicitation of all crimes, some only the solicitation of felonies, particular classes of felonies, or all felonies plus particular classes of misdemeanors, and one only the solicitation of certain specified

mental state requirement as to a given element, here whether the conduct solicited actually qualifies as an offense against persons or felony property offense under the RCC.

Subsection (c) provides additional clarity concerning the culpable mental state requirement governing a criminal solicitation as it relates to the results and circumstances of the target offense.[31] Whereas subsection (a) generally clarifies that a solicitation conviction entails proof that the person acted with a level of culpability that is no less demanding than that required by the target offense, subsection (c) specifically establishes that the person must: (1) "[i]ntend to cause all result elements required for that offense"[32];

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offenses.

WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(a) (3d ed. Westlaw 2019; *see id.* ("This suggests, as does language in some of the reported cases, that there is not a uniformity of opinion on the necessity of declaring criminal the soliciting of others to commit offenses.").

Limiting general solicitation liability to crimes of violence (as was previously the case under District law) as well as felony property offenses and all offenses against persons sensibly reconciles these policy considerations and diverse national legal trends.

[31] It should be noted that "[c]ase law is almost nonexistent" on the culpable mental state issues addressed by subsection (b), while their treatment by modern criminal statutes is almost always unclear. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1166 (1997). This is due, at least in part, to the fact that the Model Penal Code's general solicitation provision "deliberately le[aves] open" the relevant culpability issues addressed by subsection (b) for judicial resolution. Model Penal Code § 5.02(1), cmt. at 371 n.23. As the Model Penal Code commentary highlights:

> Note should be made of a question that can arise as to the need for the defendant to have contemplated all of the elements of the crime that he solicits. If, for example, strict liability or negligence will suffice for a circumstance element of the offense being solicited, will the same culpability on the part of the defendant suffice for his conviction of solicitation, or must he actually know of the existence of the circumstance? The point arises also in charges of conspiracy, where it is treated in some detail. [The Model Penal Code does not resolve these issues in either context.]

Id.

In the absence of much legal authority on these issues in the context of solicitation, the best indicator of national legal trends is the more ample legal authority on these issues in the context of conspiracy, which is a very similar form of general inchoate liability. *See, e.g.,* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 210 (1981) ("Because of its similarities to conspiracy, solicitation should require the same mental state as conspiracy."); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015) (criminal solicitation constitutes an "attempted conspiracy"). That said, legal authority on complicity is also relevant given that solicitation provides one of two bases (abetting) for holding someone criminally responsible as an accomplice. *E.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(b) (3d ed. Westlaw 2019. Some of these legal authorities are discussed elsewhere in this commentary; however, a more extensive overview and analysis can be found in the Explanatory Note accompanying RCC §§ 22E-303 and 210.

[32] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(b) (3d ed. Westlaw 2019 ("[A]s to those crimes which are defined in terms of certain prohibited results, it is necessary that the solicitor intend to achieve that result through the participation of another. If he does not intend such a result, then the crime has not been solicited, and this is true even though the person solicited will have committed the crime if he proceeds with the requested conduct and thereby causes the prohibited result."); *see generally, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012) ("A person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offense—he intentionally invites, requests, commands, hires, or encourages another to commit a crime—with the specific intent that the other person consummate the solicited crime."); *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007) ("[T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); *see also, e.g.,* RCC § 22E-303(b) (applying same culpability principle general conspiracy liability WAYNE R.

and (2) "[i]ntend for all circumstance elements required for that offense to exist."[33] In effect, subsection (c) incorporates dual principles of culpable mental state elevation[34] applicable whenever the target offense is comprised of a result or circumstance element that may be satisfied by proof of a non-intentional mental state (i.e. recklessness or negligence), or none at all (i.e. strict liability).[35]

LAFAVE, 2 SUBST. CRIM. L. § 12.2(c) (3d ed. Westlaw 2019) ("[T]here is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result."); *State v. Donohue*, 150 N.H. 180, 184, 834 A.2d 253, 256 (2003) (deeming this position to be well-established, and collecting authorities in accordance).

To illustrate, suppose that S asks X to set fire to an occupied structure in order to claim the insurance proceeds. If the resulting fire kills occupants, they may be convicted of murder on the ground that the deaths, although unintentional, were recklessly caused. S is not guilty of solicitation to commit murder, however, because he only intended to destroy the building, rather than the death of another person. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.05(B) (6th ed. 2012) (providing similar illustration in the context of conspiracy liability) (citing *State v. Beccia*, 505 A.2d 683, 684 (Conn. 1986) (holding that conspiracy to commit reckless arson is not a cognizable offense)); *see, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019 ("[I]f B were to engage in criminally negligent conduct which caused the death of C, then B would be guilty of manslaughter; but it would not be a criminal solicitation to commit murder or manslaughter for A to request B to engage in such conduct unless A did so for the purpose of causing C's death.").

[33] Commentary on Haw. Rev. Stat. Ann. §§ 705-510, 520 ("[The general solicitation statute] makes clear that, with respect to the culpability of the defendant, the defendant must act with the intent to promote or facilitate the commission of a crime," which language in the conspiracy context "requires an awareness on the part of the conspirator that the circumstances exist"); *see generally, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012) ("A person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offense—he intentionally invites, requests, commands, hires, or encourages another to commit a crime—with the specific intent that the other person consummate the solicited crime."); *Mizrahi*, 492 F.3d at 156 ("[T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); *see also, e.g.,* RCC §§ 22E-210, 303 (applying same culpability principle to accomplice liability and general conspiracy liability); *Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime . . . . That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense.") (italics added); *State v. Pond*, 315 Conn. 451, 484, 108 A.3d 1083, 1102 (2015) (deeming intent elevation as to circumstances to be well-established in the context of conspiracy liability, and collecting authorities in accordance).

To illustrate how this principle operates in the context of a strict liability crime, consider the following scenario involving two twenty one year-old male college students, S and X. One evening, X tells S that he met a girl, V, at a sorority party who, after being shown a picture of S, expressed interest in having sexual intercourse. In response, S asks X if he'd be willing to call the girl over, and lend S his college dorm to facilitate the sexual engagement. Both S and X reasonably believe that V is a 20 year-old college student; however, V is actually a fourteen year-old minor visiting her older (of age) sister. If S actually has sex with V, and is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, S can be convicted notwithstanding his mistake of fact. However, if S does not have sex with her, and is instead prosecuted for soliciting X to aid in S's commission of statutory rape, the same mistake of fact would exonerate S under subsection (b) notwithstanding the strict liability nature of the target offense. Although S purposely asked X to aid S in his sexual rendezvous with V (a minor), S lacked the *intent* for X to aid sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

[34] Note that for those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance element, subsection (b) does not elevate the applicable culpable mental state for a solicitation charge.

[35] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging solicitations to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a solicitation conviction for such offenses,

To satisfy the first principle, codified in paragraph (c)(1), the government must prove that the defendant's purposeful solicitation was accompanied by a *practically certain belief* that the requested course of conduct would cause the result element(s) required by the target offense, or, alternatively, by a *conscious desire* for that course of conduct to cause the result(s). It is not necessary to prove that the actor caused the required result elements, only that the actor believed to a practical certainty that he or she would cause the required result elements. Similarly, to satisfy the second principle, codified in paragraph (c)(2), the government must prove that the defendant's purposeful solicitation was accompanied by a *practically certain belief* that the circumstance element(s) incorporated into the target offense exist, or, alternatively, by a *conscious desire* for the requisite circumstance(s) to exist.[36] It is not necessary to prove that all required circumstance elements actually existed, only that the actor believed to a practical certainty that they did.

Subsection (d) addresses the import of an uncommunicated solicitation, which arises when the planned recipient of the defendant's command, request, or efforts at persuasion never receives the message due to external factors (e.g., police interference or carrier malfeasance).[37] Under subsection (d), the fact that the message is never received is generally "immaterial" for purposes of solicitation liability.[38] There is, however, one important limitation placed on this principle: the person must have "done everything he or she plans to do to transmit the message."[39] The latter proviso requires proof that, where an

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proof that the solicitor acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

[36] When formulating jury instructions for a solicitation to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance element), the term "intent," as defined in RCC § 22E-206, should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206, Explanatory Note.

[37] Note that a solicitor may fail to communicate with another person because the planned recipient never receives the message—e.g., the police intercept a murder for hire letter already placed in the mail by the defendant. Or, alternatively, a solicitor may fail to communicate with the planned recipient because the message is never sent—e.g., the police intercept the solicitor holding a murder for hire letter while making his way to the post office. In the first situation, the person has engaged in what might be considered a "complete attempt" at communication—that is, the person failed to achieve his criminal objective notwithstanding the fact that he was able to carry out the entirety of his criminal plans (i.e. placing the letter in the mail). In the second situation, in contrast, the person has only engaged in what might be considered an "incomplete attempt" at communication—that is, the person was unable to carry out the entirety of his criminal plans due to external interference. Subsection (c) authorizes solicitation liability in the first, but not the second, situation.

[38] *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(c) (3d ed. Westlaw 2019) ("What if the solicitor's message never reaches the person intended to be solicited, as where an intermediary fails to pass on the communication or the solicitor's letter is intercepted before it reaches the addressee? The act is nonetheless criminal . . . .").

[39] *See, e.g.,* Model Penal Code § 5.02(2) ("It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication."). In support of this approach, the drafters of the Model Penal Code argue: that:

> [T]he last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground. Conduct falling short of the last act should be excluded because it is too remote from the completed crime to manifest sufficient firmness of purpose by the actor. The crucial manifestation of dangerousness lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether the message was actually received. Liability

uncommunicated solicitation is at issue, the defendant engaged in the last proximate act necessary to transmit the message.[40]

Subsection (e) establishes the penalties for criminal solicitations. Subsection (e) states the default rule governing the punishment of criminal solicitations under the RCC: a fifty percent decrease in the maximum term of imprisonment and fine applicable to the target offense.[41] Subsection (e) also specifies that the maximum penalty for solicitation

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should attach, therefore, even though the message is not received by the contemplated recipient, and should also attach even though further conduct might be required on the solicitor's part before the party solicited could proceed to the crime.

Model Penal Code § 5.02, cmt. at 381; *see* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(c) (3d ed. Westlaw 2019) ("Liability properly attaches under these circumstances, as the solicitor has manifested his dangerousness and should not escape punishment because of a fortuitous event beyond his control.").

The Model Penal Code approach to uncommunicated solicitations has been adopted by various state codes. *See, e.g.,* Haw. Rev. Stat. § 705-510; Utah Code Ann. §§ 76-4-203. However, there are also numerous jurisdictions that, "while not specifically addressing the uncommunicated solicitation situation, might also permit a conviction in such circumstances . . . because the solicitation statute itself includes, in the alternative, the defendant's "attempt" to [solicit]." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1(c) n.98 (3d ed. Westlaw 2019) (collecting statutes and case law); *see, e.g.,* N.Y. Penal Law § 100.05 (solicitation liability where a person "solicits, requests, commands, importunes or *otherwise attempts to cause such other person to engage in such conduct*") (italics added); *People v. Lubow*, 29 N.Y.2d 58, 62, 272 N.E.2d 331 (1971) (italicized language in NY statute "would seem literally to embrace as an attempt an undelivered letter or message initiated with the necessary intent.").

[40] Consistent with this principle of liability, a solicitation conviction would be appropriate where: (1) S mails a written request for murder to X, but where the letter is then lost by the mail carrier (and thereafter handed over to the police) before A ever has an opportunity to read it; and where (2) S places a written request for murder to X in the mail, but where the letter is then immediately intercepted by the police before X ever has an opportunity to read it. In both situations, solicitation liability is supported by subsection (c) because S has done everything he plans to do to transmit the message.

If, in contrast, S, intending to mail a written request for murder to X, is arrested by the police *on his way to the post office* with the letter in hand, subsection (c) would not support liability in light of the fact that S has not engaged in the last proximate act necessary to effect such communication (e.g., placing the letter in the mail).

[41] *See, e.g.,* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 305 (1994) ("Adhering to an objective view of grading, a majority of jurisdictions reduce the grade of inchoate conduct below that of the corresponding substantive offense."). This penalty reduction is to be contrasted with the Model Penal Code, which grades most criminal solicitations as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[A] solicitation . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The (original) Model Penal Code's equalization of solicitation penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *See, e.g.,* Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why, "[i]n the United States, three-quarters of the jurisdictions reject the notion of grading inchoate offenses the same as the completed offense." Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 320 (1994) ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to.").

should be decreased by 50% *after* application of any penalty enhancements to the target offense.

Subsection (f) cross-references relevant definitions.

The RCC criminal solicitation statute has been drafted in light of, and should be construed in accordance with, prevailing free speech principles. Given the centrality of speech to encouragement, solicitation liability directly implicates a criminal defendant's First Amendment rights.[42] And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[43] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[44] The RCC respects this distinction by requiring that the defendant solicit another person to engage in "*specific* conduct" constituting an offense under subsection (a).[45] To meet this requirement, it is not necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. At the very least, though, it must be proven that the defendant's communication, when viewed in the context of the knowledge and position of the planned recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[46]

Relation to Current District Law. The RCC criminal solicitation statute clarifies, improves the proportionality of, and fill in gaps in the District law of criminal solicitations.

The District's general solicitation statute is codified by D.C. Code § 22-2107.[47] Subsection (a) of the current statute broadly prohibits "soliciting a murder," whether or not

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[42] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012) (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

[43] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949)).

[44] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

[45] *See, e.g.,* Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .") (italics added). This is consistent with accomplice liability under section 210, which similarly employs a "specific conduct" standard where complicity is based on encouragement. RCC § 22E-210(a)(2) ("Purposely encourages another person to engage in specific conduct constituting that offense."); *see, e.g.,* Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if," *inter alia*, he or she "*solicits* such other person to commit it[.]") (italics added).

[46] *E.g.,* Model Penal Code § 5.02 cmt. at 376; WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (3d ed. Westlaw 2019). So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy the RCC criminal solicitation statute. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to "go out and revolt." *State v. Johnson*, 202 Or. App. 478, 483 (2005); *see generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

[47] Enacted as part of the *Omnibus Public Safety Act of 2006*, the relevant provisions reads:

a murder actually "occurs," and is subject to a 20-year statutory maximum.[48] Likewise, subsection (b) of the current statute broadly prohibits "soliciting a crime of violence," whether or not that crime of violence actually "occurs," and is subject to a 10-year statutory maximum.[49]

Aside from these general prohibitions and penalties, D.C. Code § 22-2107 provides no further information concerning the contours of general solicitation liability under District law. Nor, for that matter, does the legislative history underling these code provisions, which is essentially non-existent.[50] And the same is also true of DCCA case law, which, as the commentary to the District's criminal jury instructions observes, does not appear to contain a single reported decision "involving this statute."[51]

The D.C. Code also contains a variety of more narrowly tailored solicitation statutes, which individually provide for solicitation liability in particular contexts by incorporating the term "solicits" as an element of the offense. However, these kinds of context-specific solicitation statutes provide little, if any, clarity on the contours of general solicitation liability under current District law.

For example, the District's contributing to the delinquency of a minor offense, D.C. Code § 22-811, prohibits, among other acts, "an adult, being 4 or more years older than a minor" from "solicit[ing]" that minor to commit a crime.[52] Likewise, D.C. Code § 22-2701

> (a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine not more than the amount set forth in § 22-3571.01, or both.
>
> (b) Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.

2006 DISTRICT OF COLUMBIA LAWS 16-306 (Act 16–482), as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610.

[48] *Id.*

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

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

[50] *See generally* COUNCIL OF THE DISTRICT OF COLUMBIA, *Judiciary Committee Report on Bill 16-247, "Omnibus Public Safety Act of 2006"* (April 28, 2006).

[51] Commentary on D.C. Crim. Jur. Instr. § 4.500.

[52] *See also* D.C. Code § 22-3010(b)(1) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts . . . to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . .")

makes it "unlawful for any person to . . . solicit for prostitution," while D.C. Code § 22-951 makes it "unlawful for a person to solicit . . . another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang."[53]

Most of these specific solicitation statutes, like D.C. Code § 22-2107, are completely silent on the meaning of solicitation in the relevant contexts.[54] And case law interpreting these statutes is sparse, though that which does exist establishes that solicitation liability is constitutional, at least insofar as it entails proof of a criminal intent.[55]

In practice, it appears that the elements of the general solicitation liability, as codified by D.C. Code § 22-2107, are determined in the District by reference to the criminal jury instructions.[56] The relevant instruction states, in its entirety, that:

> The elements of solicitation of [insert crime of violence], each of which the government must prove beyond a reasonable doubt, are that:

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[53] Relatedly, D.C. Code § 22-1312 criminalizes an "indecent sexual proposal," which, as the DCCA has explained, "connotes virtually the same conduct or speech-conduct as a sexual solicitation." *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975)); *see D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975) (noting that a "sexual proposal," as used in the statute, "connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.").

[54] There is, however, one exception: the District's statute criminalizing solicitation of prostitution, D.C. Code § 22-2701. That statute is accompanied by a general definition of "[s]olicit for prostitution," which, pursuant to D.C. Code § 22-2701.01, "means to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution." *See* SAFE STREETS FORFEITURE AMENDMENT ACT OF 1992, 1992 District of Columbia Laws 9-267 (Act 9–250).

[55] More specifically, the DCCA, in *Ford v. United States*, upheld the constitutionality of the District's solicitation of prostitution statute on the basis that it "prohibits specified conduct for the purpose of prostitution," thereby "clearly" affording District residents "notice of the illegality" of such conduct. 498 A.2d 1135, 1139–40 (D.C. 1985) ("Such a 'scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)).

Likewise, in *D.C. v. Garcia*, the DCCA upheld the constitutionality of D.C. Code § 22-1312, which criminalizes an "indecent sexual proposal," observing that

> It is important to emphasize the precise nature of the speech which the sexual proposal clause . . . proscribes. The principle is well established that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. However, there is a significant distinction between advocacy and solicitation of law violation in the context of freedom of expression. Advocacy is the act of pleading for, supporting, or recommending; active espousal and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. Solicitation, on the other hand, implies no ideological motivation but rather is the act of enticing or importuning on a personal basis for personal benefit or gain. Thus advocacy of sodomy as socially beneficial and solicitation to commit sodomy present entirely distinguishable threshold questions in terms of the First Amendment freedom of speech. The latter, we hold, is not protected speech.

335 A.2d 217, 224 (D.C. 1975).

[56] *Cf.* Commentary on D.C. Crim. Jur. Instr. § 4.500 (failing to reference any of the District's specific solicitation statutes as relevant legal authority for the elements of the general inchoate crime of solicitation).

> 1. [Name of defendant] solicited [another person] [insert name of other person] to commit [insert crime of violence]; and,
>
> 2. [Name of defendant] did so voluntarily, on purpose, and not by mistake or accident.
>
> "Solicit" means to request, command, or attempt to persuade.
>
> It is not necessary that [insert crime of violence] actually occur in order to find [name of defendant] guilty of solicitation.[57]

Three aspects of above statement of the elements of a criminal solicitation provided by this instruction bear notice. First, it leaves ambiguous the culpable mental state requirement governing the offense. This is because the jury instruction fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[58] To say, for example, that a person must solicit another person "voluntarily, on purpose, and not by mistake or accident" does not specify whether the culpability required applies to the (1) the *conduct* planned to culminate in that offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.[59]

Second, it is unclear what the third prong of the conduct requirement, described as "attempt[ing] to persuade," actually entails given the various meanings of the term attempts. Generally speaking, for example, there are two main categories of attempts: (1) complete attempts, which are attempts that fail to achieve the actor's criminal objectives notwithstanding the fact that he or she carried out the entirety of his or her criminal plans (i.e. shoot and miss); and (2) incomplete attempts, which are attempts that fail to achieve the actor's criminal objectives because he or she is frustrated by outside forces (e.g., police interception). Incomplete attempts, in turn, can be further differentiated according to the extent of the progress an actor makes before his or her plans are disrupted (e.g., taking a substantial step towards completion vs. being dangerously close to completion). With these variances in mind, it is unclear just how far along an actor must be in his efforts to convince another to commit a crime to be deemed to have engaged in "attempt[ed] persua[sion]."[60]

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[57] D.C. Crim. Jur. Instr. § 4.500.

[58] *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013) (citations, quotations, and alterations omitted).

[59] For example, to secure a conviction for solicitation to commit robbery against a senior citizen, must the government (merely) prove that the solicitor consciously desired to bring about conduct planned to culminate in the offense (e.g., knocking down and taking the wallet of victim X, who is over the age of 65)? Or, alternatively, must the government also prove that the solicitor consciously desired the relevant circumstance to exist (e.g., that victim X actually be over the age of 65)?

[60] For example, it seems clear that where D1 mails a written request for murder to D2, but where the letter is intercepted by the police (or lost by the mail carrier and thereafter handed over to the policy) before D2 ever has an opportunity to read it, this constitutes attempted persuasion. But what about where D1, intending to mail a written request for murder to D2, is arrested by the police on his way to the post office with the letter in hand?

Third, and more generally, the criminal jury instruction is silent on a variety of corollary issues relevant to understanding the scope of general solicitation liability. To take just one example, consider that of impossibility. In the solicitation context, impossibility issues arise where one party asks another to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions were as the solicitor perceived them. In this kind of situation, the solicitor might argue that criminal liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding conditions, completion of the target offense was impossible. If presented with such a claim, District judges would have to determine whether the particular kind of mistake rendering the criminal objective at the heart of a solicitation prosecution impossible constitutes a defense. On this issue, among others, the District's jury instruction (and accompanying commentary) is silent.

Aside from this silence on the elements of solicitation, another aspect of District law that is problematic relates to grading. This is reflected in the fact that solicitations to commit all "crimes of violence"[61] other than murder are subjected to the same 10-year statutory maxima under D.C. Code § 22-2107, notwithstanding significant distinctions between the relevant underlying offenses. For example, an assault with significant bodily injury[62] is distinct from an aggravated assault,[63] which is distinct from first degree sexual abuse[64] or child sexual abuse.[65] These crimes of violence are, based on their elements and the varying penalties afforded to them, offenses of quite differential seriousness. At the same time, however, D.C. Code § 22-2107 effectively treats solicitations to commit each of them as an offense of the same seriousness given the flat 10-year statutory maximum provided to them under subsection (b).

Another way to appreciate the comparative disproportionality presented by the District's current approach to grading solicitations is reflected in the impact that the flat 10

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[61] D.C. Code § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.").

[62] D.C. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[63] D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both.")

[64] D.C. Code § 22-3002 ("A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner . . . .").

[65] D.C. Code § 22-3008 ("Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined not more than the amount set forth in § 22-3571.01. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.").

year statutory maximum has on particular crimes of violence. For example, the 3-year statutory maximum governing the consummated version of assault with significant bodily injury is *multiplied many times* over by the flat 10-year statutory maximum under subsection (b).[66] In contrast, this same flat 10-year statutory maximum effectively treats solicitations to commit aggravated assault *as equivalent in seriousness* to consummated aggravated assaults, which are similarly subject to a 10-year statutory maximum.[67] And solicitations to commit first degree sexual abuse[68] or child sexual abuse[69] are treated as *significantly less serious* than the completed versions of such offenses under subsection (b) given that the completed version of these offenses are subject to potential life sentences.

Viewed as a whole, then, the District's approach to grading criminal solicitations does not reflect any consistent principle of punishment. And this, in turn, produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

The RCC criminal solicitation statute addresses the above-described problems as follows. First, subsections (a), (b), (c), and (d) provide a full description of the elements of a general criminal solicitation, which is consistent with element analysis and resolves the ambiguities surrounding the diverse set of liability issues mentioned above. When viewed collectively, this statement will improve the clarity, consistency, and comprehensiveness of the revised statutes. Second, subsection (e) establishes a principled and consistent approach to punishing solicitations (i.e. a fifty percent penalty discount), which renders offense penalties more proportionate.[70]

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[66] D.C. Code § 22-404(a)(2) ("Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 3 years, or both.").

[67] D.C. Code § 22-404.01(b) ("Any person convicted of aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 10 years, or both."). Note also that attempted aggravated assault is only subject to a 5-year statutory maximum. D.C. Code § 22-404.01(c) ("Any person convicted of attempted aggravated assault shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned for not more than 5 years, or both.").

[68] D.C. Code § 22-3002 ("A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner . . . .").

[69] D.C. Code § 22-3008 ("Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined not more than the amount set forth in § 22-3571.01. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 22-3020 or § 24-403.01(b-2). For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section is a Class A felony.").

[70] The effect of this penalty scheme on current District law varies depending on the scope, gradations, and classifications applied to individual revised offenses. For a detailed analysis of this nature in the context of attempt penalties, which is broadly applicable here, see Explanatory Note to RCC § 22E-301(d)

RCC § 22E-303. Criminal Conspiracy.

Explanatory Note. RCC § 22E-303 provides a comprehensive statement of general conspiracy liability under the RCC.[1] This statement: (1) establishes the culpable mental state requirement and conduct requirement of a criminal conspiracy; (2) specifies the penalties applicable to a criminal conspiracy; and (3) addresses particular jurisdictional issues relevant to general conspiracy liability in the District of Columbia. RCC § 22E-303 replaces the District's current general conspiracy statute, D.C. Code § 22-1805a.

Subsection (a) establishes the requirements for the RCC criminal conspiracy statute. Generally, for criminal conspiracy liability, both the defendant "and at least one other person" must actually conspire in order for criminal liability to attach under the revised statute.[2] This establishes a bilateral approach to conspiracy, which excludes

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[1] By way of historical background:

> [T]he crime of conspiracy itself is of relatively modern origins. The notion that one may be punished merely for agreeing to engage in criminal conduct was unknown to the early common law . . . Until the late seventeenth century, the only recognized form of criminal conspiracy was an agreement to make false accusations or otherwise to misuse the judicial process . . . And it was not until the nineteenth century that courts in the United States began to view conspiracies as distinct evils . . . .

State v. Pond, 108 A.3d 1083, 1096-97 (Conn. 2015) (internal citations and quotations omitted).

Today, the crime of conspiracy is widely understood to serve "two important but different functions: (1) as with solicitation and attempt, it is a means for preventive intervention against persons who manifest a disposition to criminality; and (2) it is also a means of striking against the special danger incident to group activity." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019). At the same time, however, conspiracy is also an "extremely controversial crime." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01 (6th ed. 2012). This is so for two basic reasons.

First, conspiracy "is so vague that it almost defies definition." *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring); *id.* at 477 (describing the crime as "chameleon-like."). This vagueness, it is argued, provides prosecutors with "a powerful tool . . . to suppress inchoate conduct that they consider potentially dangerous or morally undesirable." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01 (6th ed. 2012); *see Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (describing the offense as the "darling of the modern prosecutor's nursery.") (Hand, J.). "Historically," for example, "conspiracy laws have been used to suppress controversial activity, such as strikes by workers and public dissent against governmental policies." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01 (6th ed. 2012).

Second, conspiracy is "predominantly mental in composition, because it consists primarily of a meeting of minds and an intent"—very little conduct is required. *Krulewitch*, 336 U.S. at 447–48 (Jackson, J., concurring). In light of the offense's "highly inchoate nature," a "few courts and more scholars" have questioned whether conspiracies merit punishment at all. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.01 (6th ed. 2012) (collecting authorities). More often, though, it is argued that, because of conspiracy's focus on *mens rea* and concomitant disregard of *actus reus*, "persons will be punished for what they say rather than for what they do, or [simply] for associating with others who are found culpable." Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973).

[2] *E.g.,* D.C. Code § 22-1805a (defining conspiracy in terms of "two or more persons"); 18 U.S.C.A. § 371 (same). *Compare, e.g.,* Model Penal Code § 5.03(1)(a) ("A person is guilty of conspiracy *with another person or persons* to commit a crime if . . . *he . . . agrees with such other person or persons* that they or one or more of them will engage in conduct that constitutes such crime[.]") (italics added); *id.*, Explanatory Note (it is sufficient under the Model Penal Code approach that the defendant "believe that he is agreeing[] with another that they will engage in the criminal offense or in solicitation to commit it").

unilateral agreements to engage in or aid crimes from the scope of general conspiracy liability.[3] Absent proof that "two or more persons"[4] satisfy both the culpable mental state

"Most modern codes, as does the Model Penal Code, define conspiracy in terms of a single actor agreeing with another, rather than as an agreement between two or more persons." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(c)(6) n.30 (3d ed. Westlaw 2019). That said, numerous state courts in the jurisdictions with these unilateral formulations have interpreted their general conspiracy statutes in bilateral terms. *Id.* (collecting cases).

[3] The difference between the bilateral and unilateral views of conspiracy is most significant in cases in which one person, committed to furthering a criminal enterprise, approaches another seeking to enlist his or her cooperation. Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 220 (1981). If the other party *seems* to agree, but secretly withholds agreement (perhaps even resolving to notify the authorities), the initiating person is not guilty of conspiracy under the bilateral approach, but would be guilty under the unilateral approach. *Id.*; *see* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(c)(6) n.30 (3d ed. Westlaw 2019) (bilateral approach also rejects conspiracy liability where the only other party to an alleged conspiracy is mentally incapable of agreeing) (citing *Regle v. State*, 9 Md. App. 346 (1970)).

In support of the bilateral approach, and concomitant rejection of the unilateral approach, various courts and commentators have argued that:

> The primary reason for making conspiracy a separate offense from the substantive crime is the increased danger to society posed by group criminal activity[.] However, the increased danger is nonexistent when a person "conspires" with a government agent who pretends agreement. In the feigned conspiracy there is no increased chance the criminal enterprise will succeed, no continuing criminal enterprise, no educating in criminal practices, and no greater difficulty of detection[.] Indeed, it is questionable whether the unilateral conspiracy punishes criminal activity or merely criminal intentions[.] The "agreement" in a unilateral conspiracy is a legal fiction, a technical way of transforming nonconspiratorial conduct into a prohibited conspiracy[.] When one party merely pretends to agree, the other party, whatever he or she may believe about the pretender, is in fact not conspiring with anyone. Although the deluded party has the requisite criminal intent, there has been no criminal act[.]

State v. Pacheco, 125 Wash. 2d 150, 156–57, 882 P.2d 183, 186–87 (1994) (quoting from and citing to state case law, federal case law, and legal commentary); *see also id.* (highlighting the "potential for abuse" in a unilateral regime because "the State not only plays an active role in creating the offense, but also becomes the chief witness in proving the crime at trial"); *compare* Model Penal Code § 5.03 cmt. at 393 (highlighting crime prevention concerns that support unilateral approach to conspiracy).

[4] D.C. Code § 22-1805a; 18 U.S.C.A. § 371.

requirement[5] and conduct requirement[6] stated in subsections (a) and (b), no single person is subject to general conspiracy liability under § 22E-303.[7]

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[5] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.06 (6th ed. 2012) (conspiracy prosecution "must fail in the absence of proof that at least two persons possessed the requisite *mens rea* of a conspiracy, i.e. the intent to agree and the specific intent that the object of their agreement be achieved."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(c)(6) (3d ed. Westlaw 2019) ("[B]ecause of the plurality requirement it must be shown that the requisite intent existed as to at least two persons. That is, there must be a common design, so that if only one party to the agreement has the necessary mental state then even that person may not be convicted of conspiracy."). The following scenario illustrates the intersection between the bilateral agreement requirement and dual intent requirements governing conspiracy liability.

Police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P's plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the building, and find P engaged in a conversation with another individual, A, a real janitor employed by the District, who is in control of a large cart of cleaning supplies. The police overhear P asking A if she'd be willing to park her cart of supplies right in front of the entrance immediately after P enters so as to block other people from entering the building. A agrees to do so, at which point both A and P begin to make their way towards the building's entrance with A's supply cart in tow. Moments later, however, the police intercede, and arrest both A and P.

If P later finds himself in D.C. Superior Court charged with conspiracy to murder a police officer based upon his agreement with A, can he be convicted? The answer to this question depends upon whether *A's* state of mind fulfills both of the dual intent requirements governing conspiracy liability, so that it can be said that P and "at least one other person" agreed to murder a police officer. (Note: there's little question that P possesses the requisite dual intents.)

For example, if A had agreed to block the entrance to the building with her cart of supplies because P had asked her to help facilitate P's *cleaning of the lobby windows*, then neither requirement is met: A did not intentionally agree to facilitate P's conduct, which, if carried out, would have resulted in the death of a police officer (the unhinging of the large television); nor did A act with the intent that, through her agreement, a police officer be killed. Alternatively, if A had agreed to block the entrance to the building with her cart of supplies because P had asked her to help facilitate P's *removal of the television*, then the first requirement is met: A intentionally agreed to facilitate the conduct of P which, if carried out, would have resulted in the death of a police officer. But the second requirement is not met: A did not intend, through her agreed-upon participation, to cause the death of anyone, let alone a police officer. Because, in both of the above sets of circumstances, A does not satisfy the dual intent requirements of conspiracy, P cannot be convicted of conspiracy to murder a police officer. (Which is not to say that P would escape liability entirely; on these facts P likely can be convicted of attempted murder of a police officer, on the basis that he intended to kill police officer V, and came dangerously close to doing so. *See* RCC § 22E-301(a).)

If, in contrast, A had agreed to block the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both requirements: A acted with both the intent to facilitate P's planned course of conduct and the intent that, through her agreed-upon assistance, a police officer would be killed. Because, in this last scenario, A possesses both of the necessary dual intents—as well as the fact that the other elements of conspiracy are met, e.g., the presence of an "overt act," RCC § 22E-303(a)(3)—P can be convicted of conspiracy to murder a police officer.

[6] That is, engage in the necessary mutual agreement. The plurality requirement does not apply to the overt act requirement, which only needs to be met by one party to a conspiracy, which is discussed elsewhere in this commentary.

[7] It is important to note that while two or more persons must satisfy the culpability and conduct requirements of conspiracy under the revised criminal solicitation statute, it is not necessary for two or more persons to be prosecuted and/or convicted of conspiracy in order to support a conviction as to any one person. *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.06 (6th ed. 2012) ("The plurality rule does not require, however, that two persons be prosecuted and convicted of conspiracy . . . Thus, the conviction of a conspirator is not in jeopardy simply because the other person involved in the arrangement is unapprehended, dead, or unknown, or cannot be prosecuted because he has been granted immunity.") (collecting cases). In this sense,

Subsection (a) and paragraph (a)(1) require that the actor and at least one other person "purposely agree to engage in or aid the planning or commission of conduct." "Purposely" is a defined term in RCC § 22E-206 that here means that the actor and at least one other person must consciously desire that they agree to engage in or aid the planning or commission of conduct. Paragraph (a)(1) further requires that if carried out, "in fact" the conduct will constitute an offense or a criminal attempt to commit an offense. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the conduct, if carried out, will constitute an offense or a criminal attempt to commit an offense. These requirements establish that only *criminal* objectives fall within the scope of general conspiracy liability under the RCC.[8]

Paragraph (a)(1) codifies the agreement requirement at the heart of the general inchoate crime of conspiracy.[9] In so doing, this paragraph broadly clarifies that a conspiracy is comprised of a joint criminal agreement to commit the same offense.[10] And it also more specifically addresses three fundamental issues concerning the scope and applicability of general conspiracy liability.

The first issue relates to the nature of the agreed-upon participation in a criminal scheme that will support a conspiracy conviction. Paragraph (a)(1) establishes, in relevant part, that general conspiracy liability is appropriate under the RCC where two or more parties agree to "engage in" or "aid the planning or commission" of criminal conduct.[11]

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the general inchoate crime of conspiracy under the revised criminal solicitation statute is similar to the legal accountability as an accomplice under RCC §22E-210, which requires proof that another person satisfies the elements of the offense for which the defendant is being prosecuted, yet does not preclude liability although the other person claimed to have committed the offense has not been prosecuted or convicted. RCC § 22E-210; *compare United States v. Bell*, 651 F.2d 1255, 1258 (8th Cir. 1981) (Where "all other alleged coconspirators are acquitted, the conviction of one person for conspiracy will not be upheld.").

[8] *See, e.g.,* Model Penal Code § 5.03(1) (limiting general conspiracy liability to agreements to commit "crime[s]"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(a) (3d ed. Westlaw 2019) ("[M]ost states" and all of the "most recent recodifications" follow the "far better" approach of "provid[ing] that the object of a criminal conspiracy must be some crime or some felony"); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04(c) (6th ed. 2012) ("People are entitled to fair notice that their planned conduct is subject to criminal sanction . . . If the legislature has not made a specified act criminal it is unfair to surprise people by punishing the agreement to commit the noncriminal act.").

[9] *See, e.g., United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (agreement is "essence" of a conspiracy is the agreement); Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 695 (2011) ("[T]he agreement takes the law beyond the individual mental states of the parties, in which each person separately intends to participate in the commission of an unlawful act, to a shared intent and mutual goal, to a spoken or unspoken understanding by the parties that they will proceed in unity toward their shared goal.").

[10] Specifically, paragraph (a)(1) requires that two or more parties to a conspiracy "agree to engage in or aid the planning or commission of conduct which, if carried out, will constitute an [the same] offense or a criminal attempt to commit an [same] offense[.]" This language effectively precludes conspiracy liability where each participant intended to commit a different offense. So, for example, if the evidence in a two-person criminal scheme demonstrates that X believed the agreed-upon conduct was to rob V, but Y believed the agreed-upon conduct was to assault V, a charge for conspiracy to commit robbery cannot be sustained against X or Y due to the lack of mutual agreement concerning the taking-related element of robbery.

[11] *See, e.g.,* Model Penal Code § 5.03(1)(b) (conspiracy liability where one person "agrees to *aid* [an]other person or persons in the planning or commission of [a] crime") (italics added); *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he *adopt the goal of furthering or*

This two-part formulation clarifies that agreements to assist with or otherwise facilitate the planning or commission of a crime, no less than agreements to directly engage in the requisite criminal conduct, provide an adequate basis for a conspiracy conviction, provided that the other requirements of the revised statute are met.[12]

The second issue focuses on the relationship between the defendant's state of mind and his or her agreed-upon facilitation of a criminal scheme.[13] Paragraph (a)(1) establishes,

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facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.") (italics added).

[12] *See, e.g., Ocasio v. United States*, 136 S. Ct. 1423, 1430 (2016) ("[A] specific intent to distribute drugs oneself is not required to secure a conviction for participating in a drug-trafficking conspiracy. Agreeing to store drugs at one's house in support of the conspiracy may be sufficient."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04 n.77 (6th ed. 2012) (Where "D1 agrees to provide D2 with a gun to be used to kill V, D1 is guilty of conspiracy to commit murder, although she did not agree to commit the offense herself.").

That an agreement to aid provides an appropriate basis for liability under the RCC conspiracy statute reflects the well-established idea that complicity and conspiracy "normally go hand-in-hand." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 703 (3d ed. 1982)). Indeed, "in most cases an accomplice is a co-conspirator, and vice-versa." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 38.08(a) (6th ed. 2012). For example, if A purposely agrees to aid P in the commission of a robbery, and that agreement to aid either materializes or simply solidifies P's resolve to commit the robbery (even in the absence of such assistance), then A is responsible for P's robbery as an accomplice under section 210. On these same facts, however, A and P also appear to satisfy the requirements for general conspiracy liability (to commit robbery) under the revised criminal solicitation statute.

Nevertheless, there are important differences between these two legal concepts. For example, "[a]n agreement between two or more persons to participate in the commission of a crime is the key to a conspiracy and, therefore, to conspiratorial liability." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 38.08(a) (6th ed. 2012). Importantly, "[a]ctual assistance in the crime is not required." *Id.* In contrast, "[a]ccomplice liability requires proof that an actor at least indirectly participated (assisted) in the crime; an agreement to do so is not needed." *Id.*

In light of these conceptual distinctions, it is possible for one person to conspire with another person to commit an offense without also being an accomplice (i.e. in the event that the other person commits that offense on his or her own). For example, if, in the above illustration, A's purposeful agreement to aid P in the commission of a crime had gone unfulfilled, and more generally failed to encourage P to commit that crime (e.g., it didn't bolster P's resolve), yet P nevertheless proceeded to commit the robbery by himself, then A (and P) would likely satisfy the requirements for general conspiracy liability under the revised criminal solicitation statute. At the same time, however, A would not satisfy the requirements for accomplice liability under RCC § 22E-210.

Conversely, it also is possible one person to be an accomplice in the commission of an offense committed by another person without also having conspired to commit it. The following situation is illustrative. P enters a bank to rob it, at which point, A, an unaffiliated customer, observes P's actions and silently assists in the crime by disabling a bank security camera. Because P and A never agreed to commit the robbery together, they do not satisfy the requirements of the revised criminal solicitation statute. That said, because A purposely assisted P with the commission of the robbery, A may be held liable for the robbery under RCC § 22E-210.

[13] The nature of this relationship issue "is crucial to the resolution of the difficult problems presented when a charge of conspiracy is leveled against a person whose relationship to a criminal plan is essentially peripheral":

> Typical is the case of the person who sells sugar to the producers of illicit whiskey. He may have little interest in the success of the distilling operation and be motivated mainly by the desire to make the normal profit from an otherwise lawful sale. To be criminally liable, of course, he must at least have knowledge of the use to which the materials are being put, but the difficult issue presented is whether knowingly facilitating the

in relevant part, that general conspiracy liability only applies to those who act with the purpose of bringing about conduct planned to culminate in an offense.[14] This "purposive attitude" constitutes the foundation of the culpability required for both accomplice liability as well as the general inchoate crime of conspiracy.[15] It can be said to exist when a person, through his or her agreement, *consciously desires* to facilitate conduct planned to culminate in an offense.[16]

> commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end. In this case conflicting interests are involved: that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes.

Model Penal Code § 5.03, cmt. at 404.

[14] *See, e.g.,* Model Penal Code § 5.03(1) (agreement must be accompanied by "the purpose of promoting or facilitating the commission of the crime"); *Id.*, Explanatory Note ("The purpose requirement is meant to extend to [the] conduct elements of the offense that is the object of the conspiracy."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(c)(3) (3d ed. Westlaw 2019) (purpose requirement is strong majority approach); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1145-46 (1975) (same). This purpose requirement *does not* extend to whether the requisite conduct is, in fact, illegal or otherwise constitutes an offense. *See* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3(c) (3d ed. Westlaw 2019) (accomplice cannot "escape liability by showing he did not [*desire*] to aid a crime in the sense that he was unaware that the criminal law covered the conduct of the person he aided. Such is not the case, for here as well the general principle that ignorance of the law is no excuse prevails.").

[15] *See, e.g., United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.) ("[Every definition of complicity requires that the defendant in] some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used-even the most colorless, 'abet,' carry an implication of *purposive attitude* towards it.") (italics added); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940) (Hand, J.) ("There are indeed instances . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; *but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.") (italics added); Model Penal Code § 5.03 cmt. at 406 ("Under the conspiracy provision, the same purpose requirement that governs complicity is essential for conspiracy; the actor must have 'the purpose of promoting or facilitating' the commission of the crime").

[16] *See generally* RCC § 22E-206 (purposely defined). The following scenario is illustrative. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature, over the phone. Having been informed of this, P offers to purchase A's car for market value. A rejects the offer, but counters with an arrangement wherein A will give P his car in return for a ten percent stake in the profits. P agrees to this arrangement, and begins his initial preparations for the robbery. Soon thereafter, however, the police—who had tapped A's phone, and thus overheard the agreement—arrest both A and P. On these facts, A (and P) can be held liable for conspiring to commit robbery because A, through his agreement with P, consciously desired to facilitate and promote P's criminal conduct.

That a conspirator must have the purpose to facilitate or promote conduct planned to culminate in an offense does not preclude convictions for knowledge-based theories of liability concerning the result elements of the target offense. The following example is illustrative. Environmental activists X and Y agree to blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. Both X and Y are practically certain that V will die from the blast, though they'd very much prefer that V not be injured. The police intercede right before X and Y are able to set off the explosives, thereby saving V's life. On these facts, both X and Y can be convicted of conspiracy to commit (knowing) murder, premised on the fact that their agreement was accompanied by: (1) a *desire* to engage in conduct, which, if carried out, would have culminated in murder (i.e. blowing up the facility); and

The corollary to this purpose requirement is that general conspiracy liability is not supported under the revised statute where a defendant's primary motive in agreeing to facilitate a criminal scheme is to achieve some other, non-criminal objective (e.g., "conduct[ing] an otherwise lawful business in a profitable manner").[17] And this is so even if the defendant knew that his or her agreement was likely to facilitate that scheme.[18] Neither awareness of, nor indifference towards, the success of another person's criminal scheme is sufficient to satisfy the purpose requirement incorporated into paragraph (a)(1).[19]

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(2) their *awareness as to a practical certainty* that such conduct would result in V's death. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 757 (1983) ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."); Note, *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 926 (1959)) ("[A] person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees[.]"); *but see* Model Penal Code § 5.03 cmt. at 408 ("[I]t would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it.").

[17] *See, e.g., Falcone*, 109 F.2d at 581 (Hand, J.) ("[T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner" because this would "seriously undermin[e] lawful commerce."); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 353 (1985) (absent purpose requirement, the criminal law would "cast a pall on ordinary activity" by giving us reason to "fear criminal liability for what others might do simply because our actions made their acts more probable"); Model Penal Code § 5.03 cmt. at 406 (observing that "the complicity provisions of the Code" require "a purpose to advance the criminal end," and deeming "the case" for this resolution to be an "even stronger one" in the context of conspiracy, such that "[a] conspiracy does not exist [under the Code] if a provider of goods or services is aware of, but fails to share, another person's criminal purpose").

This purpose requirement should also "dispel the ambiguity inherent in many judicial formulations that predicate conspiracy on merely 'joining' or 'adhering' to a criminal organization or speak of an 'implied agreement' with the conspirators by aiding them 'knowing in a general way their purpose to break the law.'" Model Penal Code § 5.03 cmt. at 406

[18] It has been observed that, "[o]ften, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation." Model Penal Code § 2.06 cmt. at 316. And the same is also presumably true of *agreements* to aid. That said, "there are many and important cases where this is the central question in determining liability." *Id.*; *see, e.g., State v. Maldonado*, 114 P.3d 379, 382 (N.M. 2005) ("Defendant's conviction presents a recurring question in the law of conspiracy: does a defendant whose only involvement is supplying generally available goods or services become a co-conspirator merely because he knows that the goods or services he provides may or will be used by another for a criminal purpose?"); *United States v. Falcone*, 311 U.S. 205, 208-10 (1940) (same).

[19] To illustrate, consider the following modified version of the scenario presented elsewhere in this commentary. P seeks to rob a bank on his own, but needs a fast car to implement his plan. P relays his conundrum to his friend, A, who happens to own a vehicle of this nature, over the phone. Having been informed of this, P offers to purchase A's car for market value. A accepts the offer to sell his car for market value because A was already planning to sell the vehicle, so accepting P's offer will save A the effort of having to list it on his own. However, A thinks the bank robbery is a stupid idea, and tells P this much. P ignores A's advice and subsequently begins his initial preparations for the robbery. Soon thereafter, however, the police—who had tapped A's phone, and thus overheard the agreement—arrest both A and P. On these facts, A (and therefore P) cannot be held liable for conspiring to commit robbery because, *inter alia*, A did not consciously desire to facilitate or promote P's criminal conduct. Instead, A's purpose was to save himself the hassle of having to list and sell the vehicle on his own. That A knew the sale of his car to P would facilitate the bank robbery, and was arguably indifferent as to P's criminal conduct, would not support liability under the revised criminal liability statute.

The third issue is the relevance of impossibility to general conspiracy liability—i.e. the fact that the target offense cannot be consummated under the circumstances due to a mistake on behalf of the defendant(s).[20] Paragraph (a)(1) establishes, in relevant part, that agreements to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general conspiracy liability.[21] This reference to attempts imports the broad

[20] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense and engaged in significant conduct, but nevertheless argue that impossibility of completion should by itself preclude the imposition of conspiracy liability. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.07 (6th ed. 2012). In resolving this claim, there are four general categories of impossibility that might be considered for evaluative purposes (i.e. these are not analytically perfect distinctions).

The first category is *pure factual impossibility*, which arises where the parties to an agreement to commit a crime are precluded from consummating that crime because of circumstances unknown to them or beyond their control. The following situation is illustrative: X and Y, adult males, agree to arrange a sexual encounter with Z, a young child, at a specified time/location. Unbeknownst to X and Y, the police have been alerted to the arrangement and are awaiting the arrival of X and Y. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure factual impossibility because the object of the conspiracy, sexual activity with a minor, cannot be consummated because of circumstances beyond the parties' control, namely, police intervention.

The second category of impossibility is *pure legal impossibility*, which arises where the parties to an agreement act under a mistaken belief that the law criminalizes their intended objective. The following situation is illustrative. X and Y, adult males, agree to arrange a sexual encounter with Z, a 20 year-old woman. X and Y know Z is 20; however, they believe that the age of consent is 21—when, in fact, it is 18. Therefore, X and Y believe themselves to be conspiring to commit statutory rape. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure legal impossibility because X and Y have acted under a mistaken belief that the law criminalizes their intended objective, sexual activity with a 20 year-old woman.

The third category is *hybrid impossibility*, which arises where the object of an agreement between two or more parties constitutes a crime, but commission of the target offense is impossible due to a factual mistake regarding the legal status of some attendant circumstance that constitutes an element of the target offense. The following situation is illustrative. X and Y, adult males, agree to arrange a sexual encounter with Z, an undercover police officer posing as a young child. X and Y believe that Z is a young child. If charged with conspiracy to commit statutory rape, this situation presents an issue of hybrid impossibility because the object of X and Y's agreement, sexual activity with a minor, is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense, namely, whether Z is, in fact, a minor.

The fourth category of impossibility is *inherent impossibility*, which arises where the parties to an agreement to commit a crime plan to "employ[] means which a reasonable man would view as totally inappropriate to the objective sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a)(4) (3d ed. Westlaw 2019). The following situation is illustrative. X and Y, adult males, agree to arrange a sexual encounter with Z, a child-like manikin sitting in a shop window. X and Y believe that Z is an actual child, a mistake that is patently unreasonable under the circumstances. If charged with conspiracy to commit statutory rape, this situation presents an issue of inherent impossibility because any reasonable person would have known that the manikin was not a child. *See* Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 244-45 (1995) (common denominator underlying inherent impossibility is that the parties' "actions are so absurd or patently ineffective that the completion of the crime would always be impossible under the same set of circumstances").

[21] *See, e.g.,* Model Penal Code § 5.03(1) (conspiracy liability where one person agrees with another person that "they or one of them will engage in conduct that constitutes . . . an *attempt* … to commit such crime," or if he or she "agrees to aid such other person or persons . . . in *an attempt* . . . to commit such crime."); Model Penal Code § 5.03 cmt. at 421 ("[If an] actor agrees that he or another will engage in conduct that he believes to constitute the elements of the offense, but that fortuitously does not in fact involve those elements, he

abolition of impossibility claims employed in the RCC's general attempt provision into the conspiracy context.[22] Under this approach, it is generally immaterial that the agreed-upon criminal scheme could never have succeeded under the circumstances.[23] So long as the parties agreed to bring about conduct that would have culminated in an offense if "the situation was as [the parties] perceived it" then conspiracy liability may attach,[24] provided that the agreed-upon plan of action was at least "reasonably adapted" to commission of the target offense.[25]

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would under this section be guilty of an agreement to attempt the offense, since attempt liability could be made out under [the MPC's general attempt provision] if the contemplated conduct had occurred.").

[22] Under RCC § 22E-301(a)(4)(B), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the person perceived it." Subparagraph (a)(3) further requires that the person's conduct must have been "reasonably adapted to completion of that offense."

[23] *See* RCC § 22E-301(a), Explanatory Note.

[24] RCC § 22E-301(a)(4)(B). Specifically, the subjective approach incorporated into RCC § 22E-303renders pure factual and hybrid impossibility claims immaterial. For example, under the RCC it would not be a defense to conspiracy to commit murder that: (1) the intended victim was already dead, provided that the parties to the conspiracy mistakenly believed the person to be alive at the moment one of them engaged in an overt act; or that (2) the intended murder weapon was inoperable, provided that the parties mistakenly believed it be operable. Nor would it preclude liability for conspiracy to commit theft under the RCC that: (1) the owner of the target property consented to its taking, provided that the parties to the conspiracy mistakenly believed it to be absent; or that (2) the safe targeted is empty, provided that the parties believed it be filled with valuable objects. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2019) ("The modern trend, evident in most jurisdictions, is to reject both [forms of] impossibility as defenses."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) (same).

In contrast, pure legal impossibility remains a viable theory of defense under the RCC. However, this does not hinge on RCC § 22E-301(a)(4)(B), or any other provision in section 301. Rather, the "underlying basis for acquittal is the principle of legality," which "provides that we should not punish people—no matter culpable or dangerous they are—for conduct that does not constitute the charged offense at the time of the action." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012); *see* Model Penal Code § 5.01 cmt. at 318 ("[If] the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.").

For example, "it is not a crime to throw even a [District of Columbia] steak into a garbage can." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 595 (2d ed. 1960). So if after losses against the Washington Nationals, the Oriole Bird, the Baltimore Orioles mascot, and the Phillie Phanatic, the Philadelphia Phillies mascot, together place a local District steak in the garbage, neither is guilty of committing any offense. Nor could the Oriole Bird and the Phillie Phanatic be convicted of conspiring to commit an imaginary offense of this nature although they honestly believed such conduct to be prohibited by the D.C. Code. *E.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) ("Just as a person may not ordinarily escape punishment on the ground that she is ignorant of a law's existence, it is also true that we cannot punish people under laws that are purely the figments of their guilty imaginations."); *In re Sealed Cases*, 223 F.3d 775 (D.C. Cir. 2000) (just as "[a] hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place," so too "a charge of conspiracy to shoot a deer would be equally untenable" although the parties themselves believed deer hunting to be criminally prohibited").

Inherent impossibility also remains a viable (if exceedingly limited) theory of defense under the reasonable adaptation standard codified in paragraph (a)(2) of RCC § 22E-301.

[25] RCC § 22E-301.

Inherent impossibility is an issue in conspiracy prosecutions where the parties to a criminal agreement plan to "employ[] means which a reasonable man would view as totally inappropriate to the objective sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(a)(4) (3d ed. Westlaw 2019); *see, e.g.,* John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999) (recognition of inherent impossibility defense to attempt most strongly supported

Paragraph (a)(2) requires that a criminal conspiracy necessarily incorporates "the culpability required for the [target] offense."[26] Pursuant to this principle, a defendant may not be convicted of a criminal conspiracy under § 22E-303 absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any broader aspect of culpability[27]—required to establish that offense.[28] Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (a)(1) applies to the elements in paragraph

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by relevant case law, statutes, and commentary); *Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957) (recognizing inherent impossibility defense to conspiracy); *compare* Model Penal Code § 5.05(2) (providing sentencing mitigation for a conspiracy that "is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section"). Conduct of this nature would not be "reasonably adapted" to completion of the target offense under RCC § 22E-301, and, therefore, could constitute a (failure of proof) defense to conspiracy liability under the RCC.

For example, the fact that the defendant in a conspiracy to murder prosecution agreed with another person to kill the victim by pulling the trigger on a broken firearm that the parties mistakenly believed to be operable would not call into question whether the defendant's conduct was reasonably adapted to the completion of murder. In contrast, the fact that the defendant in a conspiracy to murder prosecution agreed with another person to kill the victim by shooting a fully functional firearm at a voodoo doll with the victim's picture attached to it would be relevant to evaluating the reasonable adaptation standard—and ultimately preclude the attachment of conspiracy liability under paragraph (a)(2). *See, e.g., Ventimiglia v. United States*, 242 F.2d 620, 622 (4th Cir. 1957) ("[A]n attack on a wooden [dummy] cannot be an assault and battery (though it might constitute malicious destruction of property), and hence a combination and agreement to do so cannot be a conspiracy to commit assault and battery, although the defendants, before acting, thought the 'victim' a living person.")

[26] *See, e.g.,* Model Penal Code § 5.03(1) (government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(c)(2) (3d ed. Westlaw 2019) ("Clearly, a 'conspiracy to commit a particular substantive offense cannot exist *without at least* the degree of criminal intent necessary for the substantive offense itself.'") (quoting *Ingram v. United States*, 360 U.S. 672, 678 (1959)) (italics added).

[27] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201 (culpability required defined). For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability to secure a conviction. *See* RCC § 22E-201 ("'Culpability required' includes . . . Any other aspect of culpability specifically required for an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify). And, of course, conspiracy liability is subject to the same voluntariness requirement governing all offenses under RCC § 22E-203. *See* RCC § 22E-201 (voluntariness requirement also part of culpability required).

[28] This derivative culpable mental state requirement, which is drawn from the target offense, is to be distinguished from the independent culpable mental state requirement governing the agreement at issue in all conspiracy prosecutions, discussed elsewhere in this commentary.

Generally speaking, conspiracy liability entails proof that the accused: (1) "intended," by his or her agreement, to assist or directly engage in conduct planned to culminate in an offense; and (2) "intended," through that agreement, to bring about any result elements or circumstance elements that comprise the target offense. *See, e.g.,* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 754–55 (1983); *State v. Maldonado*, 114 P.3d 379, 382 (N.M. 2005) (discussing "twin intent requirements of conspiracy").

"One of these intents may exist without the other," such as, for example, "where A and B agree to burn certain property and A knows the property belongs to C but B (perhaps because he has been misled by A) believes that the property belongs to A." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(c)(1) (3d ed. Westlaw 2019). Here, B intends, through his agreement with A, to facilitate the destruction of another person's property. However, B does not intend the property destruction to occur *against the will of the owner*, a key circumstance element of a destruction of property offense.

(a)(2) and there is no culpable mental state requirement for the fact that the actor and other parties to the agreement act with the culpability required for the offense. Paragraph (a)(3) establishes that an overt act in furtherance of the conspiracy by either the defendant or a person with whom he or she has conspired is a necessary element of general conspiracy liability.[29] This overt act requirement is quite narrow.[30] For example, it does not require proof of progress sufficient to rise to the level of an attempt to commit the target offense.[31] Nor must the act be illegal.[32] While not particularly demanding, however, the requisite overt act must be proven beyond a reasonable doubt in order to support a conspiracy conviction.[33]

Subsection (b) provides additional clarity concerning the culpable mental state requirement governing a criminal conspiracy as it relates to the result and circumstance elements of the target offense. Whereas paragraph (a)(2) generally establishes that a conspiracy conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "actor and at least one other person" must both: (1) "[i]ntend to cause all result elements required for the offense"[34]; and (2) "[i]ntend for all circumstance

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[29] *See, e.g.,* Model Penal Code § 5.03(5) ("No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04 (6th ed. 2012) (overt act requirement has gained "wide acceptance" among the states, while "[m]ost penal code revisions" apply it to all conspiracies); *Whitfield v. United States,* 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least [23] current conspiracy statutes.").

[30] *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(b) (3d ed. Westlaw 2019) ("If the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement.") (collecting cases); Model Penal Code § 5.03(5) cmt. at 387, 454 (same).

[31] *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(b) n.81 (3d ed. Westlaw 2019) ("The overt act need not rise to the level of a 'substantial step' required for an attempt to commit the felony that is the conspiracy's object.") (quoting *Owens v. State*, 929 N.E.2d 754 (Ind. 2010)); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04(d) (6th ed. 2012) (overt act "need not constitute an attempt to commit the target offense").

[32] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04(d) (6th ed. 2012) ("overt act need not be illegal"); *State v. Heitman*, 262 Neb. 185, 198, 629 N.W.2d 542, 553 (2001) (same). This means that otherwise innocent conduct, such as writing a letter, making a phone call, purchasing an instrumentality, or attending a meeting, can, when made pursuant to an unlawful agreement, satisfy the overt act requirement. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.04(d) (6th ed. 2012) (citing *Yates v. United States*, 354 U.S. 298, 333–34 (1957), overruled on other grounds in *Burks v. United States*, 437 U.S. 1 (1978)); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(b) (3d ed. Westlaw 2019) (noting comparable examples).

[33] *E.g.,* Model Penal Code § 5.03, cmt. at 454 ("[W]hen an overt act is required, it is of course an element of the crime of conspiracy, since it must be alleged and proved to support a conviction."); *see, e.g., id.* at 453 (overt act "affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists"); *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001) (overt act appropriately respects the admonition that "evil thoughts alone cannot constitute a criminal offense."); *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992) (overt act helps "to separate truly dangerous agreements from banter and other exchanges that pose less risk.").

[34] *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2(c) n.81 (3d ed. Westlaw 2019) ("[T]here is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result."); *State v. Donohue*, 150 N.H. 180, 184, 834 A.2d 253, 256 (2003) (deeming this position to be well-established, and collecting authorities in accordance).

Dressler illustrates operation of this principle in the context of a result element crime subject to recklessness accordingly:

elements required for the offense to exist."[35] In effect, subsection (b) incorporates dual principles of culpable mental state elevation[36] applicable whenever the target offense is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e. recklessness or negligence), or none at all (i.e. strict liability).[37]

To satisfy the first principle, codified in paragraph (b)(1), the government must prove that the defendant and at least one other person had a *practically certain belief* that the agreed-upon course of conduct would cause the result element(s) required by the target offense, or, alternatively, had a *conscious desire* for that course of conduct to cause the result(s). Similarly, to satisfy the second principle, codified in paragraph (b)(2), the government must prove that the defendant and at least one other person had a *practically*

> It follows from the specific-intent nature of conspiracy that the culpability required for conviction of conspiracy at times must be greater than is required for conviction of the object of the agreement. For example, suppose that D1 and D2 agree to set fire to an occupied structure in order to claim the insurance proceeds. If the resulting fire kills occupants, they may be convicted of murder on the ground that the deaths, although unintentional, were recklessly caused. They are not guilty of conspiracy to commit murder, however, because their objective was to destroy the building, rather than to kill someone. Put another away, as a matter of logic, one "cannot agree to accomplish a required specific result unintentionally."

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.05(b) (6th ed. 2012) (quoting *State v. Beccia*, 505 A.2d 683, 684 (Conn. 1986) (holding that conspiracy to commit reckless arson is not a cognizable offense)).

[35] *See, e.g.,* Commentary on Haw. Rev. Stat. § 705-520 ("It seems clear [] that, because of the preparatory nature of conspiracy, intention to promote or facilitate the commission of the offense requires an awareness on the part of the conspirator that the circumstances exist."); *State v. Pond*, 315 Conn. 451, 484, 108 A.3d 1083, 1102 (2015) (deeming this position to be well-established, and collecting authorities in accordance); *see also, e.g., Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) ("[A]iding and abetting requires intent extending to the whole crime . . . . That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense."); *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 589 (1st Cir. 2015) ("[U]nder *Rosemond*, an aider and abettor of [the crime of producing child pornography] must have *known* the victim was a minor" although the victim's age is a matter of strict liability for the target offense).

To illustrate how this principle operates in the context of a strict liability crime, consider the following scenario involving two twenty one year-old male college students, P and A. One evening, P asks A if he can borrow A's college dorm room to have consensual sex with V, a girl P just met at a fraternity party. Unbeknownst to both A and P, however, V is a fourteen year-old minor, who P mistakenly believes to be twenty-one and, crucially, who A has never met. A agrees to let P use his room, hands P his keys, and, thereafter, P and V have sex in A's room. If P is subsequently prosecuted for a strict liability sexual abuse offense applicable to fourteen year-old victims, P can be convicted notwithstanding his mistake of fact. However, the same mistake of fact would exonerate A under subsection (b) notwithstanding the strict liability nature of the target offense. Although A purposely agreed to aid P with his sexual rendezvous with V, A lacked the *intent* to facilitate sex with *a fourteen year old*, which would be required by the principle of culpable mental state elevation codified by subsection (b).

[36] Note that for those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance, subsection (b) does not elevate the applicable culpable mental state for a conspiracy charge.

[37] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging conspiracies to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

certain belief that the circumstance element(s) incorporated into the target offense exist, or, alternatively, by a *conscious desire* for the requisite circumstance(s) to exist.[38] It is not necessary to prove that the actor and at least one other person caused the required result elements or that the required circumstance elements actually existed.

Subsection (c) establishes the penalties for criminal conspiracies. Paragraph (c)(1) states the default rule governing the punishment of criminal conspiracies under the RCC: a fifty percent decrease in the maximum term of imprisonment and fine applicable to the offense after the application of any penalty enhancements.[39]

Subsections (d), (e), and (f) recodify the jurisdictional provisions set forth in D.C. Code § 22-1805a,[40] and, in so doing, address two issues relevant to general conspiracy

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[38] When formulating jury instructions for a conspiracy to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance), the term "intent," as defined in RCC § 22E-206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* RCC § 22E-206, Explanatory Note.

[39] *See, e.g.,* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 305 (1994) ("Adhering to an objective view of grading, a majority of jurisdictions reduce the grade of inchoate conduct below that of the corresponding substantive offense."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(d) n.81 (3d ed. Westlaw 2019) (nearly half of American jurisdictions "provide that the conspiracy crime is one class lower than the object crime") (collecting statutes); Model Penal Code § 5.05 cmt. at 489 n.19 ("Many recent revisions generally grade conspiracy one level below the object offense."). This penalty reduction is to be contrasted with the Model Penal Code, which grades most criminal conspiracies as "crimes of the same grade and degree as the most serious offense which is attempted." Model Penal Code § 5.05(1); *but see id.* ("[A] conspiracy . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree.").

The drafters of the Model Penal Code adopted this policy of conspiracy penalty equalization, in a significant departure from the prevailing common law approach, on the basis of the same dangerousness-based rationale that motivated their endorsement of a unilateral approach to conspiracy and equalizing the penalty for other general inchoate crimes, such as attempt. *See, e.g.,* Model Penal Code § 5.05, cmt. at 490 ("To the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan."). However, as discussed in the Explanatory Note accompanying RCC § 22E-301(d), this rationale for punishment has been called into question by many on empirical grounds, including, perhaps most notably, by the drafters of the recent Model Penal Code Sentencing Project. *See, e.g.,* Model Penal Code: Sentencing § 6.06 PFD (2017) ("There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders.").

The (original) Model Penal Code's equalization of conspiracy penalties also conflicts with a strong intuitive sense, captured by public opinion surveys, that resultant harm should matter for grading purposes. *See, e.g.,* Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUDIES 409, 429-30 (1998) (failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades" by lay jurors, while the earlier the defendant's plans are frustrated, the greater this "no harm" discount). This may explain why, "[i]n the United States, three-quarters of the jurisdictions reject the notion of grading inchoate offenses the same as the completed offense." Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 1994 J. CONTEMP. LEGAL ISSUES 299, 320 (1994) ("Nearly two-thirds of American jurisdictions have adopted codes that have been heavily influenced by the Model Penal Code, but less than 30% of these have adopted the Code's inchoate grading provision or something akin to.").

[40] The relevant statutory provisions, subsections (c) and (d), read:

> (c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a

liability under the RCC. The first is whether and to what extent the revised statute applies to conspiracies to commit target offenses outside the District of Columbia. And the second is whether and to what extent the revised statute applies to conspiracies formed outside the District of Columbia.

Subsection (d) addresses the first situation, where the requisite agreement is formed within the District of Columbia, but where the object of the agreement is to engage in conduct outside the District of Columbia. Paragraph (d)(1) establishes that general conspiracy liability applies only if the conduct to be performed outside the District of Columbia would constitute a criminal offense under the statutory laws of the District of Columbia if performed inside the District of Columbia, provided that one of the conditions under paragraph (d)(2) is met. First, under paragraph (d)(2) and subparagraph (d)(2)(A), that conduct would constitute a criminal offense under the statutory laws of that other jurisdiction if performed in that jurisdiction.[41] Second, and alternatively under paragraph (d)(2) and subparagraph (d)(2)(B), that conduct would constitute a criminal offense under the statutory laws of the District of Columbia even if it was performed outside the District of Columbia.[42]

Subsection (e) addresses the second situation, where the requisite agreement is formed outside the District of Columbia, but where the object of the agreement is to engage in conduct inside the District of Columbia. Paragraph (e)(1) establishes that general conspiracy liability applies if the conduct to be performed inside the District of Columbia would constitute a criminal offense under the statutory laws of the District of Columbia,

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> criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:
>
> > (1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or
> >
> > (2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.
>
> (d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction.

D.C. Code § 22-1805a. Note that the prior references to "act[s] of Congress exclusively applicable to the District of Columbia" in the old District statute have been replaced with the phrase "statutory laws of the District of Columbia" in RCC § 22E-303(d), (e), and (f). This explicitly clarifies that these jurisdictional provisions apply to all criminal offenses in the D.C. Code, rather than just congressionally enacted offenses.

[41] For example, if two people form a conspiracy within the District to manufacture a controlled substance in another jurisdiction, it is a violation of this statute only if manufacturing that substance is a criminal offense under the District's statutory laws.

[42] For example, if two people form a conspiracy within the District to transmit criminal threats from another jurisdiction to a person residing within the District, they may be convicted of a criminal conspiracy because the statutory laws of the District criminalize transmitting a criminal threat from outside of the jurisdiction to a person located within the District.

provided that an overt act in furtherance of the conspiracy is committed within the District of Columbia (paragraph (e)(2). Under these circumstances, subsection (e) clarifies that it is no defense that the conduct that is the object of the conspiracy would not constitute a criminal offense under the laws of that other jurisdiction.[43]

The RCC conspiracy statute is intended to preserve existing District law relevant to conspiracy liability to the extent it is consistent with the RCC's statutory text and accompanying commentary.[44] Subsections (a)-(e) therefore incorporate existing District legal authorities whenever appropriate.[45]

Subsection (f) specifies that when the requirements under paragraphs (e)(1) and (e)(2) are proven, it is not a defense to prosecution for conspiracy that the object of the conspiracy would not constitute a criminal offense in the jurisdiction in which the conspiracy was formed. If two or more persons agree in another jurisdiction to engage in conduct in the District that constitutes a crime in the District, and an overt act in furtherance of the conspiracy is committed within the District, it is irrelevant that the object of the conspiracy would not constitute a criminal offense in the jurisdiction where the conspiracy was originally formed.

Relation to Current District Law. The RCC conspiracy statute clarifies, improves the proportionality of, and fill in gaps in the District law of criminal conspiracies.

The D.C. Code provides for conspiracy liability in a variety of ways. Most prominently, the D.C. Code contains a general conspiracy penalty provision that applies to a relatively broad group of offenses. [46] Additionally, the D.C. Code contains a variety of

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[43] Nothing in subsection (e) should be construed as lessening the government's burden to prove the culpable mental state requirement for conspiracy under RCC § 22E-303(a) and (b).

[44] This includes both those topics explicitly addressed by subsections (a)-(e) as well as those that are not, such as, for example: (1) determining the scope, duration, and number of conspiracies, see *McCullough v. United States*, 827 A.2d 48, 60 (D.C. 2003); (2) unanimity, see D.C. Crim. Jur. Instr. § 7.102 (citing *U.S. v. Treadwell*, 760 F.2d 327, 336-37 (D.C. Cir. 1985)); (3) charging, see *Tann v. United States*, 127 A.3d 400, 430 (D.C. 2015); (4) joinder, see *McCray v. United States*, 133 A.3d 205 (D.C.), *cert. denied sub nom. Fortson v. United States*, 137 S. Ct. 581, 196 L. Ed. 2d 455 (2016), and (5) the fact-finder's role in determining whether the relevant jurisdictional bases have been met, see *Gilliam v. United States*, 80 A.3d 192 (D.C. 2013).

[45] For an example of an area of the District's law of conspiracy changed by the RCC, compare D.C. Code § 22-1805a(a)(1) ("If 2 or more persons conspire either to commit a criminal offense *or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose* . . . .") *with* RCC § 22E-303(a) ("An actor commits criminal conspiracy to commit *an offense* when the actor and at least one other person. . . .").

[46] That provision, D.C. Code § 22-1805a, establishes in relevant part:

> (a)(1) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.
>
> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment

semi-general conspiracy penalty provisions, which create conspiracy liability for narrower groups of offenses with related social harms.[47] Finally, some specific offenses in the D.C. Code individually provide for conspiracy liability by incorporating the term "conspires" as an element of the offense.[48]

The District's scattered collection of conspiracy statutes present the same two basic problems reflected in the District's "patchwork of attempt statutes."[49] The first is that the District's conspiracy statutes fail to clearly communicate the elements of a criminal conspiracy. In no place, for example, does the D.C. Code define the term conspiracy. This statutory silence has effectively delegated to District courts the responsibility to establish the contours of conspiracy liability. Over the years, the DCCA has issued numerous opinions and proffered a variety of statements relevant to determining the contours of conspiracy liability under District law. The case law in this area reflects the piecemeal evolution of doctrine over more than a century: it is sometimes ambiguous, occasionally internally inconsistent, and has never been clearly synthesized into a single analytical framework. Nonetheless, a holistic reading of District authority reveals basic and fundamental principles governing the contours of conspiracy liability. Consistent with the interests of clarity and consistency, the revised conspiracy statute translates these principles into a detailed statutory framework.

The second main problem in the District's conspiracy statutes is that they lack a consistent grading principle. For example, some District conspiracies are subject to the same statutory maxima governing the completed offense. Many other District conspiracies, in contrast, are subject to a statutory maximum less severe than (typically one-half) the statutory maximum applicable to the completed offense. Viewed collectively, then, the D.C. Code manifests at least two fundamentally different patterns in how it grades conspiracies, without any discernible rationale for the variances. This produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate. Consistent with the interests of consistency and proportionality, the revised conspiracy statute changes District law by adopting a uniform approach to grading conspiracies at one half the severity of the completed offense.

A more detailed analysis of District conspiracy law and its relationship with the revised conspiracy statute is provided below. It is organized according to seven main

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prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

The first subparagraph was created by Congress in 1970. *See* 84 Stat. 599, Pub. L. 91-358, title II, § 202, at 599 (July 29, 1970). The latter subparagraph was added by the D.C. Council in 2009 as part of the Omnibus Public Safety and Justice Amendment Act of 2009. *See* D.C. Law 18-88, § 209, 56 DCR 7413, 2009 District of Columbia Laws 18-88 (Dec. 10, 2009). Both subparagraphs were subject to the Criminal Fine Proportionality Act of 2012, see D.C. Law 19-317, § 201(z), 60 DCR 2064 (June 11, 2013).

[47] *See* D.C. Code § 48-904.09 (setting forth penalties for conspiracy to commit various drug offenses); D.C. Code § 8-417 (setting forth penalties for conspiracy to commit various pesticide-related violations); D.C. Code § 50-1331.08 (setting forth penalties for conspiracy to commit various false title-related violations).

[48] *See* D.C. Code § 22-3153 (conspiracy to commit particular crimes of violence as acts of terrorism); D.C. Code § 22-3154 (conspiracy to manufacture or possess a weapon of mass destruction); D.C. Code § 22-3155 (conspiracy to use, disseminate, or detonate a weapon of mass destruction); D.C. Code § 22-2001 (conspiracy to kidnap); D.C. Code § 21-591 (conspiracy to violate various fiduciary obligations); D.C. Code § 1-1001.14 (conspiracy to engage in corrupt election practices).

[49] 1978 D.C. Code Rev. § 22-201 cmt. at 113.

topics: (1) the plurality requirement; (2) the agreement requirement; (3) the culpable mental state requirement; (4) impossibility; (5) the overt act requirement; (6) the treatment of non-criminal objectives; (7) penalties; and (8) jurisdictional issues.

RCC § 22E-303(a) (Prefatory Clause): Relation to Current District Law on Plurality Requirement. The prefatory clause of RCC § 22E-303(a) both codifies and clarifies the bilateral approach to conspiracy currently applied in the District.

One fundamental policy issue at the heart of conspiracy liability is whether the offense is bilateral or unilateral in nature. This distinction can be summarized as follows:

> The bilateral approach asks whether there is an agreement between two or more persons to commit a criminal act. Its focus is on the content of the agreement and whether there is a shared understanding between the conspirators. The unilateral approach is not concerned with the content of the agreement or whether there is a meeting of minds. Its sole concern is whether the agreement, shared or not, objectively manifests the criminal intent of at least one of the conspirators.[50]

Under current District law, it is well established that conspiracy is a bilateral, rather than unilateral, offense. The genesis of this approach is the District's general conspiracy statute, which explicitly states that "2 or more persons [must] conspire" to commit an offense.[51] The DCCA, in turn, has observed that this language means what it says, namely, that at least two of the relevant parties must actually agree.[52]

District practice, as captured by the Redbook jury instructions, also reflects a bilateral approach to conspiracy. More specifically, the Redbook states that the government must prove that "an agreement existed between two or more people to commit

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[50] *State v. Pacheco*, 125 Wash. 2d 150, 160 (1994).

[51] D.C. Code §§ 22-1805a(1)-(2). Note that a person who merely *solicits* another to commit a crime of violence is subject to criminal liability under the District's general solicitation statute. *See* D.C. Code § 22-2107(b) ("Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.") Under District law, a "crime of violence" means:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

[52] *E.g., McCullough v. United States*, 827 A.2d 48, 58 (D.C. 2003); *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997); *see De Camp v. United States*, 10 F.2d 984, 985 (D.C. Cir. 1926) ("It is true that a conspiracy can only exist between two or more persons, and a single defendant could not be guilty of the crime.").

the crime" that constitutes the object of the conspiracy.[53] This aspect of the jury instructions does not entail proof of "a formal agreement or plan, in which everyone involved sat down together and worked out the details."[54] At the very least, however, the government must prove beyond a reasonable doubt that "there was a common understanding among those who were involved to commit the crime," which constitutes the object of the conspiracy.[55]

Under current District law, therefore, "[t]he existence of an agreement between [the defendant] and at least one other person, in the sense of a 'joint commitment' to a criminal endeavor, is not a mere technicality but 'the fundamental characteristic of a conspiracy.'"[56]

Consistent with the interests of clarity, as well as the preservation of current District law, the RCC codifies this bilateral approach to conspiracy. This is reflected in the prefatory clause of the revised conspiracy statute, which establishes that a person is guilty of a conspiracy to commit an offense when, *inter alia*, that "actor *and at least one other person*" satisfy the elements of a conspiracy. This italicized language, drawn from DCCA case law, replaces the "2 or more persons" language employed in the District's current general conspiracy statute.[57] It more clearly communicates the required joint commitment at the heart of the bilateral approach to conspiracy under District law.

RCC § 22E-303(a)(1): Relation to Current District Law on Agreement Requirement. RCC § 22E-303(a)(1) codifies District law relevant to the agreement requirement of a criminal conspiracy.

The agreement constitutes both the "gist of"[58] and "[t]he essential element"[59] of a conspiracy under District law. Absent a statutory clarification of the agreement requirement in D.C. Code § 22-1805a, however, it has fallen to the DCCA to determine the contours of this essential element. The body of case law that has resulted can be subdivided into two different dimensions: (1) substantive (i.e. the principles of liability governing the agreement requirement); and (2) evidentiary (i.e. the kind of proof that will satisfy those principles). This section focuses on the substantive dimension.

The scope of the agreement requirement is quite broad under DCCA case law, encompassing a wide range of conduct. For example, it is well established that a defendant can be deemed to have agreed with others to pursue criminal objectives without "knowing the identity of all the other people . . . participating in the agreement."[60] Nor, for that

[53] D.C. Crim. Jur. Instr. § 7.102.
[54] *Id.*
[55] *Id.*
[56] *In re T.M.*, 155 A.3d at 413 (Beckwith, J., *concurring in part and dissenting in part*) (quoting *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016)).
[57] D.C. Code § 22-1805a(a).
[58] *Wilson-Bey v. United States*, 903 A.2d 818, 841 (D.C. 2006) (*en banc*) (quotations and citations omitted).
[59] *Pearsall v. United States*, 812 A.2d 953, 961 (D.C. 2002) (citation omitted).
[60] *Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000); *Green v. United States*, 718 A.2d 1042, 1057 (D.C. 1998); *see Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996) (rejecting appellant's argument that he did not knowingly participate in a conspiracy because he had never been sure with whom he conspired); *see also Rogers v. United States*, 340 U.S. 367, 375 (1951) ("[A]t least two persons are required to constitute a conspiracy but the identity of the other members of the conspiracy is not needed inasmuch as one person can be convicted of conspiracy with persons whose names are unknown.") (cited in D.C. Crim. Jur. Instr. § 7.102).

matter, does the defendant need to have "agreed to all the details" of a scheme to be deemed to have agreed to pursue its objectives.[61]

Perhaps most importantly, a defendant can be convicted of a conspiracy under District law "even if that person agrees to play only a minor part as long as that person understands the unlawful nature of the plan."[62] This seems to mean that an agreement to aid another in the planning or commission of an offense, just like an agreement to directly commit that offense, can provide the basis for conspiracy liability "provided there is assent to contribute to a common enterprise."[63] Consistent with this principle, proof that a person agreed to participate in "every phase of the criminal venture" is neither a necessary nor essential component of conspiracy liability under District law.[64]

Paragraph (a)(1) of the revised conspiracy statute codifies the above District authorities applicable to understanding the scope of the agreement requirement. Paragraph (a)(1) establishes that an "[a]gree[ment] to engage in or aid the planning or commission" of criminal conduct is sufficient to establish general conspiracy liability under the RCC. This two-part formulation clarifies that agreements to aid (i.e. assist[65]), no less than agreements to directly commit, an offense constitute a sufficient basis for general conspiracy liability. This is consistent with current District law pertaining to the scope of the agreement requirement, and, as such, should preserve current District law pertaining to proof of the agreement requirement.[66]

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[61] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057. So, for example, as the DCCA observed in *Collins v. United States*:

> The formation of a conspiracy to rob does not necessarily require agreement either as to the means of committing the robbery, or as to the particular person to be robbed . . . . Indeed, conspirators may leave room for improvisation or refinement of details so long as they have agreed upon their fundamental goal . . . .

73 A.3d 974, 983 (D.C. 2013) (citations and quotations omitted).

[62] *Thomas*, 748 A.2d at 939; *Green*, 718 A.2d at 1057.

[63] *Long v. United States*, 169 A.3d 369, 378 (D.C. 2017) (quoting *United States v. Gardiner*, 463 F.3d 445, 457 (6th Cir. 2006)); *see, e.g., In re T.M.*, 155 A.3d at 404 (conspiracy conviction upheld where one party to agreement was "walking with and advising [the other party] on how to evade detection" after shooting); *McCoy v. United States*, 890 A.2d at 210 (conspiracy conviction upheld where one party to agreement shouted instructions at the other to drive the car in close range of the victim's car in furtherance of shooting); *Hairston v. United States*, 905 A.2d 765, 784 (D.C. 2006) (conspiracy conviction upheld where defendant "obtain[ed] guns and ammunition and join[ed] efforts to 'catch' members of [rival gang]"); *Green*, 718 A.2d at 1058 (upholding conspiracy conviction where defendant "joined the agreement with an understanding of its objective and with the intent to *assist* in its accomplishment").

[64] *Long*, 2017 WL 4248198, at *7 (quoting *Gardiner*, 463 F.3d at 457). The fact that agreements which envision accessorial support, no less than agreements to directly commit an offense, fall within the scope of conspiracy liability under District law seems to reflect the fact that concerted criminal activity is a social harm of the "gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Wilson-Bey*, 903 A.2d at 841 (discussing when "two or more to confederate and combine together to commit or *cause to be committed* a breach of the criminal laws") (quoting *Pinkerton*, 328 U.S. at 644).

[65] *See generally Tann v. United States*, 127 A.3d 400 (D.C. 2015), *cert. denied sub nom. Arnette v. United States,* No. 16-8523, 2017 WL 1200942 (U.S. May 1, 2017); *Johnson v. United States*, 883 A.2d 135 (D.C. 2005); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992).

[66] As an evidentiary matter, DCCA case law clarifies that the agreement requirement need not be "proven by direct evidence." *Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009) (quotations and citations omitted). Instead, they may be—and frequently must be—"inferred from a development and a collocation

RCC § 22E-303(a) & (b): Relation to Current District Law on Culpable Mental State Requirement. RCC § 22E-303(a) and (b) codify and fills gaps in District law concerning the culpable mental state requirement governing a conspiracy.

The precise contours of the culpable mental state requirement applicable to conspiracy under District law are ambiguous. The DCCA has generally recognized that there exists "two separate intents" at issue in conspiracy, "the intent to agree and the intent to achieve the criminal objective."[67] And, consistent with this understanding, the court has repeatedly held that the government is required to prove that the defendant both: (1) "intentionally joined [an] agreement"; and (2) did so "with the intent to advance or further the unlawful object of the conspiracy."[68] Upon closer consideration, however, the actual import of this particular formulation is less than clear.[69]

Consider that the first requirement, an intent to join an agreement, is a relatively insignificant part of any conspiracy offense. It is well established, for example, that "[t]he term 'agree' is commonly understood to include an 'intent to agree,'"[70] and that such an intent is "without moral content."[71] As a result, the larger, and more significant, issue is "what objective the parties intended to achieve by their agreement."[72] This is the issue that the second requirement of the previously quoted District formulation purports to address; it requires the government to prove an "intent to advance or further the unlawful object of the conspiracy."[73] Yet this formulation begs at least two different questions, neither of which is clearly resolved by the case law. First, what does "intent" mean in the context of an "intent to advance or further the unlawful object of the conspiracy"? And second, how does this intent requirement interact with the elements of the target offense, which may, or may not, be considered part of the "unlawful object of the conspiracy"?

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of circumstances." *Id.* (noting that evidentiary concerns are particularly significant in conspiracy cases given the difficulty of directly establishing the existence of an agreement.) The relevant circumstances considered by District courts as a matter of course "include the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties and the interests of the alleged conspirators." *Castillo–Campos v. United States,* 987 A.2d 476, 483 (D.C. 2010) (internal quotation marks and alterations omitted).

[67] *Green v. United States*, 718 A.2d 1042, 1057–58 (D.C. 1998).

[68] *Id.*; *see, e.g., Thomas v. United States*, 748 A.2d 931, 939 (D.C. 2000); D.C. Crim. Jur. Instr. § 7.102(2).

[69] Note that other DCCA cases use the phrase "knowing and voluntary participation in the agreement" instead of "intentionally joining an agreement." *E.g.*, *Campos-Alvarez v. United States*, 16 A.3d 954, 965 (D.C. 2011); *In re T.M.*, 155 A.3d 400, 404 (D.C. 2017); *McCullough v. United States*, 827 A.2d 48, 58 (D.C. 2003); *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997). These appear to be substantively identical formulations, though one *could* read the term "participation" in the latter formulation to impose an additional conduct requirement, above and beyond agreement. One problem with such a reading, however, is that it would seem to render the overt act requirement superfluous in the sense that the element of participation would by itself always satisfy the overt act requirement. *See generally* Commentary to RCC § 22E-303. In any event, as a matter of *mens rea*, this formulation does not alter the analysis of District law presented in this section. *See United States v. Childress*, 58 F.3d 693, 709 (D.C. Cir. 1995) (explaining why the "knowing and voluntary participation" language does not alter the fact that conspiracy is a "specific intent" crime).

[70] Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 752-53 (1983).

[71] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2 (3d ed. Westlaw 2019).

[72] *Id.*

[73] *McCrae v. United States*, 980 A.2d 1082, 1089 (D.C. 2009).

Confounding the first question is the fact that the term "intent" is defined in two different ways by common law authorities. Historically, intent has been "viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of a belief as to a practical certainty.[74] But there are exceptions to this bifurcated understanding. In specific contexts, for example, intent is employed as a synonym for purpose, thereby excluding knowledge as a viable basis for liability.[75] The law of conspiracy has typically been considered to be one such context by common law authorities.

A careful reading of District authorities suggests that existing District law *likely* accords with the common law view. For example, as the DCCA—quoting from U.S. Supreme Court case law—observed in *Brawner v. United States*:

> In certain narrow classes of crimes . . . heightened culpability has been thought to merit special attention . . . . [One] such example is the law of inchoate offenses such as . . . conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.[76]

Consistent with this understanding of conspiracy as an offense that entails proof of a "heightened mental state," the DCCA has seemingly equated the "intent" at issue in conspiracy with an "unlawful purpose"[77] or "illegal purpose."[78] This kind of purpose-based interpretation also accords with persuasive precedent—cited by the Redbook—from the U.S. Court of Appeals for the D.C. Circuit, which explicitly clarifies that "a purposeful state of mind [is] required" for conspiracy.[79]

Also relevant to this issue is the DCCA's observation in *McCoy v. United States* that "[m]ere [] awareness" is "insufficient to make out a conviction for either aiding and abetting or conspiracy."[80] The requirement of a "purposive attitude" is, as recognized by the DCCA's *en banc* decision in *Wilson-Bey*, an essential component of complicity liability under District law.[81] It therefore stands to reason—and is likewise indicated by the *McCoy* decision—that the same kind of "purposive attitude" is a necessary component of conspiracy liability.

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[74] *United States v. U.S. Gypsum Co*., 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987).

[75] *See United States v. Bailey*, 444 U.S. 394, 405 (1980); Model Penal Code § 2.02, cmt. at 125; WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.2 (3d ed. Westlaw 2019).

[76] 979 A.2d 1191, 1194 (D.C. 2009) (quoting *Bailey*, 444 U.S. at 405); *see Childress*, 58 F.3d at 707–08.

[77] *Green v. United States*, 718 A.2d 1042, 1058 (D.C. 1998).

[78] *Castillo-Campos*, 987 A.2d at 483; *see also Thomas*, 748 A.2d at 934 (for conspiracy requiring proof that the accused "*knowingly and intentionally* agrees.").

[79] *Childress*, 58 F.3d at 709; *see United States v. Clarke*, 24 F.3d 257, 264–65 (D.C. Cir. 1994) (to convict defendants of conspiracy to possess drugs with intent to distribute, "the government had to establish . . . that the defendants *purposefully* agreed to act in partnership"); *see also* Commentary to D.C. Crim. Jur. Instr. § 7.102 (citing *Childress* for the proposition that an erroneous instruction that conspiracy was a "general intent" crime was harmless since the instruction clearly informed the jury that a purposeful state of mind was required).

[80] *McCoy v. United States*, 890 A.2d 204, 211 (D.C. 2006), *as amended* (Feb. 23, 2006) (citing *Bolden v. United States*, 835 A.2d 532, 535 (D.C. 2003); *Speight v. United States*, 599 A.2d 794, 796-97 (D.C. 1991).

[81] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*).

Even assuming intent means purpose in the context of the phrase "intent to advance or further the unlawful object of the conspiracy," however, the culpable mental state requirement applicable to conspiracy under District law still remains ambiguous. The reason? It fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[82] To say, for example, that the parties to an agreement must desire to "advance or further the unlawful object of the conspiracy" does not specify whether the requisite purpose requirement applies to the (1) the *conduct* planned to culminate in that offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.

It seems relatively clear that, at minimum, the parties to the agreement must desire to bring about the conduct planned to culminate in an offense. Less clear, however, is whether and to what extent this purpose requirement—or any other principle of culpable mental state elevation—applies to the results and circumstances of the target offense.

For example, to secure a conviction for conspiracy to commit robbery *against a senior citizen*, must the government (merely) prove that the parties consciously desired to bring about conduct planned to culminate in the offense (e.g., knocking down and taking the wallet of victim X, who is over the age of 65)? Or, alternatively, must the government also prove that the parties consciously desired the relevant circumstance to exist (e.g., that victim X actually be over the age of 65)?

Likewise, where a target offense involving a result element is involved (e.g., homicide), must the government prove a conscious desire to bring about that result as well? Or, alternatively will a lesser mental state suffice (e.g., could two persons be convicted of conspiracy to commit second-degree murder where they agreed to blow up a housing project they were practically certain to be inhabited if their *purpose* was the destruction of building, and not to kill any of its inhabitants)?

Existing DCCA case law on conspiracy sheds little light on these issues.[83] The best one can do, then, is look to other legal contexts, where awareness—but likely nothing less than awareness—seems to suffice for liability.

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[82] *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013) (citations, quotations, and alterations omitted).

[83] This is perhaps unsurprising given that, under the *Pinkerton* doctrine, the government can, in many cases, use proof of a conspiracy to commit *any* offense plus negligence as to the results or circumstances of a greater or distinct offense to secure full liability for the latter offense. *See Pinkerton v. United States*, 328 U.S. 640 (1946). Here's how the DCCA summarized the *Pinkerton* doctrine in *Wilson-Bey*:

> [T]he *Pinkerton* doctrine provides that "a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Gordon v. United States,* 783 A.2d 575, 582 (D.C. 2001). Thus, in order to secure a conviction in conformity with *Pinkerton,* the prosecution must prove that an agreement existed, that a substantive crime was committed by a co-conspirator in furtherance of that agreement, and that the substantive crime was a reasonably foreseeable consequence of the agreement between the conspirators. *Pinkerton,* 328 U.S. at 646-47, 66 S.Ct. 1180; *Gordon,* 783 A.2d at 582. The government is not, however, required to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy.

For example, DCCA case law on attempt—described in the Commentary to RCC § 22E-301—appears to indicate that a principle of intent elevation governs the results of the target offense.[84] If true, this would mean that, where an attempt to commit a result element crime is charged, the government must prove that the defendant acted with either a belief that it was practically certain that the person's conduct would cause that result, or, alternatively, that the person consciously desired to cause any results of the target offense—regardless of whether that result is subject to a less demanding culpable mental state.[85] (It would also mean, however, that purpose as to a result, while sufficient, is not necessary for an attempt conviction.[86])

Given that conspiracy, which merely requires proof of an agreement and a mere overt act in furtherance of it,[87] is even more inchoate than attempt, which requires proof of conduct dangerously close to completion,[88] it stands to reason that the culpable mental state requirement applicable to the results of a conspiracy would, at minimum, entail a principle of culpable mental state elevation at least as demanding as that applicable to attempt.[89]

For circumstances, on the other hand, DCCA case law on accomplice liability provides a relevant point of departure. In this context, the DCCA in *Robinson v. United States* recently observed that—quoting from U.S. Supreme Court case law—"[a]n aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime . . . . [T]he intent must go to the specific and entire crime charged."[90] It therefore follows, as the *Robinson* court concluded, that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[91]

The *Robinson* decision indicates that, whatever the culpable mental state governing the circumstances of the target offense, a person cannot be deemed an accomplice of that offense without knowledge (or perhaps a belief) that they existed—regardless of whether a less demanding culpable mental state, such as recklessness or negligence, will suffice to establish to target offense.[92] (It also indicates, however, that a purpose requirement does not govern the circumstances of the target offense when charged under a complicity theory.[93])

Given that accomplice liability requires proof that the target offense was completed—whereas conspiracy liability does not—it stands to reason that the culpable

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903 A.2d at 840. Note that the *Pinkerton* doctrine, while requiring proof of the elements of a conspiracy, is actually a theory of complicity. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.08 (6th ed. 2012). Therefore, it is not addressed in this Report, but will instead be considered alongside accomplice liability in the CCRC's forthcoming work on complicity. The provisions that comprise RCC § 22E-303 neither preclude nor necessitate continued recognition of the *Pinkerton* doctrine.

[84] *See* Explanatory Note to RCC § 22E-301.

[85] *See id.*

[86] *See id.*

[87] *See* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012).

[88] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975).

[89] *See, e.g.,* Model Penal Code § 5.01 cmt. at 408-09.

[90] *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).

[91] *Id.*

[92] *See id.*

[93] *See Rosemond*, 134 S. Ct. at 1249.

mental state requirement applicable to the circumstances of a conspiracy would, at minimum, entail principles of culpable mental state elevation that are at least as demanding as those applicable to those of accomplice liability.[94]

One question left open by this analysis is whether an even *more demanding* principle of purpose elevation might apply to the results and circumstances of the target offense when a conspiracy is charged.[95] While purpose elevation is possible,[96] it's hard to see why anything more demanding than intent as to the results and circumstances of the target offense should be necessary to ground a conspiracy conviction as a policy matter.[97]

In accordance with this section's analysis of District law, subsections (a) and (b) codify the culpable mental state requirement of conspiracy as follows. Paragraph (a)(2) establishes that the culpability required for a criminal conspiracy necessarily incorporates "the culpability required for the [target] offense." Paragraph (a)(1) establishes a requirement of purpose applicable to both the agreement itself as well as to the conduct envisioned by the agreement, i.e. the parties must "[p]urposely agree to engage in or aid the planning or commission" of criminal conduct. These requirements are consistent with current District law on conspiracy.

Finally, subsection (b) establishes that the "defendant and at least one other person" must both: (1) "[i]ntend to cause all result elements required for that offense"; and (2) "[i]ntend for all circumstance elements required for that offense to exist." This language incorporates dual principles of culpable mental state elevation[98] applicable whenever the target offense is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e. recklessness or negligence), or none at all (i.e. strict liability).[99] In this case, proof of intent on behalf of two or more parties is required. These

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[94] *See, e.g.,* Model Penal Code § 5.01 cmt. at 408-09.

[95] *But see Rosemond*, 134 S. Ct. at 1249.

[96] *But see Childress*, 58 F.3d at 707–08; *compare with Clarke,* 24 F.3d at 264–65 and *United States v. Haldeman,* 559 F.2d 31, 112 (D.C. Cir. 1976).

[97] The following example is illustrative. Environmental activists X and Y agree to blow up a coal-processing facility during the evening/afterhours when only a single person, the on-duty night guard, V, will be present. Both X and Y are practically certain that V will die from the blast, though they'd very much prefer that V not be injured. The police intercede right before X and Y are able to set off the explosives, thereby saving V's life. On these facts, both X and Y should be able to be convicted of conspiracy to commit (knowing) murder, premised on the fact that their agreement was accompanied by: (1) a *desire* to engage in conduct, which, if carried out, would have culminated in murder (i.e. blowing up the facility); and (2) their *awareness as to a practical certainty* that such conduct would result in V's death. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 757 (1983) ("When causing a particular result is an element of the object offense and such result does not occur, the actor, to be liable for conspiracy under Subsection (1), must have the purpose or belief that the conduct contemplated by the agreement will cause such result."). *See also* Model Penal Code § 5.03 cmt. at 408 ("[I]t would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it.").

[98] Note that for those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance, subsection (b) does not elevate the applicable culpable mental state for a conspiracy charge.

[99] Importantly, neither of these principles of culpable mental state elevation precludes the government from charging conspiracies to commit target offenses comprised of result or circumstance elements subject to recklessness, negligence, or strict liability. However, to secure a conspiracy conviction for such offenses, proof that the parties to the agreement acted with the intent to cause every result and circumstance element that constitutes the target offense is necessary.

two policies fill a gap in the District law of conspiracy in a manner that is broadly consistent with District law applicable in other relevant contexts.

RCC § 22E-303(a)(1): Relation to Current District Law on Impossibility. RCC § 22E-303(a)(1) fills gaps in District law pertaining to the relevance of impossibility to conspiracy prosecutions in a manner that is consistent with the District approach to impossibility in the context of attempt prosecutions.

The issue of impossibility arises in the conspiracy context wherein two or more parties agree to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions were as they perceived them. In this kind of situation, one or more parties charged with conspiracy might argue that liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding conditions, completion of the target offense was impossible.[100] If presented with such a claim, the court would then have to determine whether and to what extent the particular kind of mistake rendering the criminal objective at the heart of a conspiracy prosecution impossible constitutes a defense.

There does not appear to be any District legal authority governing this particular kind of situation. No District statute speaks directly to the relationship between conspiracy and impossibility, and the DCCA does not appear to have published any opinions addressing it either.[101] The closest issue that District law addresses is the relationship between attempt and impossibility.

The commentary to RCC § 22E-301 provides a detailed discussion of the relevant legal trends in the District concerning this issue.[102] Generally speaking, impossibility is not a defense to an attempt charge under District law. In practical effect, this means that the fact that a criminal undertaking fails because of a defendant's mistaken beliefs concerning the situation in which he or she acts is typically deemed to be irrelevant for purposes of assessing attempt liability.

This broad rejection of impossibility claims extends to two different situations: (1) those involving pure factual impossibility, i.e. where "the intended substantive crime is impossible of accomplishment [] because of some physical impossibility unknown to the defendant"[103]; and (2) those involving hybrid impossibility, i.e. where the object of an agreement is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an

[100] *See* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012).
[101] *See also* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (3d ed. Westlaw 2019) (noting that "the issue of impossibility has been dealt with in the law of attempts . . . with much greater frequency").
[102] *See* Explanatory Note to RCC § 22E-301.
[103] *In re Doe*, 855 A.2d 1100, 1106 (D.C. 2004) (citing *German v. United States*, 525 A.2d 596, 606 n.20 (D.C. 1987) and WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019). Impossibility of this nature may result from the defendant's mistake as to *the victim*: consider, for example, a pickpocket who is unable to consummate the intended theft because, unbeknownst to her, she picked the pocket of the wrong *victim* (namely, one whose wallet is missing). *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012). Alternatively, impossibility of this nature may also result from the defendant's mistake as to *the means of commission*: consider, for example, the situation of a murderer-for-hire who is unable to complete the job because, unbeknownst to him, his murder weapon malfunctions. *See id.*

element of the target offense.[104] The reason for this broad rejection of impossibility is that in either of these situations, the defendant's "conduct, intent, culpability, and dangerousness are all exactly the same."[105]

At the same time, the District law of attempts also appears to recognize a narrow exception to this general rejection of impossibility. More specifically, it appears that impossibility may constitute a defense where the defendant's conduct is not "reasonably adapted" to completion of the target offense.[106] So, for example, if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions, hexing or voodoo," such conduct could not "constitute an attempt to murder since the means employed are not in any way adapted to accomplish the intended result."[107] By requiring a basic relationship between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement would seem to both preclude convictions for inherently impossible attempts[108] and limits the risk that innocent conduct will be misconstrued as criminal.[109]

These impossibility principles recognized by the DCCA in the attempt context are relevant to understanding contours of conspiracy liability under District law for two reasons. First, it's at least possible that these principles have actually been statutorily incorporated into the District's law of conspiracy. More specifically, the District's general conspiracy statute criminalizes conspiracies to commit any "crime of violence."[110] The

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[104] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012); *see In re Doe*, 855 A.2d at 1106. Illustrative scenarios of hybrid impossibility involve defendants caught in police sting operations. Consider, for example, the prosecution of a defendant who sends illicit photographs to a person he believes to be an underage female, but who is actually an undercover police officer, for attempted distribution of obscene material to a minor. *See People v. Thousand*, 631 N.W.2d 694 (Mich. 2001).

[105] *In re Doe*, 855 A.2d at 1106.

[106] *See, e.g., Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989); *Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996); *Williams v. United States*, 966 A.2d 844, 848 (D.C. 2009); *Doreus v. United States*, 964 A.2d 154, 158 (D.C. 2009); *Corbin v. United States*, 120 A.3d 588, 602 n.20 (D.C. 2015).

[107] Edwin R. Keedy*, Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 469 (1954). As explained in the commentary to RCC § 22E-301(a), there's no DCCA case law specifically addressing these kinds of issues. However, this is not surprising since attempt prosecutions premised upon "inherently impossible" attempts of this nature "seldom confront the courts." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019). Nevertheless, the DCCA has affirmatively upheld attempt convictions in impossibility cases based upon the premise that the defendant's conduct *was* reasonably adapted to commission of an offense. *See, e.g., Seeney*, 563 A.2d at 1083; *Thompson*, 678 A.2d at 27. The implication, then, is that where a defendant's conduct is *not* reasonably adapted to commission of an offense—as would be the case with attempted murder by means of witchcraft—attempt liability could not attach.

[108] An inherently impossible attempt is one "where any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought." WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019). An illustrative example is an attempt to kill implemented by means of witchcraft, incantation, or any other superstitious practice.

[109] This conclusion is also consistent with the DCCA's policy rationale for generally rejecting impossibility defenses. For example, in *In re Doe*, the DCCA rejected an impossibility defense on the rationale that "[w]hether the targeted victim is a child or an undercover agent, the defendant's conduct, intent, culpability, and dangerousness are all exactly the same." 855 A.2d at 1106. Where, however, a person attempts to commit a crime by means not otherwise reasonably adapted to commission of the target offense—for example, where the defendant's sole means of enticing a child is by performing a witchcraft ceremony in his own home—this rationale does not hold since the person's conduct and dangerousness seem qualitatively different.

[110] D.C. Code § 22-1805a(a) establishes in relevant part:

latter category, in turn, is defined by D.C. Code § 23-1331 to include "attempt[s]" to commit a long list of designated offenses.[111] When viewed collectively, then, the possibility of liability for a conspiracy to attempt a crime of violence could be understood to cover impossible conspiracies.[112]

Second, and perhaps more important, is that the policy considerations relevant to the resolution of impossibility claims are the same whether in the context of attempt liability or conspiracy liability. Indeed, if anything, the policy considerations that weigh against recognizing impossibility claims in the attempt context weigh even more heavily in favor against recognizing impossibility claims in the conspiracy context.[113]

With these considerations in mind, and given the interests of clarity, consistency, and proportionality, the RCC applies the same approach to impossibility in the context of

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> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.

[111] More specifically, D.C. Code § 23-1331 "defines" a crime of violence by reference to a list of offenses so designated, which includes criminal attempts:

> (4) The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an *attempt*, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4) (emphasis added).

[112] For a discussion of federal case law on conspiracy to attempt, see Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 60 (1989).

[113] As one court has framed the point:

> The case has been argued as though, for purposes of the defense of impossibility, a conspiracy charge is the same as a charge of attempting to commit a crime. It seems that such an equation could not be sustained, however, because . . . a conspiracy charge focuses primarily on the intent of the defendants, while in an attempt case the primary inquiry centers on the defendants' conduct tending toward the commission of the substantive crime. The crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime, take any step in preparation; mere preparation, however, is an inadequate basis for an attempt conviction regardless of the intent . . . Thus, the impossibility that the defendants' conduct will result in the consummation of the contemplated crime is not as pertinent in a conspiracy case as it might be in an attempt prosecution.

State v. Moretti, 52 N.J. 182, 187 (1968).

attempts—itself a codification of current District law—to impossibility in the context of conspiracy. This outcome is achieved by means of incorporation. Paragraph (a)(1) establishes, in relevant part, that agreements to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" can also provide the basis for general conspiracy liability. This reference to attempts imports the broad abolition of impossibility claims employed in the RCC's general attempt provision into the conspiracy context.[114] Under this approach, it is generally immaterial that the agreed-upon criminal scheme could never have succeeded under the circumstances.[115] So long as the parties agreed to bring about conduct that would have culminated in an offense if "the situation was as [the parties] perceived it" then conspiracy liability may attach,[116] provided that the agreed-upon plan of action was at least "reasonably adapted" to commission of the target offense.[117]

RCC § 22E-303(a)(2): Relation to Current District Law on Overt Act Requirement. RCC § 22E-303(a)(2) both codifies and clarifies current District law on the overt act requirement.

It is well established under District law that proof of a bilateral agreement to commit a crime and the requisite intent is not, by itself, sufficient to secure a conviction for conspiracy. Rather, "[u]nder D.C. law, a conspiracy requires proof of both agreement and action."[118] The latter component of action is reflected in the overt act requirement, which is expressly codified by the District's general conspiracy statute.

More specifically, D.C. Code § 22-1805a(b) states that: "No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose."[119] Construing this language, the DCCA has held that the overt act requirement entails proof that "during the life of the conspiracy, and in furtherance of its objective, the commission by at least one conspirator of at least one of the overt acts specified in the indictment."[120]

This overt act requirement often is not difficult to satisfy as a matter of practice.[121] In contrast to the conduct requirement of an attempt, for example, the DCCA has observed that conspiracy's overt act requirement "is far less exacting; a preparatory act, innocent in

[114] Under RCC § 22E-301(a)(4)(B), a person commits an attempt if, *inter alia*, he or she "engages in conduct that . . . [w]ould have come dangerously close to completing that offense if the situation was as the actor perceived it." Subparagraph (a)(3) of the statute further requires that the person's conduct must have been "reasonably adapted to completion of that offense."
[115] *See* RCC § 22E-301, Explanatory Note ("Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation been accurate.").
[116] RCC § 22E-301(a)(4)(B);.
[117] RCC § 22E-301..
[118] *Gilliam v. United States*, 80 A.3d 192, 208 (D.C. 2013) (quoting *Gibson v. United States*, 700 A.2d 776, 779 (D.C. 1997).
[119] D.C. Code § 22-1805a(b).
[120] *Hairston v. United States,* 905 A.2d 765, 784 (D.C. 2006); *see, e.g., Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009). Likewise, the District's criminal jury instructions further clarify that this overt act must have been committed "for the purpose of carrying out the conspiracy." D.C. Crim. Jur. Instr. § 7.102.
[121] *See, e.g., Hairston*, 905 A.2d at 784; *Mitchell*, 985 A.2d at 1135.

itself, may be sufficient."[122] All the same, it seems clear from both case law and statute that the overt act requirement is nevertheless an element of the offense of conspiracy.[123]

Consistent with these legal authorities, the RCC codifies the overt act requirement reflected in current District law. The relevant language employed in RCC § 22E-303(a)(2) requires proof that "[o]ne of the parties to the agreement engages in an overt act in furtherance of the agreement." This language is intended to be substantively identical to that employed in D.C. Code § 1805a(b); however, two clarifying revisions bear notice.

First, the phrase "alleged and proved," employed in D.C. Code § 1805a(b), is omitted as superfluous. This is a product of the fact that the RCC incorporates the overt act requirement into the definition of a conspiracy, rather than treating it through a separate subsection as is presently the case under D.C. Code § 1805a(b). Due to this reorganization, it is clear that the overt act requirement is an element of a conspiracy under the RCC. There is, then, no need to affirmatively state that the overt act requirement is entitled to the same procedural protections afforded to any other element of an offense.

Second, the phrase "pursuant to the conspiracy and to effect its purpose," employed in D.C. Code § 1805a(b), is replaced with the phrase "in furtherance of the agreement" under RCC § 22E-303(a)(3). This substitution more accessibly communicates the contours of the overt act requirement in District law.[124]

RCC §§ 22E-303(a) and (b) (Generally): Relation to Current District Law on Agreements to Achieve Non-Criminal Objectives. RCC §§ 22E-303(a) and (b) clarify, but may also change, District law by excluding non-criminal objectives from the scope of general conspiracy liability.

Under current District law, agreements to engage in non-criminal objectives also provide the basis for conspiracy liability under limited circumstances. This is a product of the fact that the District's general conspiracy statute criminalizes conspiring "*either* to commit a criminal offense or *to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose*."[125] As the DCCA recently explained in *Long v. United States*: "The use of the word "either" in the conspiracy statute envisions two types of conspiracies: (1) a conspiracy to defraud the District of Columbia or any court or agency; and (2) a conspiracy to commit a specific offense."[126]

The contours of conspiracy to defraud liability under District law are ill defined. The relevant statutory language seems to expand criminal liability beyond that provided

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[122] *Robinson v. United States*, 608 A.2d 115, 116 (D.C. 1992) (citing *Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975)).

[123] *See, e.g., Mitchell*, 985 A.2d at 1135. Note, however, that while D.C. Code § 1805a(b) requires for an overt act to be "alleged and proved," the DCCA has observed that "the overt act requirement is not a part of the 'corpus delicti' of conspiracy," which is to say the "body, substance or foundation of the crime." *Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996). Rather, as the court in *Irving v. United States* phrased it: "The substance of the crime of conspiracy is knowing participation in an agreement to accomplish an unlawful act; the requirement of an overt act is merely an evidentiary prophylactic." *Id.* at 1288. This is relevant for evidentiary reasons. *See Bellanger v. United States*, 548 A.2d 501, 502–03 (D.C. 1988) (holding that proof of overt act is not required to support admission of evidence of statement of coconspirator during course of conspiracy).

[124] *See, e.g., Hairston*, 905 A.2d at 784; *Mitchell*, 985 A.2d at 1135.

[125] D.C. Code § 22-1805a(1).

[126] *Long v. United States*, 169 A.3d 369, 376 (D.C. 2017) (citing *Eaglin v. District of Columbia*, 123 A.3d 953, 956 (D.C. 2015)).

for by a charge of conspiracy to commit fraud (e.g., it seems to cover forms of fraud that would not be criminal if committed by a single individual). Just how far this expansion is intended to go, however, is unclear: the relevant statutory language is quite vague,[127] while reported conspiracy cases premised on "defraud[ing] the District of Columbia or any court or agency" appear to be exceedingly rare. At minimum, though, relevant case law clarifies that such language is capacious enough to encompass at least some public corruption schemes.

For example, in *United States v. Lewis*, the U.S. Court of Appeals for the D.C. Circuit (CADC) upheld a conviction for conspiracy to defraud under the District's general conspiracy statute where the defendant, the owner of a restaurant-bar, agreed with two government officials to a scheme in which the officials would pressure a shopping center to provide the defendant with a lease to a liquor store in exchange for a portion of that store's profits.[128] In so doing, the CADC held that the District's general conspiracy statute covers "conspiring to defraud the District of Columbia of its lawful governmental functions including its right to have the disinterested official services of [the defendants], and its right to have its business conducted honestly."[129]

The DCCA's recent decision in *Long v. United States* is similarly in accordance.[130] In that case, the Court of Appeals upheld a conviction for conspiracy to defraud based upon the defendant's participation in a public corruption scheme, wherein he agreed to: (1) serve as the driver for a mayoral candidate paid off the books in order to avoid campaign finances laws; and (2) arrange a meeting for one mayoral candidate to endorse another in exchange for some form of compensation.[131]

Aside from these two decisions, the contours of the conspiracy to defraud prong of D.C. Code § 22-1805a are undefined by existing case law. At the same time, there is general support in the case law for the proposition that the conspiracy to defraud prong of D.C. Code § 22-1805a should be construed in accordance with the comparable prong in the federal conspiracy statute, 18 U.S.C. § 371, which criminalizes conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose." For example, the CADC in *Lewis* observed that:

> Though the legislative history does not expressly indicate Congress's desire to model the D.C. provision after the federal provision, the similarity of language and the routine construction of D.C.'s local statutes in accord with their federal counterparts lend strong support to the view that the D.C. provision should be interpreted along the lines of the federal provision.[132]

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[127] *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959) (noting that similar language in the federal conspiracy to defraud statute is extremely vague).

[128] *United States v. Lewis*, 716 F.2d 16, 22-23 (D.C. Cir. 1983). Having been convicted by the federal trial court of conspiracy to defraud under the District's general conspiracy statute, the defendant argued on appeal that his conviction ought to be overturned because the conspiracy to defraud prong of that statute "should be limited to fraud on the government involving money or property and not be read to reach fraud which impairs governmental functions." *Id.* at 23.

[129] *Id*.

[130] *Long v. United States*, 169 A.3d 369, 376 (D.C. 2017).

[131] *See id.*

[132] *Lewis*, 716 F.2d at 23 (citing *Dennis v. United States,* 384 U.S. 855, 859-864 (1966); *Hammerschmidt v. United States,* 265 U.S. 182, 188 (1924)).

Likewise, the DCCA's *Long* decision seems to be consistent with this reading. In that case, the court observed that the federal conspiracy statute "contains essentially the same language as the District's statute," and, therefore, indicated that it should be construed in accordance with the federal statute.[133]

Assuming the breadth of these two provisions are identical, however, raises a host of problems. As further discussed below,[134] the federal conspiracy to defraud provision is oft-criticized for the use of language that is "shadowy" at best.[135] The relevant ambiguities, in turn, have produced criminal liability of "such broad and imprecise proportions as to trench . . . the standards of fair trial and on constitutional prohibitions against vagueness and double jeopardy."[136] In light of these problems, today "most states provide that the object of a criminal conspiracy must be some crime, or some felony."[137]

Given these policy and practice considerations, and consistent with the interests of clarity and consistency, the RCC's general conspiracy provision excludes any reference to conspiracies "to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose." RCC §§ 22E-303(a) and (b) are instead limited to agreements to commit criminal "offenses," including the revised and expanded fraud offense.[138] This exclusion will ensure that the RCC clearly communicates the elements of general conspiracy liability. This change may—but need not necessarily—circumscribe the limits of conspiracy liability under District law.[139]

RCC §§ 22E-303(c): Relation to Current District Law on Conspiracy Penalties. Subsection (c) establishes a uniform and proportionate grading scheme for criminal conspiracies, which clarifies, simplifies, and changes District law.

The D.C. Code's general conspiracy statute, D.C. Code § 22-1805a, establishes a default penalty framework for conspiracy offenses comprised of two basic rules. First, conspiracies to commit offenses other than "crimes of violence" are punishable by a maximum of 5 years incarceration, "except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense."[140] And second, conspiracies to

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[133] *Long v. United States*, 169 A.3d 369, 376 (D.C. 2017).
[134] *See* Explanatory Note to RCC § 22E-303(a) & (b).
[135] Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 408 (1959); *see In re McBride*, 602 A.2d 626, 633 (D.C. 1992) (citing *id.*).
[136] Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 408 (1959) .
[137] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.3 (3d ed. Westlaw 2019).
[138] By implication, conspiracy liability does not attach to agreements to engage in conduct that would not otherwise be criminal if committed by an individual.
[139] Whether this constitutes a change in law depends, first, upon whether there is a meaningful policy difference between conspiring to "defraud the District of Columbia or any court or agency thereof in any manner or for any purpose" under current law, and conspiring to commit the revised fraud statute. Assuming the answer to this question is yes, then the existence of a change in law depends upon, second, whether the RCC codifies a specific public corruption conspiracy offense, which might otherwise fill the foregoing gap in liability.
[140] *See* D.C. Code § 22-1805a(a)(1) ("If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.").

commit "crimes of violence"[141] are punishable by a maximum of either "15 years []or the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both."[142]

Notwithstanding these two generally applicable rules, numerous District statutes communicate important penalty exceptions. Some of these exceptions are communicated through the penalty provisions governing conspiracies to commit individual or certain groupings of offenses. Illustrative provisions include the D.C. Code provisions setting forth penalties for conspiracies to commit: (1) various drug-related offenses[143]; (2) the

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Note that this provision also subjects conspiracies "to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose" to a maximum 5-year penalty. Interpreting this language, the DCCA has observed that:

> The use of the word "either" in the conspiracy statute envisions two types of conspiracies: (1) a conspiracy to defraud the District of Columbia or any court or agency; and (2) a conspiracy to commit a specific offense. *See* Eaglin v. District of Columbia, 123 A.3d 953, 956 (D.C. 2015) ("If the plain meaning of statutory language is clear and unambiguous and will not produce an absurd result, we will look no further." (citation, internal quotation marks, and brackets omitted)). The statute also contemplates a default five-year maximum prison term for conspiracy, except if the charge is a conspiracy to commit a specific offense and the specific offense alleged has a lower maximum prison term than five years. *See* D.C. Code § 22–1805a(a)(1).

Long v. United States, 169 A.3d 369, 375–77 (D.C. 2017) (upholding conspiracy to defraud charge, and concomitant five year statutory maximum, notwithstanding the "fact that the government could have charged appellant with a misdemeanor conspiracy to commit the specific offense of funding and concealing contributions to Mayoral Campaign A in excess of those permitted under the Campaign Finance Reform Act") (citing *District of Columbia v. Economides*, 968 A.2d 1032, 1036 (D.C. 2009) ("[T]he decision of whether or not to prosecute, and what charges to file . . . generally rests entirely in the prosecutor's discretion.").

[141] D.C. Code § 23-1331(4) ("The term 'crime of violence' means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.").

[142] *See* D.C. Code § 22-1805a(a)(2) ("If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.").

[143] *See* D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

manufacture or possession of a weapon of mass destruction[144]; and (3) the use, dissemination, or detonation of a weapon of mass destruction.[145]

Other exceptions to the District's general conspiracy penalty rules are communicated through incorporation of the term "conspires" into the definition of a given offense, effectively providing that a conspiracy to commit that offense is subject to the same punishment as the completed offense. Illustrative provisions in the D.C. Code include the statutory definitions of (1) kidnapping,[146] (2) criminal violations of fiduciary obligations,[147] and (3) corrupt election practices.[148]

Collectively, the District's scattered approach to penalizing conspiracies presents two main problems: (1) it lacks a consistent grading principle; and (2) it is confusingly communicated. With respect to the first problem, at least two fundamentally different grading patterns appear in the penalties governing conspiracies to commit both crimes of violence and non-violent crimes under the D.C. Code.

The first grading pattern, which might be referred to as a "significant punishment discount," is reflected in the numerous District conspiracy offenses subject to statutory maxima that are significantly less severe than (typically half) the statutory maxima governing the completed offense.

A penalty discount of this nature is perhaps most clearly reflected in the grading of conspiracies to commit various non-violent crimes. For example, whereas the statutory

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[144] *See* D.C. Code § 22-3154(b) ("A person who attempts or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.")

[145] *See* D.C. Code § 22-3155(b) ("A person who attempts or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries to multiple persons, or massive destruction of property may, upon conviction, be punished by imprisonment for not more than 30 years.").

[146] *See* D.C. Code § 22-2001 ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.").

[147] *See* D.C. Code § 21-591 ("Whoever: (1) without probable cause for believing a person to be mentally ill: (A) causes or conspires with or assists another person to cause the hospitalization, under this chapter, of the person first referred to; or (B) executes a petition, application, or certificate pursuant to this chapter, by which he secures or attempts to secure the apprehension, hospitalization, detention, or restraint of the person first referred to; or (2) causes or conspires with or assists another person to cause the denial to a person of a right accorded to him by this chapter; or (3) being a physician, psychiatrist or qualified psychologist, knowingly makes a false certificate or application pursuant to this chapter as to the mental condition of a person -- shall be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than three years, or both.").

[148] *See* D.C. Code § 1-1001.14 (a-1)(1) ("A person shall not knowingly or willfully: (A) Pay, offer to pay, or accept payment of any consideration, compensation, gratuity, reward, or thing of value for registration to vote or for voting; (B) Give false information as to his or her name, address, or period of residence for the purpose of establishing his eligibility to register or vote, that is known by the person to be false; (C) Procure or submit voter registration applications that are known by the person to be materially false, fictitious, or fraudulent; (D) Procure, cast, or tabulate ballots that are known by the person to be materially false, fictitious, or fraudulent; or (E) Conspire with another individual to do any of the above."); *id.* at § (a)(2) ("A person who violates paragraph (1) of this subsection shall, upon conviction, be fined not more than $10,000, be imprisoned not more than 5 years, or both.").

maxima for felony property offenses such as first degree theft,[149] first degree fraud,[150] and first degree financial exploitation of a vulnerable adult or elderly person[151] are set at 10 years, a conspiracy to commit any of those offenses is subject to the 5 year default rule governing conspiracies to commit non-crimes of violence under the general conspiracy statute.[152] In addition, the 7-year statutory maximum applicable to first degree receiving stolen property[153] is reduced to 5 years under this default rule.[154] And the 10-year statutory maxima applicable to second degree cruelty to children,[155] as well as the 20-year statutory maximum applicable to felony threats,[156] are also reduced to five years under the first default rule.[157] (Neither of these offenses is a crime of violence.[158])

A pattern of significant punishment discounting can also be seen in the penalties governing numerous conspiracies to commit crimes of violence. For example, whereas first-degree murder[159] and second-degree murder[160] are both potentially subject to a sentence of life in prison under the D.C. Code, a conspiracy to commit either of those offenses is subject to the 15 year default rule governing conspiracies to commit crimes of violence under the general conspiracy statute.[161] Likewise, the 30 year statutory maxima applicable to first degree burglary[162] is also reduced to 15 years under the default rule governing conspiracies to commit crimes of violence.[163]

These significantly discounted conspiracy penalties are to be contrasted with those that reflect a grading pattern that might be referred as "equal punishment," namely, they

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[149] D.C. Code § 22-3212(a) ("Any person convicted of theft in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is $1,000 or more.").
[150] D.C. Code § 22-3221(a)(1) ("Any person convicted of fraud in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is $1,000 or more . . . .").
[151] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . When the value of the property or legal obligation is $1,000 or more, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 10 years, or both.").
[152] D.C. Code § 22-1805a(a)(1).
[153] D.C. Code § 22-3232(c)(1) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 7 years, or both, if the value of the stolen property is $1,000 or more.").
[154] *See* D.C. Code § 22-1805a(a)(1).
[155] D.C. Code § 22-1101(b)(2) ("Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").
[156] D.C. Code § 22-1810 ("Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.").
[157] *See* D.C. Code § 22-1805a(a)(1).
[158] *See* D.C. Code § 23-1331(4).
[159] D.C. Code § 22-2104(a)("The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release . . . .").
[160] D.C. Code § 22-2104(c) ("Whoever is guilty of murder in the second degree shall be sentenced to a period of incarceration of not more than life . . . .").
[161] *See* D.C. Code § 22-1805a(a)(2).
[162] D.C. Code § 22-801(a) ("Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.").
[163] *See* D.C. Code § 22-1805a(a)(2).

subject conspiracies to the same statutory maximum governing the completed offense. The D.C. Code is comprised of numerous conspiracy offenses that effectively equalize the sanction for conspiracies, though the D.C. Council has authorized this outcome in a variety of ways.

Most explicit is the District's semi-general penalty provision for drug crimes, D.C. Code § 48-904.09, which broadly states that conspiracies to commit drug crimes may be punished as seriously as completed drug crimes.[164] In practical effect, this means that, *inter alia*, conspiracies to manufacture, distribute, or possess, with intent to manufacture or distribute, a Schedule I or II controlled substance are subject to the same 30 statutory maximum governing the completed offense.[165]

A pattern of equal punishment is also apparent in those District offenses that statutorily incorporate the term "conspires" into their statutory definition. Illustrative provisions in the D.C. Code include the statutory definitions of (1) kidnapping,[166] (2) criminal violations of fiduciary obligations,[167] and (3) corrupt election practices.[168]

Numerous other District conspiracy offenses exhibit a pattern of equal punishment through more convoluted means. For example, the District's while armed enhancement applies the same flat 30-year statutory maximum add-on to numerous crimes, without regard to whether the underlying crime is completed or merely attempted, through the D.C. Code's definition of "crimes of violence" and "dangerous crimes."[169]

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[164] D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy[.]").

[165] *See* D.C. Code § 48-904.01(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[166] *See* D.C. Code § 22-2001 ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section.").

[167] *See* D.C. Code § 21-591 ("Whoever: (1) without probable cause for believing a person to be mentally ill: (A) causes or conspires with or assists another person to cause the hospitalization, under this chapter, of the person first referred to; or (B) executes a petition, application, or certificate pursuant to this chapter, by which he secures or attempts to secure the apprehension, hospitalization, detention, or restraint of the person first referred to; or (2) causes or conspires with or assists another person to cause the denial to a person of a right accorded to him by this chapter; or (3) being a physician, psychiatrist or qualified psychologist, knowingly makes a false certificate or application pursuant to this chapter as to the mental condition of a person -- shall be fined not more than the amount set forth in [§ 22-3571.01] or imprisoned not more than three years, or both.").

[168] *See* D.C. Code § 1-1001.14 (a-1)(1) ("A person shall not knowingly or willfully: (A) Pay, offer to pay, or accept payment of any consideration, compensation, gratuity, reward, or thing of value for registration to vote or for voting; (B) Give false information as to his or her name, address, or period of residence for the purpose of establishing his eligibility to register or vote, that is known by the person to be false; (C) Procure or submit voter registration applications that are known by the person to be materially false, fictitious, or fraudulent; (D) Procure, cast, or tabulate ballots that are known by the person to be materially false, fictitious, or fraudulent; or (E) Conspire with another individual to do any of the above."); *id.* at § (a)(2) ("A person who violates paragraph (1) of this subsection shall, upon conviction, be fined not more than $10,000, be imprisoned not more than 5 years, or both.").

[169] More specifically, D.C. Code § 22–4502(a)(1) establishes that anyone who commits a violent or dangerous crime:

In addition, conspiracies to commit second degree fraud,[170] unauthorized use of a motor vehicle,[171] and blackmail[172] (not involving a threat of violence[173]) are all subject to the same 5-year penalty as the completed offense by virtue of the default rule applicable to non-violent crimes in the general conspiracy statute.[174] And, along similar lines, conspiracies to commit the least severe forms of theft,[175] fraud,[176] receiving stolen property,[177] financial exploitation of a vulnerable adult or elderly person,[178] and assault[179] are all subject to the same 180-day penalty as the completed offense (again) by virtue of the default rule applicable to non-violent crimes in the general conspiracy statute.[180]

Finally, conspiracies to commit first degree cruelty to children,[181] second degree burglary,[182] and robbery[183] are all subject to the same 15-year statutory maximum

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> May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses . . . and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years . . . .

See D.C. Code § 23-1331(4) ("The term 'crime of violence' means . . . [a] conspiracy to commit any of the foregoing [enumerated] offenses.").

[170] D.C. Code § 22-3221(b)(1) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or twice the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct is $1,000 or more . . . .").

[171] D.C. Code § 22-3215(d)(1) ("[A] person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both.").

[172] D.C. Code § 22-3252 (b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[173] *See* D.C. Code § 23-1331(4).

[174] *See* D.C. Code § 22-1805a(a)(1).

[175] D.C. Code § 22-3212(b) ("Any person convicted of theft in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property obtained or used has some value.").

[176] D.C. Code § 22-3222(b)(2) ("Any person convicted of fraud in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both, if the property that was the object of the scheme or systematic course of conduct has some value.").

[177] D.C. Code § 22-3232(c)(2) ("Any person convicted of receiving stolen property shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both, if the stolen property has some value.").

[178] D.C. Code § 22-936.01(a) ("Any person who commits the offense of financial exploitation of a vulnerable adult or elderly person in violation of § 22-933.01 shall be subject to the following criminal penalties . . . . When the property or legal obligation has some value, a fine of not more than the amount set forth in § 22-3571.01, or imprisonment for not more than 180 days, or both.").

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

[180] *See* D.C. Code § 22-1805a(a)(1).

[181] D.C. Code § 22-1101(c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 15 years, or both.").

[182] D.C. Code § 22-801(b) ("Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years.").

[183] D.C. Code § 22-2801 ("Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of

applicable to the completed offense by virtue of the default rule applicable to *violent crimes* under the District's general conspiracy statute.[184]

Viewed as a whole, then, the District's approach to grading criminal conspiracies does not reflect any consistent principle of punishment. Indeed, the D.C. Code manifests at least two fundamentally different patterns in how it grades conspiracies, without any discernible rationale for the variances. In practical effect, this produces a penalty scheme which authorizes the imposition of sentences that are, at least in relation to one another, quite disproportionate.

At the same time, these potential disproportionalities are not immediately apparent given the second fundamental flaw reflected in the District law of conspiracies, namely, its disorganized approach to codification. For example, notwithstanding the fact that the District's general conspiracy statute purports to articulate the District's overarching penalization scheme, the D.C. Code contains numerous exceptions to these rules. Further, the manner in which these exceptions are communicated is quite inconsistent: some are communicated through individual penalty provisions incorporated into a single offense; others are communicated through semi-general conspiracy penalty provisions that apply to groups of offenses; and still other exceptions are communicated by including the word "conspires" in the definition of the offense.

RCC § 22E-303(c) endeavors to remedy these issues by establishing a clear and consistent approach to grading conspiracies, which renders offense penalties more proportionate: a proportionate penalty discount under which the statutory maximum and fine for a conspiracy is set at one-half of the statutory maximum and fine of the completed offense. This general principle is similarly applicable to criminal attempts and criminal solicitations under the RCC.

RCC §§ 22E-303(d), (e), and (f): Relation to Current District Law on Jurisdiction. Subsections (d), (e), and (f) are in accord with, but may also fill a potential gap in, current District law governing jurisdiction in conspiracy prosecutions.

The District's general conspiracy statute currently contains two provisions, D.C. Code §§ 22-1805a(c) and (d), which address separate jurisdictional issues. The relevant statutory provisions read:

> (c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:
>
> (1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or

another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[184] *See* D.C. Code § 22-1805a(a)(2).

> (2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.
>
> (d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction.[185]

The general import of these provisions, enacted as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, is relatively clear: they proscribe basic jurisdictional principles for dealing with conspiracies formed inside the District to commit crimes outside the District, D.C. Code § 22-1805a(c), as well as for conspiracies formed outside the District to commit crimes inside the District, D.C. Code § 22-1805a(d). However, there is scant District authority illuminating the precise meaning of these provisions. Relevant legislative history in the House Committee Report only indicates a general recognition that this language was "modeled" on the law of conspiracy in New York, "rather than Federal law, because of the need for greater specificity in a statute applicable to a geographically limited area within the United States."[186]

One issue that both the statutory text and legislative history leave unclear is whether and to what extent D.C. Code §§ 22-1805a(c) and (d) were intended to apply to criminal offenses *passed by the D.C. Council*. The lack of clarity on this issue is a product of the fact that D.C. Code §§ 22-1805a(c) and (d) make continuous reference to "an act of

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[185] D.C. Code §§ 22-1805a(c)-(d).

[186] DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970: REPORT OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA ON H.R. 16196, at 66 (March 13, 1970). The relevant provision in the New York Penal Code reads:

> 1. A person may be prosecuted for conspiracy in the county in which he entered into such conspiracy or in any county in which an overt act in furtherance thereof was committed.
>
> 2. An agreement made within this state to engage in or cause the performance of conduct in another jurisdiction is punishable herein as a conspiracy only when such conduct would constitute a crime both under the laws of this state if performed herein and under the laws of the other jurisdiction if performed therein.
>
> 3. An agreement made in another jurisdiction to engage in or cause the performance of conduct within this state, which would constitute a crime herein, is punishable herein only when an overt act in furtherance of such conspiracy is committed within this state. Under such circumstances, it is no defense to a prosecution for conspiracy that the conduct which is the objective of the conspiracy would not constitute a crime under the laws of the other jurisdiction if performed therein.

N.Y. Penal Law § 105.25.

Congress applicable exclusively to the District of Columbia." This phrasing reflects the pre-Home Rule reality that, when the relevant jurisdictional provisions were enacted in 1970, local criminal laws were written by Congress. Since Home Rule, however, the D.C Council has been responsible for passing nearly all of the District's criminal laws.[187] Which raises the following question: are conspiracies to commit such offenses, enacted by the D.C. Council, covered by the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d)?[188]

There does not appear to be any case law addressing this particular issue, and the reported decisions even mentioning these jurisdictional provisions is scant.[189] However, the one DCCA case directly addressing them, *Gilliam v. United States*, seems to provide indirect support for the proposition that conspiracies to commit offenses enacted by the D.C. Council might be covered by the relevant jurisdictional provisions.[190] After quoting to the text of D.C. Code § 22-1805a(d), for example, the *Gilliam* decision states that:

> We understand this provision to mean that when a prosecution for conspiracy is predicated on an agreement made in another jurisdiction, the government must prove that an overt act pursuant to the conspiracy was committed within the District of Columbia in order to prove the offense.[191]

Notably absent from this statement is any reference to conspiracies to commit offenses specifically passed by Congress; instead, the court merely references "a prosecution for

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[187] *See, e.g.,* D.C. Code § 22-3002 (sexual abuse); D.C. Code § 22-3053 (revenge porn).

[188] Note that D.C. Code §§ 22-1805a(c)-(d) do not purport to address jurisdiction over all conspiracy prosecutions, only those where: (1) "the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia"; or (2) "[a] conspiracy [is] contrived in another jurisdiction to engage in conduct within the District of Columbia"); *see Gilliam v. United States*, 80 A.3d 192, 209-10 (D.C. 2013) (noting that these provisions address two particular situations).

[189] *See United States v. Lewis*, 716 F.2d 16, 23 (D.C. Cir. 1983) (noting that the "venue and jurisdiction" provisions of D.C. Code § 22-1805a reflect the "necessity of greater specificity in a statute applicable to a geographically limited area within the United States").

[190] At issue in *Gilliam* were indictments charging "that appellants entered into an agreement within the District of Columbia to murder [the victim]" in Maryland. 80 A.3d at 192. More specifically, the indictments alleged that the appellants "committed nine overt acts during and in furtherance of that conspiracy—four acts in Maryland [] and five acts in the District[]." *Id.* At trial, the court instructed the jury that "proof of any one of [these overt acts] would support a conviction for conspiracy." *Id.* The appellants were thereafter convicted by the jury. On appeal, the appellants argued that "the trial court improperly allowed the jury to convict them for conspiracy based solely on acts occurring outside the District of Columbia over which . . . the Superior Court lacked jurisdiction." *Id.* at 209. The DCCA ultimately agreed, deeming it "plausible that the jury relied solely on overt acts in Maryland in convicting appellants of conspiracy." *Id.*

[191] *Id.* at 209–10. The DCCA ultimately concluded that the foregoing "statutory requirement was overlooked" by the trial court given that:

> the jury could have convicted appellants of conspiracy based solely on a finding that they entered into an agreement in Maryland and that they committed an overt act in Maryland—i.e. without finding any conspiratorial agreement made or joined, or overt act committed, within the District of Columbia.

Id.

conspiracy."[192] (That said, such a reference would not have been necessary because the charge at issue in the *Gillam* case was conspiracy to commit murder.)

Lastly, in 2009 the D.C. Council amended the District's general conspiracy statute to more severely punish conspiracies "to commit a crime of violence as defined in § 23-1331(4)."[193] The latter category of offenses specifically includes a variety of crimes enacted by the D.C. Council since Home Rule.[194] With that in mind, it seems unlikely that the D.C. Council would have declined to revise the relevant jurisdictional provisions had they been understood to exclude many of the very offenses that were receiving enhanced penalties under the Omnibus Public Safety and Justice Amendment Act.

Subsections (d), (e), and (f) accord with the previously discussed District authorities. These three subsections recodify D.C. Code §§ 22-1805a(c) and (d), making one potential change to District law and three kinds of non-substantive revisions to the current statutory text.

The potential change is that the revised jurisdictional provisions replace the phrase "an act of Congress applicable exclusively to the District of Columbia" with a reference to "the statutory laws of the District." This definitively resolves the issue discussed above: conspiracies to commit offenses enacted by the D.C. Council are explicitly covered by the jurisdictional provisions set forth in D.C. Code §§ 22-1805a(c) and (d). It is unlikely this constitutes a departure from current District law, but, to the extent it does, it fills an unjustifiable (and likely unintended) gap created by the advent of home rule in the District.

The three kinds of non-substantive revisions, which improve the clarity and consistency of current District law governing jurisdiction in conspiracy prosecutions, are as follows. First, the revised jurisdictional provisions rephrase the current jurisdictional provisions in a more accessible manner. For example, the legalistic term "contrived," employed in both D.C. Code §§ 22-1805a(c) and (d), is replaced with the simpler term "formed" in both RCC §§ 22E-303(d) and (e).

Second, the revised jurisdictional provisions reorganize the current jurisdictional provisions in a more intuitive way. For example, the substantive requirement that the relevant conduct "constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein," employed in both D.C. Code

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[192] *Id.*

[193] This new penalty provision was part of the Omnibus Public Safety and Justice Amendment Act of 2009. *See* D.C. Law 18-88, § 209, 56 DCR 7413, 2009 District of Columbia Laws 18-88 (Dec. 10, 2009).

[194] Under District law, a "crime of violence" means:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4). Many of these offenses—for example, aggravated assault, carjacking, sexual abuse, and child sex abuse, among others—were enacted by the D.C. Council.

§§ 22-1805a(c) and (d), is broken out into its own separate subsection in both RCC §§ 22E-303(d) and (e). In addition, the clarification stated in D.C. Code § 22-1805a(d)—that "it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the statutory laws of the other jurisdiction" where the substantive requirements stated in subsection (e) are met—is placed in its own subsection, RCC § 22E-303(f).

Third, the revised jurisdictional provisions rephrase the current jurisdictional provisions in a more descriptively accurate manner. For example, the vague use of "therein" employed throughout D.C. Code §§ 22-1805a(c) and (d) is replaced with a more specific reference to the relevant location in both RCC §§ 22E-303(d) and (e).

When viewed collectively, RCC §§ 22E-303(d), (e), and (f) both improve upon and preserve current District law governing jurisdiction in conspiracy prosecutions.

RCC § 22E-304. Limitation on Vicarious Liability for Conspirators.

Explanatory Note. *This section specifies that a party to a criminal conspiracy under RCC § 22E-303 may not be held liable for a criminal act of another party to the conspiracy unless an independent basis of liability is established under the RCC provisions concerning accomplice liability, liability for causing crime by an innocent actor, or liability for criminal solicitation, or under a District statute that otherwise expressly specifies such liability to exist. This section negates existing District case law recognizing what is commonly referred to as the Pinkerton doctrine.*

Subsection (a) specifies that a person who commits a criminal conspiracy as defined under RCC § 22E-303 is not liable for a criminal offense committed by another participant in the conspiracy, unless an independent basis for liability is established in one of two ways. This subsection codifies that there is no general, vicarious liability for co-conspirators while recognizing that other statutes may provide a basis for vicarious liability. As used here, "criminal conspiracy" refers to the crime defined under RCC § 22E-303, whether or not another person is charged with or convicted of such a crime.

Paragraphs (a)(1) and (a)(2) include two alternative circumstances in which an actor may be held liable for the acts committed by another participant in the conspiracy. Paragraph (a)(1) specifies that a person may be vicariously liable for an offense committed by another party to the conspiracy if that person satisfies requirements for criminal liability specified in RCC §§ 22E-210, 22E-211, or 22E-302. These sections specify the requirements for accomplice liability, liability for causing crime by an innocent actor, and solicitation. A person has vicarious liability for an offense committed by a co-conspirator if these other bases of liability satisfied, and a prosecution may proceed under one or more of these bases of liability. Subsection (a) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to the elements in paragraph (a)(1) and there is no culpable mental state for the fact that the actor satisfies the requirements for criminal liability in RCC §§ 22E-210, 22E-211, or 22E-302.

Paragraph (a)(2) provides, in the alternative, that a person may be held liable for an offense committed by another party to the conspiracy if another statutory provision expressly specifies that a person may be liable for a criminal offense committed by a fellow party to a conspiracy. A prosecution may proceed under such a statutorily-specified basis of liability. Subsection (a) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to the elements in paragraph (a)(2) and there is no culpable mental state for the fact that another statute expressly specifies that a party to a conspiracy may be held criminally liable for an offense committed by another party to the conspiracy.

Relation to Current District Law. *RCC § 22E-304 changes current District law by barring general, vicarious liability for the substantive crimes of a co-conspirator.*

The current D.C. Code does not provide general, vicarious liability for the substantive crimes of a co-conspirator. A person may be subject to vicarious liability for actions of another under the current conspiracy statute, D.C. Code § 22–1805a, under the aiding and abetting statute, D.C. Code § 22–1805, or under the statute for soliciting a crime

of violence D.C. Code § 22–2107. However, District case law has established that, in addition to conspiracy, accomplice, and solicitation liability, a person can be held liable for the substantive offenses committed by a co-conspirator when such a crime was in furtherance of the conspiracy and reasonably foreseeable.[1] This District case law follows the U.S. Supreme Court ruling in *Pinkerton v. United States* that a party to a conspiracy to violate federal crimes in the Internal Revenue Code may be held liable for a criminal offense committed by another party to the conspiracy if the offense is in furtherance of the conspiracy, and was reasonably foreseeable.[2] This theory of liability has become commonly known as the *Pinkerton* doctrine, and has been adopted by many United States jurisdictions[3] (though several jurisdictions have rejected the approach[4]).

RCC § 22E-304 supersedes District case law expanding criminal liability under the *Pinkerton* doctrine. Beyond the liability a person faces for entering into a conspiracy, soliciting another to commit a crime or acting as an accomplice, the doctrine imposes additional liability for criminal offenses committed by others in a manner that arguably results in either improper punishment for the acts of another or double punishment for the conspiracy.[5] Under *Pinkerton*, a person who is party to a conspiracy may be held liable for any reasonably foreseeable crimes committed by other parties in furtherance of the conspiracy. This effectively lowers the requisite mental state for the other offense to negligence, the least culpable mental state codified under the RCC.[6] Consequently, a person may be held liable for a crime committed by another under *Pinkerton*, even if that person did not intend, or have any suspicion, that another party to the conspiracy would commit an additional offense in furtherance of the conspiracy.[7] This approach may be

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[1] *Wilson–Bey v. United States,* 903 A.2d 818, 840 (D.C.2006) (*en banc*) (quoting *Gordon v. United States,* 783 A.2d 575, 582 (D.C.2001)) (""a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement").

[2] *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

[3] *E.g.*, Minn. Stat. § 609.05; Tex. Penal Code Ann. § 7.02; Wis. Stat. § 939.05. *State v. Walton*, 630 A.2d 990, 998-99 (Ct 1993); *People v. Bell*, 447 N.E.2d 909, 916 (Ill. App. Ct. 1983); *Smith v. State*, 549 N.E.2d 1036, 1038 (Ind. 1990); *State v. Tyler*, 840 P.2d 413, 424 (Kan. 1992); *State v. Stein*, 360 A.2d 347, 358 (N.J. 1976); *Commonwealth v. Roux*, 350 A.2d 867, 871-72 (Pa. 1976); *State v. Kukis*, 237 P. 476, 481 (Utah 1925).

[4] *E.g.*, Ala. Code § 13A-4-3; HRS § 702-22; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8. State ex rel. Woods v. Cohen, 844 P.2d 1147, 1151 (Ariz. 1992); People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979); State v. Lind, 322 N.W.2d 826, 841-42 (N.D. 1982); State v. Stein, 27 P.3d 184, 189 (2001).

[5] *See, e.g.*, *Pinkerton*, 328 U.S. at 649-650 ("If [the Pinkerton doctrine] does not violate the letter of constitutional right, it fractures the spirit.") (J. Rutledge dissenting).

[6] *See, e.g.,* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 Am. U. L. Rev. 585, 589 (2008) ("The 'reasonably foreseeable' requirement, for instance, imposes a minimum mens rea of negligence for vicarious liability stemming from a conspiracy"). Commentators have argued that the "reasonable foreseeability" requirement "provid[es] no meaningful limits on vicarious liability." Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability*, 33 Am. J. Crim. L. 91, 113 (2006).

[7] For example, A and B agree to distribute a controlled substance. Unbeknownst to A, B decides to kill rival C in order to increase the volume of sales. Under the *Pinkerton* theory, A could be held liable for murder, even though he did not kill anyone, or know that B intended to kill anyone.

consistent with some civil law standards for imposing liability,[8] but has been sharply criticized for being inconsistent with culpable mental state requirements throughout American criminal law.[9]

The *Pinkerton* doctrine contrasts sharply with RCC § 22E-210, which defines the requirements for accomplice liability in the RCC, and current District law regarding accomplice liability. Under RCC § 22E-210, an actor may be held liable for a criminal offense committed by another only if the actor "acts with the culpability required for that offense."[10] This reflects well established District case law requiring that an accomplice has "the culpable mental state required for the underlying crime committed by the principal."[11] In addition, accomplice liability requires that the actor *purposely* assists or encourages the principal to engage in conduct constituting the offense. Only when these stringent mental state requirements are satisfied can a person be held liable as an accomplice to another person's criminal conduct. *Pinkerton*, by contrast imposes liability for criminal offenses committed by others while *lowering* the requisite culpable mental state.[12]

Consider the following hypothetical. A and B agree to run an illegal bookmaking operation. Without informing B, A decides to take out the competition by severely beating a rival bookmaker C with a weapon, demanding that he stop taking bets. B did not know that A was going to beat C, and had no intent that the bookmaking operation would lead to violence. Nonetheless, under the *Pinkerton* doctrine, B could be held liable for felony assault and is subject to the same penalties as if he had beaten C himself, provided that A's conduct was reasonably foreseeable and in furtherance of the conspiracy. Although B acted culpably by entering into the conspiracy in the first place, the penalties provided for criminal conspiracy under RCC § 22E-303 adequately provide a proportionate penalty.

RCC § 22E-304 changes current District law by reversing DCCA case law that recognizes the *Pinkerton* doctrine. This change improves the proportionality of the revised criminal statutes.

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[8] *See, e.g.,* George P. Fletcher, *Rethinking Criminal Law* 663 (1978) (noting that while vicarious liability "might make some sense in the field of torts . . . it is patently absurd to think of conspirators controlling each other's acts.").

[9] *See, e.g.,* Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 Pierce L. Rev. 1, 3 (2005) ("the Pinkerton rule, is one of the most controversial doctrines in modern criminal law"); Wayne LaFave, § 13.3(a)Complicity and conspiracy distinguished, 2 Subst. Crim. L. § 13.3(a) (3d ed.) (noting "the *Pinkerton* rule never gained broad acceptance").
Both the Model Penal Code and proposed revised Federal criminal code reject *Pinkerton* liability. Proposed New Federal Criminal Code § 401 (1971) expressly provides that if one is a co-conspirator he is also liable as an accomplice only if the usual requirements are met.

[10] RCC § 22E-210.

[11] *Tann v. United States*, 127 A.3d 400, 444-45 (D.C. 2015).

[12] Although *Pinkerton* requires that the actor was negligent as to the additional offense, nearly all criminal offenses in the RCC require at least recklessness. *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

RCC § 22E-305. Exceptions to General Inchoate Liability.

Explanatory Note. *This section establishes two exceptions to the RCC general inchoate offenses of criminal solicitation (RCC § 22E-302) and criminal conspiracy (RCC § 22E-303).*[1]

Paragraph (a)(1) excludes the victim of an offense from being held liable for soliciting its commission under RCC § 22E-302 or conspiring in its commission under RCC § 22E-330.[2] For example, a minor who asks an adult to engage in sex may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested that adult to commit statutory rape.[3] And if that adult accepts the solicitation, then the minor may technically satisfy the requirements of general conspiracy liability under the RCC in the sense of having purposefully agreed to the commission of statutory rape.[4] Nevertheless, paragraph (a)(1) precludes holding the minor criminally liable for soliciting or conspiring in the commission of the minor's own victimization under sections 302 and 303 of the RCC.[5] Subsection (a) uses "in fact," a defined term in RCC § 22E-207,

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[1] Within American criminal law, there are a range of situations where "an actor may technically satisfy the requirements of an offense definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019). Two such situations arise in the context of the general inchoate crimes of solicitation and conspiracy where: (1) the would-be solicitor/conspirator is also a victim of the target offense; and (2) the criminal objective of the would-be solicitor/conspirator is inevitably incident to commission of the target offense. *Id.*

Sometimes, the exceptions to general inchoate liability available to these classes of individuals are stated or discussed directly. *See, e.g.,* Ark. Code Ann. § 5-3-103(a) ("It is a defense to a prosecution for solicitation or conspiracy to commit an offense that: (1) The defendant is a victim of the offense; or (2) The offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(D)(1) (6th ed. 2012) ("A person may not be convicted of conspiracy to violate an offense if her conviction would frustrate a legislative purpose to exempt her from prosecution for the underlying substantive crime.").

More common (though less clear), however, is for these exceptions to be articulated by reference to the comparable exceptions governing legal accountability from which they've been derived. *See, e.g.,* Model Penal Code § 5.04(2) ("It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice[.]"); Model Penal Code § 2.06(6)(a) ("Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . he is a victim of that offense; or [] the offense is so defined that his conduct is inevitably incident to its commission[.]"); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (3d ed., Westlaw 2017) ("[O]ne who is in a legislatively protected class and thus could not even be guilty as an accessory of the crime which is the objective is likewise not guilty of conspiracy to commit that crime.").

Both the statutory text of the revised statute and this commentary employ the first (and clearer) approach of directly addressing the relevant exceptions to general inchoate liability, without express reliance on the parallel exclusions from liability for conduct of another person that otherwise exist under the RCC. *See* RCC § 22E-211 (Criminal liability for conduct by an innocent or irresponsible person).

[2] This rule effectively *exempts* from general inchoate liability those who might otherwise satisfy the general requirements of solicitation or conspiracy in relation to the commission of the offense perpetrated against themselves. *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(D)(1) (6th ed. 2012); Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 562 (2004).

[3] *See* RCC § 22E-302(a) (criminal solicitation defined).

[4] *See* RCC § 22E-303(a) (criminal conspiracy defined).

[5] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(D)(1) (6th ed. 2012) ("[I]n the absence of express legislative authority to the contrary, if a male and an underage female have sexual

to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to the elements in paragraph (a)(1) and there is no culpable mental state required for the fact that the person is a victim of the target offense.

Paragraph (a)(2) excludes a person whose criminal objective is inevitably incident to commission of an offense—as defined by statute[6]—from being held liable for soliciting or conspiring to commit that offense.[7] For example, a prospective purchaser who

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intercourse, the female may not be convicted as an accomplice in her own "victimization." [] And, because underage females [] cannot be convicted as accomplices[], they are also immune from prosecution for conspiracy to commit [statutory rape] upon themselves."); *In re Meagan R.*, 42 Cal. App. 4th 17, 21–22 (1996) (minor "cannot be liable as [a] coconspirator to the crime of her own statutory rape"). This same exception would also apply to many other kinds of "people who are victims of the underlying offense—such as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a 'conspiracy' with the extortionist." Commentary on Proposed Del. Crim. Code § 705 (2017). Although those "who pay extortion, blackmail, or ransom monies" can be understood to have agreed to "significantly assist[] in the commission of the crime," the fact they are the "victim of a crime" means that they "may not be indicted" on conspiracy or solicitation charges. *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (analyzing comparable exceptions in the context of complicity).

[6] That the person's criminal objective must be inevitably incident to commission of an offense *as defined by statute* clarifies that paragraph (a)(2) only applies when the target offense could not have been committed without the defendant's planned participation under any set of facts. This is to be distinguished from the situation of a defendant whose planned participation was merely useful or conducive to the commission of target offense *as charged in a particular case*. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.3 (3d ed., Westlaw 2017) (In applying the inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime.") (quoting *State v. Duffy*, 8 S.W.3d 197, 201-202 (Mo. App. 1999)).

So, for example, the role of a doorman in protecting a particular drug house from being robbed or ripped off may inextricably be part of the main business of that home, the sale and purchase of controlled substances. However, because it is entirely possible to distribute controlled substances without the assistance of a doorman, the doorman's criminal objective—as contrasted with that of the purchaser—is not inevitably incident to the commission of the crime of drug distribution. Therefore, paragraph (a)(2) would not preclude holding a prospective doorman who offers a drug dealer his services in return for a portion of the proceeds liable for soliciting or conspiring to commit the distribution of controlled substances. *Wagers v. State*, 810 P.2d 172, 175-76 (Alaska Ct. App. 1991) ("[B]ecause [defendant's] role as a doorman/guard was not 'inevitably incidental' to the commission of the crime of possession with intent to deliver, [he] is not exempt[.]").

For another example, consider a prospective bribery scheme involving bribe offeror, B, go-between G, and public official, P. B gives G $20,000 in cash with instructions to approach P and propose a transaction whereby P will receive the money in return for providing B with a government license to which B is not otherwise entitled. If G agrees with B to participate in this scheme and approaches P, paragraph (a)(2) would *not* preclude holding G liable for conspiring with B to commit the crime of bribe offering. Although G's criminal objective—to act as a middleman, and facilitate the offering of a bribe—might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to commit the crime of bribe offering, which can be completed without a go-between. *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(c)(4) (3d ed., Westlaw 2017) (observing that a conspiracy exists where "*D* and *E* agreed to bribe *F*") (citing *United States v. Burke*, 221 F. 1014 (D.N.Y. 1915)); *Tyler v. State*, 587 So. 2d 1238, 1243 (Ala. Crim. App. 1991) ("The crime of solicitation to commit the offense of distribution of a controlled substance is committed where A solicits B to distribute drugs to C. If the solicited crime were consummated, both A and B would be guilty of the distribution.").

[7] This rule effectively *exempts* from general solicitation and conspiracy liability those who might otherwise satisfy the requirements for these general inchoate crimes in relation to the commission of an offense for

approaches a dealer in the hopes of securing a supply for personal use may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested the seller to perpetrate the distribution of a controlled substance.[8] And if that dealer accepts the solicitation, then the purchaser may technically satisfy the requirements of general conspiracy liability in the sense of having purposefully agreed with the seller to perpetrate the distribution of a controlled substance.[9] Nevertheless, because the purchaser's criminal objective—the *acquisition* of controlled substances—is inevitably incident to the *distribution* of controlled substances, paragraph (a)(2) precludes holding the purchaser criminally liable for soliciting or conspiring in the commission of drug distribution.[10] Subsection (a) uses "in fact," a defined term in RCC § 22E-207, that

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which their planned participation was logically required as a matter of law. *See, e.g.,* Commentary on Ky. Rev. Stat. Ann. § 502.040; Commentary on Ala. Code § 13A-4-3.

[8] *See* RCC § 22E-302(a) (criminal solicitation defined).

[9] *See* RCC § 22E-303(a) (criminal conspiracy defined).

[10] *See, e.g., Tyler*, 587 So. 2d at 1241 ("[W]here A solicits B only to sell drugs to A, and A does not receive any controlled substance, A . . . is not guilty of solicitation to commit the offense of distribution of a controlled substance."); *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998) (same); *Com. v. Fisher*, 426 Pa. Super. 391, 394, 627 A.2d 732, 733 (1993) (same); *United States v. Parker*, 554 F.3d 230 (2d Cir. 2009) ("[T]he objective to transfer the drugs from the seller to the buyer cannot serve as the basis for a charge of conspiracy to transfer drugs"). Along similar lines, paragraph (a)(2) would also preclude holding the dealer criminally liable for soliciting or conspiring in the commission of drug *possession*.

In contrast, paragraph (a)(2) would not preclude holding the dealer liable for conspiring to *distribute* controlled substances based on an agreement with the purchaser. *See Ex parte Parker*, 136 So. 3d 1092, 1095 (Ala. 2013) (assuming that drug transaction is sufficient to support conspiracy to distribute conviction against *seller*). This is because the dealer's criminal objective—the *distribution* of controlled substances—is not inevitably incident to commission of the target offense, but rather, actually *constitutes* the target offense (i.e. provides the actual basis for a drug distribution charge). *See also Tyler*, 587 So. 2d at 1242 ("In a prosecution against the seller, where the statutorily proscribed conduct is the sale of the controlled substance, [it is] the buyer's conduct [that] would be "inevitably or necessarily incidental" to the sale."). And, according to the same logic, subsection (a)(2) would neither preclude holding the purchaser liable for conspiring to *possess* controlled substances based on an agreement with the dealer. *See also Tyler*, 587 So. 2d at 1243 ("Similarly, in a prosecution against the buyer, where the proscribed conduct is the possession of the controlled substance, [it is] the seller's conduct [that] would be 'inevitably or necessarily incidental' to that possession.").

This treatment is consistent with the RCC approach to dealing with conduct inevitably incident in the context of complicity. *See* RCC § 22E-212(a) ("Unless otherwise expressly specified by statute, a person is not liable for the conduct of another under RCC § 22E-210 or RCC § 22E-211 when, in fact . . . the person's conduct is inevitably incident to commission of the offense"). For example, RCC § 22E-212(a) generally precludes holding: (1) a drug purchaser liable for *distribution* as an accomplice to the drug dealer; and (2) a drug dealer liable for *possession* as an accomplice to the *drug purchaser*. *See id.*, Explanatory Note. Conversely, RCC § 22E-212(a) does not preclude holding: (1) a drug dealer directly liable for distribution; or (2) a drug purchaser directly liable for possession. And because such actors can be held directly liable for committing an offense, RCC § 22E-305(a)(2) would not preclude holding them liable for conspiring to commit that offense.

This parallel treatment of the conduct inevitably incident exception to conspiracy liability is, however, inconsistent with the broadest interpretation of Wharton's Rule, under which "[n]o person may be convicted of conspiracy to commit a crime when an element of that crime is agreement with the person with whom he is alleged to have conspired[.]" Ky. Rev. Stat. Ann. § 506.050; *see* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(c)(4) (3d ed., Westlaw 2017) ("[This includes] the buying and selling of contraband goods, and the giving and receiving of bribes.") (citing 2 F. WHARTON, CRIMINAL LAW § 1604 (12th ed. 1932)). However, this expansive interpretation of Wharton's Rule is also the least defensible and has been subject to significant criticism. *See, e.g.,* Model Penal Code § 5.04(2) cmt. at 481 ("[Such an approach] completely overlooks the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no

indicates that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to the elements in paragraph (a)(2) and there is no culpable mental state required for the fact that the person's criminal objective is inevitably incident to commission of the target offense as defined by statute.

Subsection (b) establishes an important limitation on the exceptions to solicitation and conspiracy liability set forth in subsection (a), namely, that they do not apply when "criminal liability [is] expressly specified by statute." This clarifies that the revised statute is only a *default* bar on criminal liability for victims and individuals whose criminal objective is inevitably incident to commission of an offense.[11] It merely establishes that such individuals are excluded from the general principles of solicitation and conspiracy liability set forth in RCC § 22E-302 and RCC § 22E-303.[12] As such, the legislature is free

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reason to immunize criminal preparation to commit it."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(c)(4) (3d ed., Westlaw 2017).

On the narrower and more defensible reading, in contrast, Wharton's Rule merely "supports a presumption" that, "absent legislative intent to the contrary," charges for conspiracy and a substantive offense that requires "concerted criminal activity" should "merge when the substantive offense is proved." *Iannelli v. United States*, 420 U.S. 770, 785–86 (1975); *see, e.g., Pearsall v. United States*, 812 A.2d 953, 962 & n.11 (D.C. 2002) ("Wharton's Rule [merely] bar[s] convictions for both the substantive offense and conspiracy to commit that same offense," so, "[e]ven if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment."); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4(c)(4) (3d ed., Westlaw 2017)("To the extent [Wharton's Rule simply] avoids cumulative punishment for conspiracy and the completed offense, [the doctrine] makes sense."); Model Penal Code § 5.04(2) cmt. at 481 ("[Wharton's] rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime that inevitably requires concert."). Section 304 does not preclude this outcome, while the RCC's general merger provision effectively requires it. *See* RCC § 22E-214(a)(4) (establishing presumption of merger whenever "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each"); *id.*, Explanatory Note ("For example, where D, a drug dealer, is convicted of both conspiracy to commit drug distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, 'reasonably accounts' for the former.").

[11] *See, e.g.,* Model Penal Code § 5.04(2) cmt. at 481 ("The position [] adopted for conspiracy and solicitation[] is to leave to the legislature in defining each particular offense the selective judgment that must be made as to whether more than one participant ought to be subject to liability. Since the exception is confined to behavior 'inevitably incident' to the commission of the crime, the problem inescapably presents itself in defining the crime.").

[12] This reflects the fact that both the victim and conduct inevitably incident exceptions to solicitation and conspiracy are justified on the basis of legislative intent. *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09 n.195 (6th ed. 2012) ("It would frustrate legislative intent[] if the underage party [in a statutory rape prosecution] were subject to prosecution for conspiracy in her own victimization."); *Gebardi v. United States*, 287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206 (1932) ("[W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 n.4 (Ky. 2016) ("[T]he legislature, by specifying the kind of individual who was guilty when involved in a transaction necessarily involving two or more parties, must have intended to leave the participation by the others unpunished.") (quotations and citations omitted); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.41(d) (3d ed., Westlaw 2017) ("Were the [exemptions for solicitation liability] otherwise, the law of criminal solicitation would conflict with the policies expressed in the definitions of the substantive criminal law."); Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 571 (2004)

to impose criminal liability upon these general categories of protected individuals on an offense-specific basis.[13] In that case, however, the legislature must draft individual criminal statutes to clearly reflect this determination.[14]

("This rule is often cast in the form of not permitting a conviction for conspiracy to commit an offense when doing so would undermine the legislative purpose in creating the offense.").

Underlying this legislative intent rationale are considerations of proportionate punishment. For example, it has been observed that subjecting drug purchasers to liability for conspiracy or solicitation to distribute would conflict with:

> [A] policy judgment that persons who acquire or possess illegal drugs for their own consumption because they are addicted are less reprehensible and should not be punished with the severity directed against those who distribute drugs . . . .
>
> [I]f an addicted purchaser, who acquired drugs for his own use and without intent to distribute it to others, were deemed to have joined in a conspiracy with his seller for the illegal transfer of the drugs from the seller to himself, the purchaser would be guilty of substantially the same crime, and liable for the same punishment, as the seller. The policy to distinguish between transfer of an illegal drug and the acquisition or possession of the drug would be frustrated.

United States v. Parker, 554 F.3d 230, 235 (2d Cir. 2009); *see, e.g., Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) ("The traditional law is that where a statute treats one side of a bilateral transaction more leniently . . . adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature."); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) ("Under the State's argument, a purchaser convicted of soliciting the sale of a controlled substance (a Class B felony) would be punished more harshly then either a seller convicted of soliciting the purchase of a controlled substance (a Class C felony) or a purchaser who actually received the controlled substance (a Class C felony). Such an interpretation is unreasonable.").

[13] *See, e.g.* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019) ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction."); *see also, e.g.,* Ala. Code § 13A-4-1(c) ("When the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the offense solicited, defendant is guilty of such related offense only and not of criminal solicitation."); N.Y. Penal Law § 100.20 ("When under such circumstances the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the crime solicited, the actor is guilty of such related and separate offense only and not of criminal solicitation.").

[14] The following situation is illustrative: X, the bribe offeror in a two-person corruption scheme involving public official Y, proposes to give Y $20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable for soliciting the commission of the crime of *bribe receiving* under section 305 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his conduct under a statute that, through its express terms, prohibits the *offering of a bribe*.

The same analysis is applicable to general conspiracy liability. For example, if Y agrees to the transaction, X *cannot* be held liable for conspiring in the commission of the crime of *bribe receiving* under section 305 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his own conduct under a statute that, through its express terms, prohibits *bribery agreements.*

Section 305 should also be construed to exclude victims and conduct inevitably incident from the scope of general attempt liability based on a solicitation (or conspiracy). For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation could potentially satisfy the requirements for attempted distribution of controlled substances. (And, where the seller accepts the invitation, all the more could the resultant conspiracy potentially satisfy the requirements for attempted distribution of controlled substances.) *See*

Relation to Current District Law. The revised statute clarifies, improves the proportionality of, and fill in gaps in the District law of general inchoate liability.

RCC § 22E-305(a)(1) and (b): Relation to Current District Law on General Inchoate Liability for Victims. There is no current D.C. Code provision or case law directly addressing whether, as a general principle of criminal law, a victim can be held criminally liable for soliciting or conspiring in the commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed in the context of accomplice liability.

No current District criminal statute explicitly exempts victims from the scope of general solicitation or conspiracy liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District's current first-degree child sex abuse offense subjects to potential life imprisonment a person who, "being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."[15] And the District's current second-degree child sex abuse offense subjects to ten years of imprisonment a person who, "being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."[16] These current offenses exist specifically for the *protection* of minor-victims.[17]

At the same time, the normal principles of general inchoate liability derived from the District's general solicitation statute, D.C. Code § 22-2107,[18] and general conspiracy statute, D.C. Code § 22-1805a,[19] would appear to authorize treating a minor-victim

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generally RCC § 22E-301(a) (attempt generally requires intent to commit offense and dangerous proximity to completion). Under these circumstances, subsection (a)(2) should be understood to preclude holding the purchaser criminally liable for an attempt to perpetrate the distribution of controlled substances just as it would preclude comparable theories of solicitation or conspiracy liability.

[15] D.C. Code § 22-3008.

[16] D.C. Code § 22-3009.

[17] *See* D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); *Ballard v. United States*, 430 A.2d 483, 486 (D.C. 1981) ("[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.").

[18] The relevant statutory text reads:

> (a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine not more than the amount set forth in § 22-3571.01, or both.
>
> (b) Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.

D.C. Code § 22-2107.

[19] The relevant statutory text reads:

criminally liable for soliciting or conspiring in the perpetration of child sex abuse against him or herself.[20] Consider, for example, the situation of a minor who both initiates and agrees to a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully solicited and conspired with the adult to commit statutory rape in a manner sufficient to satisfy the requirements of general inchoate liability. In practical effect, then, applying general principles of solicitation and conspiracy liability to the District's child sex abuse statutes would mean that a minor may be subject to significant levels of criminal liability.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's statutory rape offenses. Given these problems, it's unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse does not appear to ever include charges of this nature. This example may also indicate that—from a broader legislative and executive perspective—a victim exception to general inchoate liability is implicitly understood to exist in District law and practice.

This kind of exception has also been explicitly recognized in the complicity context through two century-old District judicial decisions in the course of interpreting

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> (a)(1) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.
>
> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.
>
> (b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose . . . .

D.C. Code § 22-1805a.

[20] The District's jury instruction on solicitation liability summarizes current District law as follows: "[The defendant solicited another person] voluntarily, on purpose, and not by mistake or accident. 'Solicit' means to request, command, or attempt to persuade." CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 4.500—SOLICITATION (5th ed. 2017).

And the District's jury instruction on conspiracy liability summarizes current District law as follows:

> [A] conspiracy is a kind of partnership in crime. For any defendant to be convicted of the crime of conspiracy, the government must prove two [three] things beyond a reasonable doubt: first, that [during (the charged time period)] there was an agreement to [^] [describe object of conspiracy]; [and] second, that [^] [name of defendant] intentionally joined in that agreement; [and third, that one of the people involved in the conspiracy did one of the overt acts charged].

Id. at § 7.102.

congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted for aiding or abetting the target offenses, the holding in each case remains relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense precisely *because* she was victim of the party committing the act.[21] In the second case, *Thompson v. United States* (1908), the U.S. Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.[22]

Another relevant aspect of District law is the *de facto* victims exception incorporated into the District's prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding "children"—defined as anyone under the age of 18[23]—from criminal liability for prostitution.[24] Beyond creating a general immunity from prosecution for victimized children (including, presumably, those who might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to "refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that

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[21] *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) ("The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.").

The relevant statute, as quoted in *Yeager*, reads:

> Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

[22] *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose "miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.").

The relevant statute, as quoted in *Thompson*, reads:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

[23] D.C. Code § 22-2701(d)(3).

[24] *See generally* D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it "unlawful for any person to engage in prostitution or to solicit for prostitution," subject to the "[e]xcept[ion] provided in subsection (d)." *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any "child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value." *Id.* at § (d)(1).

provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[25] These provisions appear to reflect the D.C. Council's view, articulated in supporting legislative history, that "[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted."[26]

RCC § 22E-305(a)(1) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding the victim of an offense from the scope of general solicitation and conspiracy liability unless expressly provided by statute.[27] (This is consistent with the similar exclusion for victims applicable to legal accountability under RCC § 22E-212.[28])

RCC § 22E-305(a)(2) and (b): Relation to Current District Law on General Inchoate Liability for Conduct Inevitably Incident. A conduct inevitably incident exception to general inchoate liability is generally consistent with District case law recognizing Wharton's Rule. This exception is also consistent with the legislative intent underlying current statutory offenses enacted by the D.C. Council. And it is consistent with conduct inevitably incident exception to accomplice liability, which the D.C. Court of Appeals (DCCA) has implicitly recognized through *dicta* on at least one occasion.

No current District criminal statute explicitly recognizes an exemption to general solicitation or conspiracy liability for an actor whose criminal objective is inevitably incident to the commission of an offense. That said, DCCA case law recognizes the doctrine known as Wharton's Rule, which has been described as a "specialized application" of the conduct inevitably incident exception to conspiracy liability.[29]

Specifically, Wharton's Rule "is an 'exception to the general principle that a conspiracy and the substantive offense that is its immediate end' are discrete crimes for which separate sanctions may be imposed."[30] As the court in *Pearsall v. United States* observed:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of

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[25] *Id.* at § (d)(2).

[26] COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

> Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

[27] Note that under RCC § 22E-305(b) the legislature remains free to subject victims to general inchoate liability on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[28] *See generally* Commentary on RCC § 22E-212(a).

[29] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (2d. Westlaw 2018).

[30] *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)).

> such a nature as to require necessarily the participation of two people for its commission. [] For example, Wharton's Rule applies to offenses such as adultery, incest, bigamy, and duelling that require concerted criminal activity, a plurality of criminal agents and is essentially an aid to the determination of legislative intent. [] Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule bar convictions for both the substantive offense and conspiracy to commit that same offense . . . . .
>
> In determining whether more than one person is necessary to commit the offense, it is recognized that a participant is necessary to the commission of a crime, for purposes of merging substantive and conspiracy counts, if the substantive statute requires the [participant's] existence as an abstract legal element of the crime . . . .
>
> The crimes that traditionally fall under Wharton's Rule share three characteristics:
>
> [1] [t]he parties to the agreement are the only persons who participate in commission of the substantive offense . . . . [2] the immediate consequences of the crime rest on the parties themselves rather than on society at large . . . . and [3] the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert.[31]

In light of these principles, the *Pearsall* court rejected the defendant's claim that his dual convictions for (1) conspiracy to commit armed robbery and (2) armed robbery premised on his role as an accomplice violated Wharton's Rule.[32]

At the heart of the DCCA's reasoning is a recognition that it is "entirely possible for appellant to commit the offense of armed robbery . . . without the participation of anyone else."[33] True, consummation of "armed robbery may be *easier* with the assistance of others."[34] Nevertheless, "such assistance is not *necessary* to commit the offense," i.e. "[a]rmed robbery does not require proof that there was more than the one actor."[35] And "[s]ince the focus of a Wharton's Rule inquiry is on the statutory elements, rather than the facts proved at trial, that the evidence showed several persons participated in the armed robbery does not make the rule applicable."[36] Accordingly, the *Pearsall* court concluded, "Wharton's Rule does not preclude conviction in a single trial of conspiracy to commit armed robbery and the substantive offense of armed robbery or its lesser-included offense

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[31] *Pearsall*, 812 A.2d at 962 (internal citations, quotations, and footnotes removed); *see also id.* n.11 ("Even if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment.").

[32] *Id.* at 962.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* (internal citations and quotations omitted).

of attempted armed robbery."[37]

Both the general recognition of Wharton's Rule in *Pearsall* as well as DCCA's decision to uphold the defendant's conspiracy conviction in light of it provides judicial support for a conduct inevitably incident exception to conspiracy liability.[38] The conduct inevitably incident exception, like Wharton's Rule, has the practical effect of curtailing general conspiracy liability where the target offense necessarily requires the participation of two parties as a matter of law.[39] And the conduct inevitably incident exception, like Wharton's Rule, has no application where—as was the case in *Pearsall*—the participation of one party was merely helpful to completion of the target offense based on the facts of the case.[40]

Case law aside, an analysis of the drug statutes in the current D.C. Code illustrates why a conduct inevitably incident exception to general inchoate liability is consistent with legislative intent. Compare the District's different approaches to punishing those who distribute and those who merely possess controlled substances.

The District's current distribution statute makes it a thirty year felony for "any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance," which is, in fact, "a narcotic or abusive drug" subject to classification "in Schedule I or II."[41] In contrast, the District's current

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[37] *Id.* at 963.

[38] As the commentary to the D.C. jury instruction on conspiracy observes:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two people for its commission. Typically, this Rule applies to offenses such as adultery, incest, bigamy, and dueling that require concerted activity. Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule, under a double jeopardy analysis, bar convictions for both the substantive offense and the conspiracy to commit that same offense. *See Pearsall v. U.S.*, 812 A.2d 953 (D.C. 2002); *U.S. v. Payan*, 992 F.2d 1387, 1390 (5th Cir. 1993). The focus of Wharton's Rule is on the statutory elements of an offense, rather than the facts proved at trial. Thus, an armed robbery, for example, does not require proof that there was more than one actor and Wharton's Rule does not apply in such circumstances. *Pearsall*, 812 A.2d at 962.

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 7.102—CONSPIRACY (5th ed. 2017).

[39] *See, e.g., State v. Roldan*, 314 N.J. Super. 173, 182–83, 714 A.2d 351, 356 (App. Div. 1998) (Wharton's Rule holds that "where an agreement between two parties is inevitably incident to the commission of a crime, such as a sale of contraband, 'conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained.'") (quoting *Iannelli v. United States,* 420 U.S. 770, 773, 95 S.Ct. 1284, 1288, 43 *L. Ed.*2d 616, 620 (1975)). For discussion of the differences between Wharton's Rule and the conduct inevitably incident exception to conspiracy, *see* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019).

[40] *Roldan*, 314 N.J. Super. at 182–83, 714 A.2d at 356 (noting that no exception where "the evidence shows that two or more parties have entered into an agreement to engage in concerted criminal activity which goes beyond the kind of simple agreement inevitably incident to the sale of contraband") (citing *Iannelli*, 420 U.S. at 778, 95 S.Ct. at 1290, 43 L.Ed.2d at 623) (quoting *Callanan v. United States*, 364 U.S. 587, 593-94, 81 S.Ct. 321, 325, 5 L.Ed.2d 312, 317 (1961)).

[41] D.C. Code § 48-904.01(a)(1)-(2); *see id.* at (a)(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be

possession statute makes it a 180 day misdemeanor to "knowingly or intentionally to possess a controlled substance" of a similar nature.[42]

These different approaches are likewise reflected in the District's current drug offense-specific attempt and conspiracy penalty provision, D.C. Code § 48-904.09, which penalizes an attempt or conspiracy to commit any particular drug offense at precisely the same level as the completed version of that drug offense.[43] This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.[44]

At the same time, application of the District's normal principles of conspiracy liability would appear to authorize holding a purchaser-possessor criminally liable for conspiring in the distribution of drugs by the seller to the purchaser-possessor. Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully agreed to commit distribution in a manner sufficient to satisfy the

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imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]").

[42] D.C. Code § 48-904.01(d)(1) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than $1,000, or both."); *compare* D.C. Code § 48-904.01(d)(2) ("Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.").

[43] D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[44] Indeed, "[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct." *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia*, Committee on the Judiciary, Report on Bill 4–123*, The Uniform Controlled Substances Act of 1981, 2–3 (April 8, 1981)) (hereinafter "Committee Report"). For example, the legislative history underlying the District's Uniform Controlled Substances Act observes that:

> While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Committee Report, at 5. *See also, e.g., Long*, 623 A.2d at 1150 (observing that "the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District's Uniform Controlled Substances Act."); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) ("[A] central purpose of the enactment of the [District's] local [drug] statute was to abolish the 'unilateral approach' of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.").

requirements of conspiracy liability under D.C. Code § 22-1805(a). In practical effect, then, applying general principles of conspiracy liability to the District's drug distribution statute would mean that the drug user could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

A similar analysis is likewise applicable to solicitation. Although the District's current general solicitation statute, D.C. Code § 22-2107, only applies to crimes of violence[45] (and therefore not to drug distribution), a solicitation might also provide the basis for attempt liability.[46] For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation might potentially satisfy the conduct requirement for attempt liability, given both the proximity to and likelihood that the solicitation would result in the distribution of controlled substances.[47] If true, however, then it would follow that the drug user, by attempting to perpetrate the distribution of controlled substances, could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

Treating the purchaser-possessor in a drug deal in either of the ways described above seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's current controlled substances offenses.[48] Given these problems, it's unsurprising that reported District case law does not appear to include a single drug distribution prosecution involving general inchoate crimes brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to general inchoate liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by the conduct inevitably incident exception to accomplice liability, which the DCCA has implicitly recognized through *dicta*. In the relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction

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

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

[46] *See generally* Commentary on RCC § 22E-301(a).

[47] *Id.*; *see also State v. Fristoe*, 135 Ariz. 25, 658 P.2d 825 (Ariz. App. 1982) (mere solicitation can amount to an attempt); *Ward v. State*, 528 N.E.2d 52 (Ind. 1988) (same); *but see Tyler v. State*, 587 So. 2d 1238 (Ala. Crim. App. 1991) (mere solicitation cannot amount to attempt).

[48] *See Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be "deemed an aider and abettor to [distribution]," this would effectively "write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession.'") (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

between "a willing buyer [and] a willing seller" can be held criminally liable for distribution as an accomplice.[49] One judge dissented, arguing that, among other problems, the majority's holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.[50] In response, the two-judge majority explained that they were "unpersuaded at this point that the court's interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution," while citing to federal case law explicitly recognizing that "one who receives drugs does not aid and abet distribution 'since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession."[51]

RCC § 22E-305(a)(2) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding an actor whose criminal objective is inevitably incident to the commission of an offense as a matter of law from the scope of general solicitation and conspiracy liability unless expressly provided by statute. [52] (This is consistent with the similar exclusion for conduct inevitably incident applicable to legal accountability under RCC § 22E-212.[53])

RCC § 22E-306. Renunciation Defense to Attempt, Conspiracy, and Solicitation

Explanatory Note. *RCC § 22E-306 establishes a renunciation defense to liability for a criminal attempt under RCC § 22E-301, a criminal solicitation under RCC § 22E-302 , or a criminal conspiracy under RCC § 22E-303.*[1]

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[49] *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought "a willing buyer to a willing seller" and "specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy"); *see, e.g., Griggs v. United States*, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was "working," the defendant escorted the officer to a seller, and the defendant told the seller that the officer "wanted one twenty"); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) ("[B]eing an agent of the buyer is not a defense to a charge of distribution.").

[50] *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that "if the government's position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori,* every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.").

[51] *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski,* 548 F.2d 445, 451 (2d Cir. 1977)).

[52] Note that under RCC § 22E-305(b) the legislature remains free to impose general inchoate liability on those whose criminal objectives are inevitably incident to an offense on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[53] *See generally* Commentary on RCC § 22E-212(a).

[1] Typically, "an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense." PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019). However, where a defendant has been charged with a general inchoate offense (e.g., attempt, solicitation, and conspiracy) or an offense premised on legal accountability (e.g., complicity), the criminal justice system affords an "offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise." *Id*; *see, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.03 (6th ed. 2012); WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5(b) (3d ed. Westlaw 2019). As it arises in the context of general inchoate liability, this widely recognized (though seldom raised) defense is typically referred to as "renunciation." Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1 (1989); *see, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019) (observing that "[a] majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense," while "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation" and "to a charge of conspiracy."); Model Penal Code § 5.01 cmt. at 361 ("Instances of renunciation of criminal purpose are not frequent.").

The affirmative defense set forth in § 22E-306 is comprised of three basic requirements, each of which will be discussed in detail in this commentary. Generally, however, paragraph (a)(1) requires that the defendant made reasonable efforts aimed at preventing the target of the charged attempt, solicitation, or conspiracy. Paragraph (a)(2) requires that the defendant's conduct must have been motivated by a genuine desire to avoid the social harm implicated by the target offense (in contrast to more pragmatic goals, such as a desire to avoid arrest or postpone completion of the offense). Finally, paragraph (a)(3) requires that the target offense underlying the charged inchoate crime must not have been consummated, whether due to the defendant's preventative efforts or otherwise.[2] Subsection (a) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of

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[2] Widespread recognition of "renunciation as an affirmative defense to inchoate crimes" is often said to be driven by "two basic reasons":

> First, renunciation indicates a lack of firmness of that purpose which evidences criminal dangerousness. The same rationale underlies the reluctance to make merely "preparatory" activity a basis for liability in criminal attempt: the criminal law does not seek to condemn where there is an insufficient showing that the defendant has a firm purpose to bring about the conduct or result which the penal law seeks to prevent. Where the defendant has performed acts which indicate, *prima facie*, sufficient firmness of purpose, the defendant should be allowed to rebut the inference to be drawn from such acts by showing that the defendant has plainly demonstrated the defendant's lack of firm purpose by completely renouncing the defendant's purpose to bring about the conduct or result which the law seeks to prevent.
>
> Second, it is thought that the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken. In the very cases where the first reason becomes weakest, this second reason shows its greatest strength. That is, in the penultimate stage, where purpose is most likely to be firmly set, any inducement to desist achieves its greatest value.

Commentary on Haw. Rev. Stat. Ann. § 705-530 (citing Model Penal Code § 5.01 cmt. at 361); *see, e.g.,* Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 5-6 (1989) (observing that a renunciation defense is "[a] cost-effective technique to . . . concentra[ting] our resources on those who seem most likely to commit crime, and to target our measures of social defense at those persons who are most dangerous."); *Id.* at 5 ("Just as the degree structure of criminal [provides] greater deterrence for the higher degrees of crime [through more severe punishments], so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.").

Perhaps a better explanation of the renunciation defense's recognition, though, is "[r]etributively oriented," namely, that voluntary and complete renunciation "makes us reassess our vision of the defendant's blameworthiness." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981). As numerous legal authorities have recognized:

> All of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.

Hernandez-Cruz v. Holder, 651 F.3d 1094, 1103 (9th Cir. 2011). *See also* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.4 (3d ed. Westlaw 2019); PAUL H. ROBINSON & JOHN DARLEY, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014) (finding strong support in public opinion for renunciation defense).

interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to the elements in paragraphs (a)(1), (a)(2), and (a)(3) and there is no culpable mental state required for any of the elements in these paragraphs.

The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Paragraph (a)(1) codifies a "reasonable efforts" standard for evaluating the sufficiency of the defendant's attempt at preventing the target offense.[3] This standard requires a context-sensitive analysis, which calls upon the fact-finder to determine whether the defendant's efforts, when evaluated in light of the totality of the circumstances, were reasonably calculated to disrupt the criminal scheme in which he or she participated.[4] The type of conduct sufficient to satisfy this standard will, by necessity, be contingent upon the nature of the inchoate crime at issue. For example, in most attempt prosecutions, the defendant's abandonment of his or her criminal scheme will satisfy the reasonable efforts standard.[5] Where, however, a solicitation or conspiracy charge is at issue, and the

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[3] RCC § 22E-306(a)(1) ("The actor made reasonable efforts to prevent commission of the target offense[.]"); *see, e.g.,* R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation As A Defense to Criminal Conspiracy*, 64 FLA. L. REV. 353, 368 n.88 (2012) (collecting and analyzing state renunciation statutes that require a "reasonable," "substantial," or "proper" effort to prevent the crime); *compare* Model Penal Code §§ 5.01(4), 5.02(3), 5.03(6) (defendant's renunciation must have "prevented [offense's] commission").

Notably, the same "reasonable efforts" standard is employed in the RCC's withdrawal defense to legal accountability. RCC § 22E-213(a).

[4] While RCC § 22E-306 requires that the underlying target offense not be committed, the RCC approach does not require proof that it was the defendant's reasonable efforts that actually prevented the target offense, as is discussed elsewhere in this commentary. Among other implications, this allows for the possibility of a renunciation defense in impossibility situations, such as, for example, where the defendant's general inchoate liability arises in the context of a sting operation. *See, e.g., People v. Sisselman*, 147 A.D.2d 261 (N.Y. Sup. Ct. 1989) (recognizing renunciation defense in impossibility situations as a matter of basic fairness); Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 37 (1989) ("[It would be an] absurd result to deny [a renunciation] defense to those who have unwittingly attempted the impossible and offer it to all others. There seems to be no reason to distinguish between the two classes on the basis of either social danger or susceptibility to having their choices influenced by our offers."); *see also* RCC § 22E-301 Explanatory Note (providing overview of impossibility situations).

The following fact pattern is illustrative. D solicits Y, an undercover informant, to assault V. Soon thereafter, however, D reconsiders his proposal, regrets having made the request, and then wholeheartedly tries to persuade Y not to carry out the assault (unaware that Y is, in fact, a police officer). *See Sisselman*, 147 A.D.2d at 261 (case with similar facts). In this situation, D cannot *actually* persuade Y to desist or otherwise prevent the assault from occurring since Y never intended to go through with it in the first place. *See id.* at 264 ("The real problem here is that defendant was in no position to prevent the object crime since [the informant] never intended to carry out the solicited assault."). Nevertheless, D would still be eligible for a renunciation defense under section 306 since such conduct meets the reasonable efforts standard. As is discussed elsewhere in this commentary, attempting to deprive one's contribution to a criminal scheme of its effectiveness constitutes reasonable preventative efforts.

[5] *See, e.g.,* Model Penal Code § 5.01(4) (it is an "affirmative defense" to attempt that the defendant, *inter alia*, "*abandoned* his effort to commit the crime or otherwise prevented its commission") (italics added). The exception is where a defendant has set in motion forces that will culminate in a crime independent of his or her subsequent abandonment, such as, for example, where D, intending to destroy a building, starts the timer on an explosive device placed in the basement and then later—but prior to the explosion—thinks better of the criminal scheme. *See* Model Penal Code § 5.03 cmt. at 458 ("Since attempt involves only an individual actor, abandonment will generally prevent completion of the crime, although in some cases the actor may have to put a stop to forces that he has set in motion and that would otherwise bring about the substantive crime independently of his will."). In this situation, D's abandonment would not, by itself, constitute

defendant facilitates or promotes a criminal scheme that involves the participation of others, then mere desistance is unlikely to suffice.[6] In these contexts, a more proactive approach aimed at disrupting the collective criminal enterprise will be necessary. This includes, among other possibilities: (1) engaging in conduct sufficient to deprive one's prior contribution to a criminal scheme of its effectiveness[7]; (2) providing reasonable notice to law enforcement[8]; or (3) providing reasonable notice to the victim.[9]

Paragraph (a)(2) codifies a "voluntary and complete"[10] standard as the basis for evaluating the sufficiency of the defendant's motivations in undertaking his or her preventative efforts.[11] This standard, as further clarified in subsection (b), denies a

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reasonable efforts at preventing commission of the target offense. Instead, a more proactive effort, e.g., providing timely notification to the police, would be necessary.

[6] *See, e.g.,* Model Penal Code § 5.02(3) (it is an "affirmative defense" to solicitation that the defendant, *inter alia*, "*persuaded him not to do* so or otherwise prevented the commission of the crime") (italics added); Model Penal Code § 5.03(6) (it is an "affirmative defense" to conspiracy that the defendant, *inter alia*, "*thwarted the success of the conspiracy*") (italics added).

[7] Whether conduct is sufficient to deprive one's prior contribution to a criminal scheme of its effectiveness is contingent upon the nature of the contribution. For example, where the defendant's involvement goes no further than an initial request or tentative agreement to assist the commission of a crime, then a clear (and timely) statement of disapproval communicated to his or her co-participants would likely satisfy the reasonable efforts standard. However, a statement of this nature would not suffice if the defendant's participation was more significant, such as, for example, loaning a weapon central to the scheme's success. In that case, the actual retrieval of the weapon would be necessary to deprive one's prior contribution to a criminal scheme of its effectiveness.

[8] That is, notice to law enforcement, which is: (1) timely; (2) communicated to the appropriate agency (i.e. one with jurisdiction over the requisite criminal scheme); and (3) provides that agency with a reasonably feasible means of preventing the criminal scheme. Where, in contrast, notice is provided too late, relayed to the wrong agency, or does not provide a reasonably feasible means of preventing the criminal scheme, then the defendant's conduct would not meet the "reasonable efforts" standard.

[9] That is, notice to the victim, which is: (1) timely; and (2) provides the victim with a reasonably feasible means of avoiding the target harm. Where, in contrast, the notice is provided too late, or does not enable the victim to easily and safely escape harm, then the defendant's conduct would not meet the "reasonable efforts" standard.

[10] The voluntariness component of this renunciation *defense* is to be distinguished from the voluntariness requirement applicable to all criminal *offenses* under section 203. *See* RCC § 22E-203(a). With respect to the latter voluntariness requirement, the question presented is relatively narrow: was the act (or omission) "the product of conscious effort or determination, or [] otherwise subject to the person's control." RCC § 22E-203(b). Where, in contrast, the voluntariness of a defendant's renunciation is concerned, the focus is on the individual's reasons for action in a broader moral sense (i.e. whether the defendant's desistance was motivated by a concern for the legally protected interests of others). *Compare* Model Penal Code § 5.01(4), cmt. at 359 ("A 'voluntary' abandonment occurs when there is a change in the actor's purpose that is not influenced by outside circumstances[.] Lack of resolution or timidity may suffice. A reappraisal by the actor of the criminal sanctions applicable to his contemplated conduct would presumably be a motivation of the voluntary type as long as the actor's fear of the law is not related to a particular threat of apprehension or detection."), *with id.* ("An 'involuntary' abandonment occurs when the actor ceases his criminal endeavor because he fears detection or apprehension, or because he decides he will wait for a better opportunity, or because his powers or instruments are inadequate for completing the crime[.]").

[11] RCC § 22E-306(a)(2) ("Under circumstances manifesting a voluntary and complete renunciation of the actor's criminal intent"); *see, e.g.,* Model Penal Code § 5.01(4) (abandonment of attempt must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."); Model Penal Code § 5.02(3) (repudiation of solicitation must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose"); Model Penal Code § 5.03(6) (repudiation of conspiracy must occur "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose").

renunciation defense to two different kinds of actors. The first, addressed in paragraph (b)(1) and it subparagraphs, are those whose preventative efforts are motivated (to any extent) by a belief in the existence of circumstances which either: (1) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or (2) render accomplishment of the criminal plans more difficult.[12] In the alternative, the second kind of actors, addressed in paragraph (b)(2), are those whose preventative efforts are motivated (again, to any extent) by a decision to: (1) postpone the criminal conduct until another time; or (2) transfer the criminal effort to another victim or a different but similar objective.[13]

Paragraph (a)(3) establishes that a renunciation defense is only available when "the target offense was not committed." This non-consummation requirement categorically bars a renunciation defense in any situation where the target of an attempt, solicitation, or conspiracy is successful, without regard to why it was successful.[14] Where, in contrast, the

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Generally speaking, the requirement of a voluntary and complete renunciation envisions that the defendant's preventative conduct have been motivated by a genuine repudiation of his or her criminal plans, rather than by external influences. That said, a defendant's renunciation can be motivated by external influences in a way that is nevertheless consistent with this kind of genuine repudiation, such as, for example, where D, a participant in a nascent drug conspiracy, is persuaded by his parents to renounce because carrying out a criminal scheme would be the "wrong thing to do."

[12] *See, e.g.,* Model Penal Code § 5.01(4) ("renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."). For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that it is too risky to go ahead or because she lacks something essential to the completion of the crime, D's abandonment is not voluntary.

[13] *See* Model Penal Code § 5.01(4) ("Renunciation is not *complete* if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."). For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that waiting another day or robbing a different bank would be preferable, D's subsequent abandonment is not complete.

[14] For this reason, the renunciation defense to general inchoate crimes under section 306 is narrower than the withdrawal defense to legal accountability under section 213, which is available even where the target offense is successfully completed. *See generally* RCC § 22E-213(a), Explanatory Note (observing that it is not necessary for the target offense to have been prevented or frustrated to raise withdrawal defense).

Another way in which the renunciation defense to general inchoate crimes is narrower than the withdrawal defense to legal accountability relates to the defendant's motive. Whereas a renunciation defense is *unavailable* where the defendant was motivated by a desire to avoid getting caught or postpone commission of the offense, the withdrawal defense does not incorporate a comparable requirement of non-culpable intent. *See generally* RCC § 22E-213(a), Explanatory Note (observing that any motive will suffice for withdrawal defense).

Because of these two differences, it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct under the RCC. The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P's reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V earlier made against A. One day later, A has a change of heart, which is motivated, in large part, by A's having been alerted to the fact that the police were monitoring the phone call and are therefore very likely to catch and arrest both P and A. So A decides to again call P, and does his very best to persuade P to desist from violence against V, and, ultimately, to forgive V for the slight. However, A's reasonable efforts at dissuading P from carrying out the planned execution is unsuccessful; P goes on to kill V anyways.

target of the attempt, solicitation, or conspiracy is *unsuccessful*, there is no requirement under paragraph (a)(3) that the defendant have actually contributed to its prevention, let alone been the factual (i.e. but for) cause of the prevention.[15] It is sufficient for purposes of section 306 that the offense attempted, solicited, or conspired failed for reasons entirely unrelated to the defendant's preventative efforts—provided that those efforts were reasonable and undertaken with the appropriate motivations.[16]

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

Relation to Current District Law. The revised statute clarifies and fills gaps in District law concerning the availability and burden of proof governing a renunciation defense.

The current state of District law concerning the renunciation defense is unclear. The D.C. Code does not codify any general defenses to criminal conduct, including renunciation. There also does not appear to be any District case law directly addressing the issue in the context of attempt, solicitation, or conspiracy. At the same time, some District authority relevant to the renunciation defense exists, providing modest support for its recognition.

In the attempt context, District courts apply a conduct requirement that, in drawing the line between preparation and perpetration, seems to imply the absence of renunciation. This so-called probable desistance test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime."[17] As various commentators have observed, this formulation of attempt liability appears to be part and parcel with a renunciation defense in the sense that a "voluntary abandonment demonstr[ates] that the agent would not have 'committ[ed] the crime except for' extraneous intervention."[18] Which is to say, the fact that a defendant genuinely repudiates his or her criminal plans establishes that, with or without external interference, the outcome would have been the same: failure to consummate the target offense.

On these facts, A satisfies the standard for withdrawal under section 213, and, therefore, cannot be deemed an accomplice to P's murder of V under section 210. A would not, however, be able to avail himself of a renunciation defense under section 306 to avoid liability for his original solicitation of P (to commit murder) under the RCC's general solicitation statute. *See* RCC § 22E-302(a). Specifically, a renunciation defense would not be available to A under the revised statute because: (1) the target offense at the heart of A's solicitation, the murder of V, was completed; and (2) A's renunciation was not voluntary (i.e. it was motivated by a desire to avoid getting caught).

[15] So, for example, a defendant in a multi-party scheme would not need to prove that his timely warning to the police was essential—or even helpful—to the subsequent disruption by law enforcement.

[16] So, for example, a renunciation defense would remain available where the defendant's timely warning to law enforcement is rendered superfluous by identical information earlier transmitted by another source.

[17] *E.g.*, *Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957)) (emphasis added); *see also In re Doe*, 855 A.2d 1100, 1107 and n.11 (D.C. 2004) (quoting *Wormsley* but noting this formulation is "imperfect" in the sense that "failure is not an essential element of criminal attempt").

[18] R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.,* Model Penal Code § 5.01 cmt. at 357-58; WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2019).

In the conspiracy context, the DCCA has addressed an issue closely related to renunciation: withdrawal.[19] Withdrawal, unlike renunciation, does not speak to when an actor is relieved from conspiracy *liability*. Instead, it addresses when an actor may be relieved from the *collateral consequences* of a conspiracy.[20] For example, "a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators."[21] Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run."[22] On these kinds of collateral issues, DCCA case law recognizes a withdrawal defense, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."[23] And, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the criminal jury instructions indicate that the burden is on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it."[24]

In the solicitation context, there does not appear to be *any* DCCA case law on the contours of this form of general inchoate liability—let alone any case law on renunciation.[25]

In the absence of District authority directly addressing the viability of a renunciation defense to the general inchoate crimes of attempt, conspiracy, and solicitation, the most relevant aspect of District law is the intersection between withdrawal and accomplice liability. The DCCA appears to recognize that the same withdrawal defense applicable in the conspiracy context is also available to those being prosecuted as aiders and abettors.[26] In this context, however, withdrawal provides the basis for a *complete defense*. Which is to say, an accomplice that "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and

[19] There does not appear to be *any* DCCA case law on the general inchoate crime of solicitation. *See generally* Commentary on D.C. Crim. Jur. Instr. § 4.500 (observing that does not appear to contain a single reported decision "involving [the District's general solicitation] statute.")

[20] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) (collecting authorities).

[21] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (3d ed. Westlaw 2019); *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09 (6th ed. 2012) ("If a person withdraws from a conspiracy, she may avoid liability for subsequent crimes committed in furtherance of the conspiracy by her former co-conspirators.").

[22] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (3d ed. Westlaw 2019); *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07 (6th ed. 2012) ("[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor.").

[23] *Bost v. United States*, No. 12-CF-1589, 2018 WL 893993, at *28 (D.C. Feb. 15, 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994); *Baker v. United States*, 867 A.2d 988, 1007 (D.C. 2005).

[24] Commentary on D.C. Crim. Jur. Instr. § 7.102.

[25] *See generally* Commentary on D.C. Crim. Jur. Instr. § 4.500.

[26] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal [as a defense to accomplice liability] has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.3 (3d ed. Westlaw 2019)).

complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[27]

Recognition of a withdrawal defense to accomplice liability is congruent with recognition of a renunciation defense to general inchoate crimes. This is clearest in the context of conspiracy and solicitation liability given that the elements of accomplice liability are nearly identical—indeed, soliciting or conspiring with another person to commit a crime are two ways of aiding and abetting its commission.[28] But it is also true in the context of attempts, given the broader sense in which holding someone criminally responsible as an aider and abettor effectively "constitute[s] a form of inchoate liability."[29] And, perhaps most importantly, the elements of a withdrawal defense are not only similar to, but are necessarily included within, the more stringent elements of a renunciation defense, which typically requires *non-consummation* of the target offense under circumstances manifesting a *voluntary* and *complete* repudiation of criminal intent.[30] Arguably, then, the failure to recognize a renunciation defense to general inchoate crimes would be "inconsistent with the doctrine allowing an analogous defense in the complicity area."[31]

This is not to say, however, that the *burden of proof* governing a renunciation defense should be the same as that applicable to a withdrawal defense.[32] Even assuming

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[27] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability.").

[28] *See, e.g., Tann v. United States*, 127 A.3d 400, 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.2 (3d ed. Westlaw 2019)); *United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States,* 196 F.2d 573, 580 (D.C. Cir. 1952)); *see also* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005); Model Penal Code § 2.06(3).

[29] Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 756 n.14 (2012).

[30] As one commentator phrases the distinction:

> "Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates. "Renunciation" generally requires not only desistance, but more active rejection, and usually contains specific subjective requirements, such as a complete and voluntary renunciation.

PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 at 1 (Westlaw 2018).

[31] Model Penal Code § 5.03 cmt. at 457.

[32] As the D.C. Court of Appeals explained in *Green v. Dist. of Columbia Dep't of Employment Servs.*:

> The term 'burden of proof' [] encompass[es] two separate burdens: the burden of production and the burden of persuasion . . . The former refers to the burden of coming forward with satisfactory evidence of a particular fact in issue . . . The latter constitutes the burden of persuading the trier of fact that the alleged fact is true.

that the burden of persuasion for a withdrawal defense ultimately rests with the government under current District law,[33] there are nevertheless sound policy and practical reasons to place the burden of persuasion for a renunciation defense on the defendant, subject to a preponderance of the evidence standard. And there is also general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.[34]

Consistent with the above analysis, the RCC recognizes a broadly applicable renunciation defense, subject to proof by the defendant beyond a preponderance of the evidence, to the general inchoate crimes of attempt, solicitation, and conspiracy.

499 A.2d 870, 873 (D.C. 1985) (internal citations omitted).

[33] *Compare* Commentary on D.C. Crim. Jur. Instr. § 7.102 ("In the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction, [then the] burden [is] on government to prove that the defendant was a member of the conspiracy and did not withdraw it.") *with Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law).

[34] Most notably, this includes the District's statutory insanity defense, D.C. Code § 24-501 ("No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."); *see Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a prima facie case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury."); *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Properly viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment."). For other examples, see D.C. Code § 22-3611 (b) (providing, with respect to penalty enhancement for crimes committed against minors, that it "is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense," which "defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against minors); D.C. Code § 22-3011(b) (providing, with respect to child sex abuse, that [m]arriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence . . . .").

RCC § 22E-401. Lesser Harm.

Explanatory Note. *This section establishes a lesser harm defense for the Revised Criminal Code (RCC). The defense applies where a person acts under a reasonable belief that they are acting to avert a greater harm.*[1] *The RCC lesser harm defense is the first codification of such a defense (also known as a necessity defense*[2] *or lesser evils defense) in the District.*

Subsection (a) establishes the requirements for the defense. The term "in fact" specifies that the person is strictly liable as to whether the elements in paragraphs (a)(1) (a)(2), and (a)(3) are satisfied or not.[3]

Paragraph (a)(1) specifies that the person must reasonably believe[4] that someone is in imminent danger of a specific, identifiable harm.[5] The word "imminent" should be construed to mean ready to take place or dangerously near. It should not be construed to have the same meaning as "immediate" or to require that the harm will occur at a specific moment in time.[6] The term "harm" is not defined and is intended to be construed broadly per its ordinary meaning to encompass damage, injury, loss, or risk thereof. The person's

[1] *See, e.g.*, Model Penal Code § 3.02 cmt. at 9-10 (1985) ("Under this section, property may be destroyed to prevent the spread of a fire. A speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions. Cargo may be jettisoned or an embargo violated to preserve the vessel. An alien may violate a curfew in order to reach an air raid shelter. A druggist may dispense a drug without the requisite prescription to alleviate grave distress in an emergency. A developed legal system must have better ways of dealing with such problems than to refer only to the letter of particular prohibitions, framed without reference to cases of this kind.")

[2] A necessity defense excuses criminal actions taken in response to exigent circumstances. *See Reale v. United States*, 573 A.2d 13, 15 (D.C. 1990).

[3] RCC § 22E-207. Namely, under (a)(1), the person's belief must, in fact, be reasonable and, under (a)(2), the harm avoided must, in fact, be greater than the harm caused. However, there is no additional proof required as to the person's desire or awareness with respect to (a)(1) and (a)(2).

[4] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[5] The defense does not apply where a person takes proactive measures to avoid a risk of some indeterminate harm. Consider, for example, a person who believes that an elected official will reallocate funds from community health services funds to benefit a wealthy developer. That person is not justified in kidnapping the elected official to prevent such a generalized, ambiguous harm to others.

[6] Consider, for example, Person A knows that Person B is frequently prone to suicidal ideations and specific and identifiable forms of physical self-harm. Person A may be justified in removing a dangerous weapon or poison from Person B's home, in violation of RCC § 22E-2101 (Unauthorized Use of Property). Person A does not need to wait until a suicide is attempted before the defense applies.

belief that the harm will occur may be mistaken,[7] but it must be objectively reasonable.[8] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[9]

Paragraph (a)(2) specifies that the person must reasonably believe[10] that the conduct constituting the offense will prevent a harm from occurring.[11] The actor must also reasonably believe that the conduct constituting the offense is necessary in degree.[12]

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[7] Consider, for example, a person who believes that a child is at risk of imminently dying and speeds through a series of red lights to get the child to the emergency room. First, the person's conduct may be justified under the lesser harm defense even if it turns out that the child was experiencing a non-life threatening allergic reaction. Second, the person's conduct may be justified under the lesser harm defense even if it turns out that no amount of rushing would have been enough to save the child and that the attempt was futile. Third, the person's conduct may be justified under the lesser harm defense even if it turns out that taking the child to the emergency room actually made the illness or injury *worse*.

[8] Consider, for example, a person who believes in a superstition that a black cat crossing their path causes bad luck. That person is not justified in injuring black cats to prevent them from crossing anyone's path. Consider also, for example, a person who genuinely fears that every person of a particular race, religion, or sexual orientation is a violent predator. The lesser harm defense is unavailable if the factfinder determines the belief is objectively unreasonable.

[9] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[10] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[11] *See Griffin v. U. S.*, 447 A.2d 776, 778 (D.C. 1982) ("[A]ppellants had failed to proffer evidence sufficient to establish the elements of the defense because: (1) their proffer did not set forth any evidence concerning a specific, immediate, identifiable harm, *reasonably perceived* to be avoided by appellants' action…" (Emphasis added.)).

[12] Consider, for example, a police agency that uses an algorithm to determine which citizens are most likely to commit a violent crime that has proven to be an accurate predictor of behavior. That agency is not justified in arresting and preventatively detaining someone based on their risk assessment alone when less severe alternatives (e.g., investigation or monitoring) are readily available because such conduct would not be necessary. Consider also, for example, a group of people who stranded together on a boat and learn that one passenger has a highly contagious, deadly virus. The group is not justified in throwing that passenger overboard when less severe alternatives (e.g., quarantine, vaccination, protective personal equipment) are readily available because such conduct would not be necessary.

Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[13] Conduct is not necessary in degree if the greater harm can be avoided by a reasonable "legal alternative available to the defendants that does not involve violation of the law."[14]

Paragraph (a)(3) specifies that the harm to be avoided must be significantly greater than the harm caused by the conduct constituting the offense.[15] Unlike paragraph (a)(1) and paragraph (a)(2), paragraph (a)(3) is not satisfied by action with a reasonable belief. The question of whether one harm outweighs another harm is not committed to the private judgment of the person engaging in the conduct,[16] rather it is a mixed question of fact and law for determination at trial.[17] In most instances, the infliction of bodily injury to a person exceeds other harms.[18] However, there are exceptions to this general rule.[19] Causing the death of a person significantly exceeds every harm other than the death of one or more other persons.

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[13] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[14] *Griffin v. U.S.*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

[15] *See Griffin v. U. S.*, 447 A.2d 776, 777 (D.C. 1982) ("[T]he necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law *would have significantly exceeded* the harm actually resulting from the defendants' breach of the law." (Emphasis added.)).

[16] *See Swisher v. United States*, 572 A.2d 85 (D.C. App. 1990) (where a desire to attend a funeral did not constitute "necessity" as a defense to charge of contempt of court for failing to appear, although the defendant may have subjectively believed it was necessary to attend).

[17] *See, e.g.*, Model Penal Code § 3.02 cmt. at 12 ("[I]t requires that the harm or evil sought to be avoided be greater than that which would be caused by the commission of the offense, not that the defendant believe it to be so.").

[18] For example, a person is not justified in beating up a habitual thief to teach him a lesson.

[19] For example, a person who recklessly shoves a bystander out of the way while running away from a purse snatcher may have a lesser harm defense. Consider also, for example, a person who is experiencing homelessness and takes shelter without permission in an empty building by breaking through a window. The factfinder must consider whether the risk of bodily harm (e.g., discomfort, possible hypothermia) significantly exceeds the degree of the trespassory intrusion and property damage (e.g., momentary shelter in an entryway, moving in and locking the owners out).

Subsection (b) establishes three exceptions to the lesser harm defense.

Paragraph (b)(1) and (b)(2) preclude application of the defense if an objective element of the offense must be proven, the objective element requires either a reckless or negligent mental state, and the actor brought about the circumstances requiring the choice of harms, recklessly or negligently.[20] Recklessness and negligence are defined in RCC § 22E-206. The term "brings about" requires that the actor caused the situation requiring the defense. The actor's conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable.[21] An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm.[22]

Paragraph (b)(3) specifies that the defense does not apply in circumstances where the legislature has more specifically addressed the conduct in question in another codified defense or exclusion from liability.[23]

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

Relation to Current District Law. *Four aspects of the revised statute may constitute substantive changes to District law.*

First, the revised statute does not categorically require that the harm to be avoided be an immediate harm. The current D.C. Code does not codify a lesser harm defense. However, District case law requires evidence of "a specific, *immediate*, identifiable harm." That the danger is "imminent" is sometimes stated in District case law as a requirement,

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[20] For example, this limitation would preclude a necessity defense when an actor recklessly causes a fire, then recklessly damages property in an attempt to prevent the spread of the fire (e.g., throwing an expensive painting away from the fire but toward the vicinity of a puddle, which damages the painting). Even assuming the actor meets the other requirements of a necessity defense, the defense is not available for criminal destruction of property, RCC § 22E-2503(e).

See Model Penal Code § 3.02 cmt. at 14 (1985) ("When the actor has made a proper choice of values, his belief in the necessity of his conduct to serve the higher value will exculpate unless the crime involved can be committed recklessly or negligently. When the latter is the case, recklessness or negligence in bringing about the situation requiring the choice of evils or in appraising the necessity for his conduct may be the basis for conviction. This treatment of the matter thus precludes conviction of a purposeful offense when the actor's culpability inheres in recklessness or negligence, while sanctioning conviction for a crime for which that level of culpability is otherwise sufficient to convict.").

[21] Legal causation as defined in RCC § 22E-204 requires that the result is reasonably foreseeable, and that if the result is due to another person's volitional conduct, the actor may be justly be held responsible for the result. However, the term "brings about" only requires that the actor's conduct was a but-for cause of the situation, and that it was reasonably foreseeable. When the situation is the result of another person's volitional conduct, it is not necessary to prove that the actor is justly responsible for the situation.

[22] For example, if a person chooses to participate in a criminal enterprise, reckless that a failure to commit criminal acts will be punished by physical harm, the defense may be unavailable if the person commits a criminal offense due to fear of the physical harm.

[23] For example, a teacher could not spank a child to prevent further misbehavior and justify their conduct under the lesser harm defense. The legislature has already considered such circumstances in the special responsibility defenses (RCC § 22E-408) and determined that for a teacher, misbehavior does not outweigh the harm of spanking a child. *See* Model Penal Code § 3.02 cmt. at 13 (1985) ("...the general choice of evils defense cannot succeed if the issue of competing values has been previously foreclosed by a deliberate legislative choice, as when some provision of the law deals explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the claimed justification otherwise appears.").

although the meaning of the word is not clear and at least in some instances appears to mean "immediate" in a temporal sense.[24] To resolve this ambiguity, the RCC statute requires the harm be imminent, but does not limit the precise timing of harm to be avoided. In unusual circumstances, conduct may be necessary to avoid a much later but otherwise inevitable harm.[25] This change improves the proportionality of the revised offenses.

Second, the RCC lesser harm defense does not apply when recklessness or negligence is the culpable mental state for an objective element of an offense that must be proven, and the actor is reckless or negligent, as the case may be, in bringing about the situation requiring a choice of harms or in appraising the necessity for the actor's conduct. The current D.C. Code does not codify a lesser harm defense and current District case law on the lesser harm defense[26] does not address the actor's culpability where the actor is reckless or negligent in bringing about the circumstances requiring a choice of harms. Resolving this ambiguity, the RCC lesser harm defense expressly limits the defense when the actor recklessly or negligently created or appraised the underlying situation that appeared to require a choice of evils. This change improves the clarity and proportionality of the revised statutes.

Third, the revised defense does not apply when the conduct constituting the offense is expressly addressed by another available defense, affirmative defense, or exclusion from liability. The current D.C. Code does not codify a lesser harm defense or other general defenses and current District case law on the lesser harm defense[27] does not address whether the defense is available when other general defenses are available. To resolve this ambiguity, the revised statute bars use of the lesser harm defense when the conduct is expressly addressed by another defense, affirmative defense, or exclusion from liability. The lesser harm defense is broadly worded given the wide range of circumstances in which it may be invoked, but it is not intended to replace or be an alternative to more specific requirements for defenses, affirmative defenses, or exclusions from liability that have been

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[24] *See Griffin v. U. S.*, 447 A.2d 776, 778 (D.C. 1982) ("The defense is not available where…(2) the harm to be prevented is neither imminent, nor would be directly affected by the defendants' actions.... … Appellants' motion makes clear that their actions were designed to focus attention on the plight of the homeless; they were not undertaken as a last resort, after all else had been attempted, to avoid an immediate harm."); *see also Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. 1988); *Fleet v. Fleet*, 137 A.3d 983, 988 (D.C. 2016) (explaining, "This defense of necessity does not require proof that harm is actually occurring, but only that the defendant have a reasonable belief that harm is imminent.").

[25] As the Model Penal Code commentary explains, "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." The revised defense applies in this scenario. *See* Model Penal Code § 3.02 cmt. at 17 (1985).

[26] *Griffin v. United States,* 447 A.2d 776, (D.C.1982), *cert. den. sub nom. Snyder v. United States,* 461 U.S. 907 (1983).

[27] *Id*.

codified by the legislature.[28] This change eliminates a possible gap in liability in the revised statutes.

Fourth, the RCC lesser harm defense requires a person to have reasonable belief but otherwise requires no proof as to subjective mental state. The current D.C. Code does not codify a lesser harm defense and current District case law on the lesser harm defense[29] does not address what state of mind, if any, must be proven regarding the necessity for the otherwise criminal conduct or the fact that it is a significantly lesser harm. To resolve this ambiguity, the RCC lesser harm defense clarifies that there is no culpable mental state for the defense besides proof that the person "reasonably believes" that there is imminent danger of a specific, identifiable harm and that the conduct constituting the offense will protect against the harm and is necessary in degree. A reasonable mistake as to the facts of the situation and available alternatives does not negate the defense. This change clarifies that the revised statutes.

[28] For example, the special responsibility defenses in RCC § 22E-408 are carefully limited to persons who bear a special relationship to the complaining witness. It is drafted to allow a parent to physically discipline a child but to prohibit corporal punishment by schoolteachers. Subsection (b)(3) of the revised statute makes clear that a teacher could not use the lesser harm defense to justify corporal punishment because that situation is already accounted for by the special responsibility defense. *See* the Model Penal Code's necessity defense ("Justification Generally: Choice of Evils") in § 3.02(a)(2), which requires that "neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved."

[29] *Griffin v. United States,* 447 A.2d 776, (D.C.1982), *cert. den. sub nom. Snyder v. United States,* 461 U.S. 907 (1983).

RCC § 22E-402. Execution of Public Duty.

Explanatory Note. *This section establishes an execution of public duty defense for the Revised Criminal Code (RCC). The defense applies when a court order or another law requires or authorizes a person to engaged in conduct that otherwise constitutes a criminal offense. The RCC execution of public duty defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the defense. The term "in fact" specifies that the person is strictly liable as to whether the elements in paragraphs (a)(1) – (3) are satisfied or not.[1] An actor may satisfy the defense requirements under paragraph (a)(1), (a)(2), or (a)(3).

Paragraph (a)(1) applies where the conduct constituting the offense is required or authorized by one of six kinds of laws. Subparagraph (a)(1)(A) provides a defense where the person complies with a court order. The term "court order" includes any judicial directive, oral or written.[2] Subparagraph (a)(1)(B) provides a defense where a person complies with a law governing the armed services or the lawful conduct of war. Subparagraph (a)(1)(C) applies where a public official complies with a law defining their duties. This includes civil law.[3] The term "public official" is a defined term that means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47). The phrase "a law" is intended to make clear that the defense applies where there are two or more conflicting laws and at least one of them requires or authorizes the conduct. Subparagraph (a)(1)(D) applies where a person assists a public official in the performance of that official's duties. Subparagraph (a)(1)(E) applies where a person is serving process in accordance with the law. Subparagraph (a)(1)(F) applies when any other law imposes a public duty, whether on public officials or private citizens.[4] The word "law" should be construed broadly to include any statute or municipal regulation.[5]

Paragraphs (a)(2) and (a)(3) provide that, alternatively, there are two instances in which the defense applies to a person who mistakenly but reasonably believes[6] that their conduct is authorized by law. Per the rules of interpretation in RCC § 22E-207, a person

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[1] RCC § 22E-207.

[2] Consider, for example, a person who is ordered to remain in court for a hearing, after the time that they are due to return to a halfway house has passed. That person has an execution of public duty defense to violation of work release under RCC § 24-241.05A.

[3] *See* Model Penal Code § 3.03 cmt. at 26 (1985) (explaining the defense may include civil cases governing officers' immunity from tort liability).

[4] *See* Model Penal Code § 3.03 cmt. at 23 (1985) ("Because public duties of immense variety can be found in the statutory and common law of every state, in a section like this it would be unwieldy to attempt a complete catalogue giving attention to the precise contours of each public responsibility.").

[5] *See* Model Penal Code § 3.03 cmt. at 25 (1985) (explaining a "formal administrative regulation" is sufficient for the defense).

[6] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

is strictly liable as to whether their mistaken belief is reasonable.[7] Paragraph (a)(2) specifies that the defense applies where a person reasonably believes their conduct is authorized by a court order or warrant. The person must reasonably believe that the order or warrant authorizes the conduct and that they are personally authorized to perform it. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[8] Paragraph (a)(3) specifies that the defense applies to private citizens who reasonably believe that they are required or authorized to assist a public officer in the performance of their official duties. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[9] This defense is available even if the officer is exceeding their authority.[10]

Subsection (b) establishes two exceptions to the execution of public duty defense. Paragraph (b)(1) specifies that the defense does not apply in circumstances where the legislature has more specifically addressed the conduct in question in another codified justification defense.[11] Paragraph (b)(2) disallows the defense in cases involving use of force unless the law clearly authorizes the use of deadly force in that instance.[12]

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

Relation to Current District Law. *Execution of public duty is a new general defense and, in that sense, all aspects of the revised statute are substantive changes to District law.*

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[7] *See id.* at 28 (explaining that criminal liability will attach where the mistaken belief was formed recklessly or negligently).

[8] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[9] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[10] However, this defense is not available where the conduct is the use of deadly force. *See* Model Penal Code § 3.03 cmt. at 28.

[11] *See* Model Penal Code § 3.03 cmt. at 26 (1985) (explaining that "explicit, carefully worked out provisions of the criminal law should control the general law of public duties in the cases to which they speak.").

[12] For example, the law expressly authorizes the use of deadly force by private corrections officers. *See* D.C. Code § 24-261.02.

RCC § 22E-403. Defense of Self or Another Person.

Explanatory Note. *This section establishes the defense of self or another person defense for the Revised Criminal Code (RCC). The defense applies where a person acts under a reasonable belief that they are protecting themselves or another person from a specified physical harm. The RCC defense of self or another person defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the defense. The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).

Paragraph (a)(1) requires that the person must reasonably believe[1] that the conduct constituting the offense will prevent a specified physical harm to the actor or to another person from occurring or continuing.[2] The word "imminent" should be construed to mean ready to take place or dangerously near. It should not be construed to have the same meaning as "immediate" or to require that the harm will occur at a specific moment in time.[3] The harm at issue may be a physical contact, bodily injury, sexual act, sexual contact, confinement, or death and must be specific and identifiable. The harm could be caused by a criminal act or an accident.[4] The terms "bodily injury," "sexual act," and "sexual contact" are defined in RCC § 22E-701 and include a wide array of conduct.[5] The phrase "physical contact" should be construed to have the same meaning as in RCC § 22E-1205. The word "confinement" is undefined and is intended to broadly include confining a person in a closed space, limiting a person's movements by applying physical restraints to the body, and taking a person to another location against their will. The actor's belief that the harm will occur may be mistaken,[6] but it must be objectively reasonable.

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[1] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[2] An additional motive, such as animus or hatred toward the complainant, does not defeat an otherwise valid claim of self-defense or defense of another person. *Parker v. United States*, 155 A.3d 835 (D.C. 2017).

[3] Consider, for example, a person who is stranded without access to food or water and fears that they might eventually die of starvation. That person may be justified in taking an abandoned vehicle to get to safety in violation of RCC § 22E-2101 (Unauthorized Use of Property). The person does not need to wait until they are on the very brink of death to act.

[4] Consider, for example, a baseball coach who observes Player A is about to take a practice swing that will accidentally hit Player B. The coach may be justified in assaulting Player A, roughly pushing them out of the way, to protect Player B from being injured.

[5] The fact that a person may defend against even the most minor bodily injury or sexual contact is offset by the requirement that the conduct must be necessary in its degree. For example, an actor may be justified in using a great amount physical force to protect against a beating about the head or a prolonged groping of the breast and be unjustified in using the same degree of force to protect against a mere grazing of the arm or buttocks.

[6] *Sloan v. United States*, 527 A.2d 1277 (D.C. 1987); *Jackson v. United States*, 645 A.2d 1099 (D.C. 1994).

Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[7]

Paragraph (a)(2) specifies that the actor must reasonably believe[8] that the conduct constituting the offense will protect against the harm and that it is necessary in degree.[9] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[10] It may be reasonable for person acting in the heat of passion to believe a greater degree of force is necessary than would seem necessary to a calm mind.[11] Conduct is not necessary in degree if the harm can be avoided by a reasonable "legal alternative available to the defendants that does not involve violation of the law."[12]

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[7] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[8] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[9] The reasonableness of the belief that the conduct is necessary is fact-sensitive and depends in part on the type of harm that is being threatened, the degree of harm that is being threatened, and, in the case of defense of a third person, that third person's ability to protect themselves. The actor's awareness of the complainant's reputation for violence is also a relevant consideration. *See, e.g., Hart v. United States*, 863 A.2d 866, 870 (D.C. 2004)

[10] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[11] *Fersner v. United States*, 482 A.2d 387, 392 (D.C. 1984) ("[W]hen it comes to determining whether—and to what degree—force is reasonably necessary to defend a third person under attack, the focus ultimately must be on the intervenor's, not the victim's, reasonable perceptions of the situation."). *See also Lee v. United States*, 61 A.3d 655, 660 (D.C. 2013); *Jones v. United States*, 555 A.2d 1024, 1027–28 (D.C. 1989); *Graves v. United States*, 554 A.2d 1145, 1147–49 (D.C. 1989).

[12] *See* Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. United States*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable,

Retreat may be a reasonable way to avoid a harm, however an actor has no affirmative duty to retreat when the requirements of the defense are otherwise satisfied.[13]

Subsection (b) establishes three exceptions to the defense of self or another person defense.

Paragraph (b)(1) limits the availability of the defense when the actor uses or attempts to use deadly force. The term "deadly force" is defined in RCC § 22E-701 and means any physical force that is likely to cause serious bodily injury or death or death. A person may use deadly force even if the person does not intend to cause a serious injury[14] and even if death or serious injury does not occur.[15] The word "attempt" in paragraph (b)(1) should be construed to have the same meaning as in Criminal Attempt under RCC § 22E-301. That is, a person attempts to use deadly force if they engage in conduct that is reasonably adapted to causing serious bodily injury or death.[16] Under paragraph (b)(1), however, the actor must reasonably believe[17] that they or another are in imminent danger. Sub-subparagraph (b)(1)(A)(i) applies to any actor in any location and permits deadly force only to protect against serious bodily injury, a sexual act, confinement or death. Sub-subparagraph (b)(1)(A)(ii) applies only when the actor is inside their own individual dwelling unit[18] and permits deadly force to protect against bodily injury and sexual contact,

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legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

[13] *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979) (explaining there is no affirmative duty to retreat because "when faced with a real or apparent threat of serious bodily harm or death itself, the average person lacks the ability to reason in a restrained manner how best to save himself and whether it is safe to retreat" but that a jury may consider whether a defendant "could have avoided further encounter by stepping back or walking away" in deciding whether the defendant was actually or apparently in danger).

[14] For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

[15] For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

[16] A person does not attempt to use deadly force by merely desiring to seriously injure the other person. For example, a person who intends to kill someone by pinching their arm does not attempt to use deadly force.

[17] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[18] The word "inside" should be construed to mean inside the boundaries of the structure and to include a sunroom or balcony that is exposed to outdoor elements. The term "dwelling" is defined in RCC § 22E-701 and does not require proof of ownership or long-term residency. The words "individual" and "unit" make clear that the communal areas of multi-unit housing buildings are not included.

provided that other requirements of the defense are met. The actor must also reasonably believe[19] that their conduct will protect against the harm and is necessary in degree.

Paragraph (b)(2) precludes application of the defense if the defendant is the initial aggressor.[20] That is, if the actor purposely provokes or brings about the situation that necessitates the defense, the defense will not apply. "Purposely" is defined in RCC § 22E-206 and here requires that the person consciously desire that the specific danger[21] occur. The term "brings about" requires that the actor caused the situation requiring the defense. The actor's conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable.[22] An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm.[23]

Paragraph (b)(2) allows for two circumstances in which a person may claim self-defense or defense of another person even though they were the initial aggressor. First, the defense is available if the actor provokes the danger through speech[24] or presence alone.[25]

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[19] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[20] Consider, for example, an actor who learns of a protest in a neighboring town and wants to confront the protestors and cause a violent scene. The actor arms himself with a concealed firearm and begins assaulting protestors, hoping that one will fight back and give him a reason to use deadly force to in self-defense.

[21] If after a confrontation begins, the actor becomes subject to an unforeseeable amount of force, the actor may nevertheless respond in self-defense. Under these circumstances, it cannot be said that the person purposefully provoked the danger. *See Andrews v. United States,* 125 A.3d 316, 323 n.22 (D.C. 2015) (defense available when complainant "unjustifiably escalate[d] the ... level of violence[.]"); *see also Lee v. United States*, 61 A.3d 655, 658 n.2 (D.C. 2013).

[22] Legal causation as defined in RCC § 22E-204 requires that the result is reasonably foreseeable, and that if the result is due to another person's volitional conduct, the actor may be justly be held responsible for the result. However, the term "brings about" only requires that the actor's conduct was a but-for cause of the situation, and that it was reasonably foreseeable. When the situation is the result of another person's volitional conduct, it is not necessary that the actor is justly responsible for the situation.

[23] For example, if a person chooses to participate in a criminal enterprise, reckless that a failure to commit criminal acts will be punished by physical harm, the defense may be unavailable if the person commits a criminal offense due to fear of the physical harm.

[24] Consider, for example, an actor who appears at a political demonstration fighting for racial justice wearing a t-shirt with racist slurs written on it, fully intending and expecting that it will provoke a physical attack. If a demonstrator attacks the actor, the actor still has a right to use the degree of force necessary to protect herself from further assault. While political speech enjoys the greatest protection under the First Amendment, the exercise of other forms of speech does not alone constitute a provocation that bars the speaker from subsequently defending themselves or others if they are attacked and otherwise meet the requirements of the defense.

[25] The phrase "speech or presence alone" does not include menacing under RCC § 22E-1203, criminal threats under RCC § 22E-1204, or the tort of assault, defined as "putting

The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures. Second, the defense is available to an initial aggressor who withdraws[26] or makes reasonable efforts to withdraw.[27] Efforts to withdraw include communicating a desire to withdraw.

Paragraph (b)(3) precludes application of the defense if the actor is reckless as to the fact that they are protecting against conduct that is lawful.[28] The term "reckless" is defined in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that the physical harm at issue is lawful and that the actor's conduct is a gross deviation from the ordinary standard of conduct. The exception does not require proof that the actor knows the specific law at issue but does require conscious disregard of a substantial risk that the physical harm is lawful in some manner.[29]

Subsection (c) requires a factfinder to consider certain specific facts when determining whether an actor who is a law enforcement officer and uses deadly force satisfies the requirements of the defense. The terms "law enforcement officer" and "deadly force" are defined in RCC § 22E-701. The term "in fact" indicates that the actor is strictly liable with respect to whether they are a law enforcement officer and with respect to whether the force used is deadly force.[30] The list is not exhaustive and the factfinder may consider other factors.

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

Relation to Current District Law. *The revised defense of self or another person defense clearly changes current District law in two main ways.*

First, the revised defense provides that the use of deadly force is justified if the actor is inside their own dwelling and reasonably believes that the actor or another person is in imminent danger of harms that may fall short of death or serious bodily harm—including a bodily injury, a sexual act, a sexual contact, or confinement. The D.C. Code does not codify a defense of self or another person defense. District case law provides that

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another in apprehension of an immediate and harmful or offensive conduct." *See Madden v. D.C. Transit System, Inc.*, 307 A.2d 756, 767 (D.C. 1973); *Person v. Children's Hosp. Nat Medical Center*, 562 A.2d 648, 650 (D.C. 1989).

[26] If the defendant disengages, he is able to defend himself against any subsequent attack. *See Rorie v. United States*, 882 A.2d 763, 775 (D.C. 2005).

[27] Consider, for example, a Bar Patron A who challenges Bar Patron B to meet outside for a fight. When a large crowd gathers, A has second thoughts and tries to run away. B prevents A from fleeing and begins severely beating A. A may be now be justified in committing assault against B in self-defense.

[28] For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

[29] Consider, for example, an actor who physically attacks a bouncer, in defense of a person the bouncer is removing at a bar. It is inconsequential that the actor does not know the specific law that authorizes a bouncer to act. If the actor recklessly disregards the fact that bouncer's conduct is lawful, the defense of another person defense does not apply.

[30] RCC § 22E-207.

a person may use deadly force to protect against death or "serious bodily harm,"[31] but has not defined the term "harm" in this context,[32] as distinguishable from "serious bodily injury" found elsewhere in the D.C. Code and case law.[33] While ambiguous, the scope of "serious bodily harm" clearly does not include non-serious bodily harm. With respect to a dwelling, the DCCA has not squarely decided to accept or reject the "castle doctrine" that one who through no fault of their own is attacked in one's own home is under no duty to retreat and may use deadly force even when not threatened with deadly force themselves.[34] The DCCA has adopted a "middle ground" approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat may be evidence of whether a defendant was actually or apparently in danger.[35] However, the court has held that the doctrine does not apply when the attacker is a co-occupant of the same home.[36]

In contrast, the revised defense includes a somewhat broader right to self-defense inside one's dwelling,[37] as defined in RCC § 22E-701, permitting the use of deadly force to protect against more than serious bodily injury or death, irrespective of the complainant's co-occupancy. Deadly force may be used to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement when the actor is

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[31] *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912); *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979).

[32] *But see Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016) (defining "serious bodily harm" to have the same meaning as "serious bodily injury" with respect to the meaning of "deadly force"); *Stewart v. United States*, 370 A.2d 1374, 1376 (D.C. 1977) (recognizing in *dicta* that other jurisdictions include sexual attacks as a bodily harm that is a possible predicate for a duress defense but then describing only serious bodily injury and death as predicates in the District).

[33] "Serious bodily injury" in other contexts has been construed to mean injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function. *Brown v. United States*, 139 A.3d 870, 876 (D.C. 2016) (regarding the meaning of "serious bodily injury" in defense of property); *Jackson v. United States*, 970 A.2d 277, 279 (D.C. 2009) (citing *Jackson v. United States,* 940 A.2d 981, 986 (D.C. 2008); *Bolanos v. United States,* 938 A.2d 672, 677 (D.C. 2007); *Payne v. United States,* 932 A.2d 1095, 1099 (D.C. 2007); *Swinton v. United States,* 902 A.2d 772, 776–77 (D.C. 2006)); *see also* RCC § 22E-701.

[34] *Cooper v. United States*, 512 A.2d 1002, 1005 (D.C. 1986); *see also Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996) ("We need not decide definitively whether the castle rule should apply.").

[35] *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

[36] *Cooper v. United States*, 512 A.2d 1002, 1005–06 (D.C. 1986). The court reasoned that co-occupants are usually related and have some obligation to attempt to defuse the situation. The court stated that even unrelated roommates have a heightened obligation to treat each other with a degree of tolerance and respect.

[37] Unlike some jurisdictions, the revised defense does not offer any broader protection inside one's place of business.

in their dwelling and the other requirements of the defense are met.[38] The revised defense specifically recognizes that protection against even lower-level bodily harms that occur in the home (versus another location) involve special consideration and a blanket ban on the use of deadly force for such lesser harms is unwarranted. This change improves the clarity and proportionality of the revised statutes.

Second, the revised statute provides that a law enforcement officer may be justified in using deadly force to protect a person from a sexual act or confinement. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 forbids a law enforcement officer from using deadly force unless it is immediately necessary to protect a person from serious bodily injury or death.[39] In contrast, although there are few circumstances in which it would reasonably appear necessary in degree to use deadly force to stop such harms, the revised statute permits the defense should such circumstances arise.[40] This change improves the proportionality of the revised statutes.

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

First, the revised defense applies to all offenses. The D.C. Code does not codify a self-defense or defense of others defense. The DCCA has recognized that self-defense is a defense to various offenses, including assault, possession of a prohibited weapon and threats.[41] However, the scope of offenses to which the current self-defense and defense of others defense applies is largely undefined. To resolve this ambiguity, the RCC clarifies that defense of self or another person may justify any offense. Limiting the defense to crimes involving the use of physical force, as is common in many jurisdictions,[42] may lead to counterintuitive and undesirable outcomes.[43] This change improves the consistency and proportionality of the revised statutes.

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[38] Instances where deadly force is reasonably necessary in degree to protect against a bodily injury or sexual contact are expected to be extremely rare, as other means of protection such as withdrawal or more moderate use of force may avoid the harm. However, should a person's only means of stopping the conduct while in their home be the use of deadly force, it may be justified under this defense. Consider for example a small-framed person who is pinned by a much larger assailant who forces them to submit to a sexual contact, but there appears to be no danger of a sexual act. Depending on the facts of the case, if the person being attacked can reach and use a deadly weapon to stop the attack, such use of deadly force may be justified.

[39] Act 23-336.

[40] Consider, for example, an assailant who has confined a large number of people in an internment camp, where they are routinely being raped and tortured but not sustaining serious bodily injuries. If all other reasonable legal alternatives have been exhausted, an officer may be justified in using a less-lethal weapon that is likely (though not certain) to kill the assailant.

[41] *McBride v. United States,* 441 A.2d 644 (D.C. 1982)*; Potter v. United States,* 534 A.2d 943 (D.C. 1987); *Reid v. United States*, 581 A.2d 359 (D.C. 1990); *Douglas v. United States*, 859 A.2d 641 (D.C. 2004); *Hernandez v. United States*, 853 A.2d 202 (D.C. 2004).

[42] *See* Model Penal Code §§ 3.04 and 3.05.

[43] Consider, for example, an actor who picks up a large tree branch to protect themselves from an assault in a public park. Under the Model Penal Code's formulation, the actor

Second, the revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a self-defense or defense of others defense. That the danger is "imminent" is frequently stated in District case law[44] and the District's current pattern jury instruction.[45] as a requirement, but the meaning of the word is not clear and at least in some instances appears to mean "immediate" in a temporal sense.[46] To resolve this ambiguity, the RCC statute requires that the harm be imminent, but does not limit the precise timing of the harm to be avoided. In unusual circumstances, conduct may be necessary to avoid non-immediate but otherwise inevitable harm.[47] This change improves the proportionality of the revised statutes.

Third, the revised defense allows the factfinder to consider the actor's failure to retreat in non-homicide cases. The D.C. Code does not codify a defense of self or another person defense. In deadly force cases, the District of Columbia Court of Appeals (DCCA) has adopted a "middle ground" approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.[48] The DCCA has not squarely addressed this issue of the defendant's ability to retreat in non-deadly force cases.[49] To resolve this ambiguity, the RCC adopts a middle ground approach in non-deadly force cases as well. However, the ability to consider the defendant's ability to avoid the criminal conduct (and the defendant's awareness of that ability) may be relevant in non-

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would have a defense to assault for hitting the attacker with the tree branch but would have no defense to disorderly conduct for instead swinging the branch around wildly to create an appearance of danger.

[44] *See, e.g., Parker v. U.S.*, 155 A.3d 835 (D.C. 2017).

[45] Crim. Jury Inst. for DC Instruction § 9.500 (2019).

[46] *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912) ("[I]t is necessary before one may kill another in self-defense, that he shall actually have believed in his own mind at the very moment he strikes the blow, that then either his life is in danger, or that he is in danger of great bodily harm."); *Dawkins v. United States*, 189 A.3d 223, 233, 235 (D.C. 2019).

[47] As the Model Penal Code commentary to Necessity explains, "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." *See* Model Penal Code § 3.02 cmt. at 17 (1985).

[48] *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

[49] In *Dawkins*, the court stated that there is no duty to disengage from every potential interpersonal conflict and no *duty* to safely retreat before using nondeadly force. However, the court did not hold that a factfinder is prohibited from considering a defendant's ability to retreat (and the defendant's awareness of that ability) before engaging in the conduct constituting the offense.

deadly force cases and fact patterns.[50] This change improves the clarity and consistency of the revised statute.

Fourth, the revised statute provides that an actor may be justified in using deadly force to protect against a sexual act or confinement. The current D.C. Code does not codify a self-defense or defense of others defense. District case law provides that a person may use deadly force to protect against "serious bodily harm,"[51] but has not defined the term "harm" in this context,[52] as distinguishable from "serious bodily injury" found elsewhere in the D.C. Code and case law.[53] Resolving this ambiguity, the revised statute permits the defense should such circumstances arise, provided that the conduct reasonably appears necessary in degree. This change clarifies and may improve the proportionality of the revised statutes.

Fifth, the revised statute defines clear parameters for when the defense is available to a someone who provokes an attack. District case law has held that self-defense is not available to someone who "deliberately places himself in a position where he has reason to believe his presence would provoke trouble."[54] The DCCA has adopted a "middle

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[50] Consider, for example, person A awaits a bus on a public sidewalk when person B, out for a run, yells "get out of my way" and heads in the direction of person A. Person A does not move aside and, when person B comes within arm's reach, pushes person B to the side and onto the ground, causing bodily injury. If person A is charged with an assault and claims self-defense, the revised statute does *not* allow the government to argue that person A had a duty to retreat. However, the revised statute also does not prohibit the factfinder from considering the feasibility of taking a step to be out of the runner's path when assessing the reasonableness of the A's belief that an assault was imminent.

[51] *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912); *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979).

[52] *But see Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016) (defining "serious bodily harm" to have the same meaning as "serious bodily injury" with respect to the meaning of "deadly force"); *Stewart v. United States*, 370 A.2d 1374, 1376 (D.C. 1977) (recognizing in *dicta* that other jurisdictions include sexual attacks as a bodily harm that is a possible predicate for a duress defense but then describing only serious bodily injury and death as predicates in the District).

[53] "Serious bodily injury" in other contexts has been construed to mean injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function. *Brown v. United States*, 139 A.3d 870, 876 (D.C. 2016) (regarding the meaning of "serious bodily injury" in defense of property); *Jackson v. United States*, 970 A.2d 277, 279 (D.C. 2009) (citing *Jackson v. United States,* 940 A.2d 981, 986 (D.C. 2008); *Bolanos v. United States,* 938 A.2d 672, 677 (D.C. 2007); *Payne v. United States,* 932 A.2d 1095, 1099 (D.C. 2007); *Swinton v. United States,* 902 A.2d 772, 776–77 (D.C. 2006)); *see also* RCC § 22E-701.

[54] *Rowe v. United States*, 370 F.2d 240, 241 (D.C. Cir. 1966); *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966) ("One cannot provoke fight and then rely on claim of self-defense when such provocation results in counterattack unless he has previously withdrawn from fray and communicated such withdrawal."); *Nowlin v. United States*, 382 A.2d 9, 14 n.7 (D.C. 1978); *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995).

ground" approach[55] to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.[56] The ambiguity of this rule has resulted in courts requiring a duty to retreat in some cases and not others, with sometimes inconsistent and counterintuitive outcomes.[57] Resolving this ambiguity, the revised statute applies the RCC's standardized definition of "purpose"[58] and clarifies that any person (other than a person engaging in mere speech or presence alone[59]) who provokes the danger necessitating the defense loses the right to self-defense, unless they retreat or make reasonable efforts to retreat.[60] This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the revised defense does not apply when the person is reckless as to the fact that they are protecting against conduct that is lawful.[61] The current D.C. Code does not codify a defense of self or others defense. District case law has held that a person has no right to defend against an apparently lawful arrest or other apparently lawful restraint by a police officer,[62] but has not yet addressed other lawful conduct.[63] Resolving this ambiguity, the revised statute clarifies that a person cannot assert the offense if they are defending against a physical contact, bodily injury, sexual act, sexual contact, confinement, or death that is lawful and they are reckless as the fact that it is lawful. This change clarifies the revised statute.

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[55] Consider, for example, person A awaits a bus on a public sidewalk when person B, out for a run, yells "get out of my way" and heads in the direction of person A. Person A does not move aside and, when person B comes within arm's reach, pushes person B to the side and onto the ground, causing bodily injury. If person A is charged with an assault and claims self-defense, the revised statute does *not* allow the government to argue that person A had a duty to retreat. However, the revised statute also does not prohibit the factfinder from considering the feasibility of taking a step to be out of the runner's path when assessing the reasonableness of the A's belief that an assault was imminent.

[56] *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

[57] *Compare Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923) (finding that self-defense was unavailable to a man who ran away from a mob of 100 men yelling "Catch the nigger," and "Kill the nigger," because he reached a place of "comparative safety" and could have gone home) *with Marshall v. United States*, 45 App. D.C. 373 (1916) (finding no duty to retreat during a fight over a craps game and stating, "The right of a defendant when in imminent danger to take life does not depend upon whether there was an opportunity to escape.").

[58] RCC § 22E-701.

[59] *See* Crim. Jury Inst. for DC Instruction § 9.504 (2019).

[60] *See Harris v. United States*, 364 F.2d 701, 702 (D.C. Cir. 1966); *Parker v. United States*, 158 F.2d 185, 186 (D.C. Cir. 1946); *Rowe v. United States*, 164 U.S. 546 (1896); *Bedney v. United States*, 471 A.2d 1022, 1023–24 (D.C. 1984).

[61] For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

[62] *Speed v. United States*, 562 A.2d 124, 128 (D.C. 1989).

[63] E.g., a parent who is disciplining a child.

Seventh, the revised statute amends the list of factors that a factfinder should consider when determining whether a law enforcement officer's use of deadly force satisfies the requirements of the defense. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 states that a factfinder should consider the totality of the circumstances and provides a non-exhaustive list of factors.[64] One of these factors is: "Whether the subject of the use of deadly force [] [p]ossessed or appeared to possess a deadly weapon."[65] The scope and meaning of "possession" of a deadly weapon, whether an officer's training and experience is relevant, and other factors in this statute are unclear and there is no case law to date. To resolve these ambiguities, the revised statute clarifies the provision regarding possession of a weapon[66] and expands the list to include the officer's training and experience[67] and whether the law enforcement officer made all reasonable efforts to prevent a loss of a life. This clarifies the revised statute.

[64] Act 23-336.
[65] *Id*.
[66] Current law requires the factfinder to consider whether the complainant "Possessed or appeared to possess a deadly weapon," whereas the revised statute focuses on whether it appeared to the law enforcement officer that the person possessed a weapon or had one readily available. It is of little consequence that a person constructively possessed a weapon in a far-off location.
[67] *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, & Imperfect Self-Def.*, 2018 U. Ill. L. Rev. 629, 665 (2018) ("Unlike civilians, police officers undergo extensive training, including training on threat perception, and are more attuned than the average citizen to behaviors indicative of threat. Therefore, it makes sense to assess the reasonableness of an officer's beliefs and actions from the perspective of a reasonable officer in the defendant officer's shoes.") (Citations omitted.).

RCC § 22E-404. Defense of Property.

Explanatory Note. *This section establishes defense of property defense for the Revised Criminal Code (RCC). The defense applies when a person acts under a reasonable belief that they are protecting their own property or property of another. The RCC defense of property defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the defense. The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).[1]

Paragraph (a)(1) specifies that the person must reasonably believe[2] that property is in imminent danger of a specific, identifiable harm.[3] The word "imminent" should be construed to mean ready to take place or dangerously near. It should not be construed to have the same meaning as "immediate" or to require that the harm will occur at a specific moment in time. The term "property" is defined in RCC § 22E-701 to include services, credit, money, licenses, and benefits. However, the defense of property defense applies only when an actor is protecting real property (including things growing on, affixed to, or found on land) or personal property (i.e. movable property, including an animal).[4] The threatened harm may be damage, taking, trespass, or misuse of property belonging to any person and must be specific and identifiable.[5] The actor's belief that the harm will occur may be mistaken, but it must be objectively reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[6]

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[1] RCC § 22E-207.

[2] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[3] The defense does not apply where a person takes proactive measures to avoid a risk of some indeterminate harm. Consider, for example, a person who believes that an elected official will reallocate funds from community health services funds to benefit a wealthy developer. That person is not justified in kidnapping the elected official to prevent such a generalized, ambiguous harm to others.

[4] For example, a person is not justified in committing fraud to protect their own wealth or in committing assault to protect a friend from being financially exploited.

[5] The defense does not apply where a person takes proactive measures to avoid a risk of some indeterminate harm. Consider, for example, a person who believes that a group of protestors pose a general danger to a neighborhood. That person is not justified in using force against a protestor unless they believe that specific protestor is posing a specific threat to specific property.

[6] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

Paragraph (a)(2) specifies that the person must reasonably believe[7] that the conduct will protect against the harm and that it is necessary in degree.[8] Conduct is not necessary in degree if the harm to property can be avoided by a reasonable "legal alternative available to the defendants that does not involve violation of the law."[9]

Subsection (b) establishes three exceptions to the defense of property defense.

Paragraph (b)(1) makes the defense unavailable when the actor uses or attempts to use deadly force. The term "deadly force" is defined in RCC § 22E-701 and means any physical force that is likely to cause serious bodily injury or death. A person may use deadly force even if the person does not intend to cause a serious injury[10] and even if death or serious injury does not occur.[11] The word "attempt" in paragraph (b)(1) should be construed to have the same meaning as in Criminal Attempt under RCC § 22E-301. That

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[7] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. The reasonableness of the belief that the conduct is necessary is fact-sensitive and depends in part on the type of harm that is being threatened, the degree of harm that is being threatened, and the actor's relationship to the property. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[8] For example, an actor may be justified in beating a person (causing bodily injury but not serious bodily injury) to prevent that person from setting the actor's home on fire and unjustified in beating a person to prevent them from keying the actor's car or walking across the far edge of the actor's lawn.

[9] *See* Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. United States*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

[10] For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

[11] For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

is, a person attempts to use deadly force if they engage in conduct that is reasonably adapted to causing serious bodily injury or death.[12]

Paragraph (b)(2) precludes application of the defense when a person is acting to protect someone else's[13] land without their permission.[14] The exception is limited to protection of land and does not include real property that is growing on, affixed to, or found on land.[15] The exception does not apply when the actor reasonably believes[16] they have the owner's effective consent to take action to protect the land, even if the owner does not actually consent.[17] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[18] The terms "property of another" (and

[12] A person does not attempt to use deadly force by merely desiring to seriously injure the other person. For example, a very weak person who intends to kill someone by pinching their arm does not attempt to use deadly force.

[13] The term "property of another" is defined in RCC § 22E-701 to include property in which the actor has some interest. However, the exception does not apply where the actor has the effective consent of any owner, including themselves.

[14] Consider, for example, Tourist A notices Tourist B continuing to take photographs instead of promptly leaving the National Arboretum at closing time. A is not justified under this section in assaulting B and removing them from the grounds unless A reasonably believes that the U.S. Department of Agriculture gave effective consent to A protecting its property.

[15] For example, an actor may be justified in protecting a school window from being criminally damaged, even if the actor does not have the effective consent of the school. However, the actor is not justified under this section in protecting the school from a trespass. *But see* D.C. Code § 23-582 (concerning citizen arrests).

[16] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[17] Consider, for example, Neighbor A asks Neighbor B to "keep an eye on" A's house while A is away on vacation. B observes an intruder attempting to crawl through A's window and trespasses onto A's lawn and assault the intruder to hinder the burglary. A would have preferred that B call the police instead of trespassing. B's assault is justified is B reasonably believed that the A gave effective consent.

[18] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

"property) and "effective consent" (and "consent") are defined in RCC § 22E-701. An agency relationship may be evidence of effective consent[19] but is not required.[20]

Paragraph (b)(3) precludes application of the defense if the actor is reckless as to the fact that they are protecting against conduct that is lawful.[21] The term "reckless" is defined in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that the property harm is lawful and that the actor's conduct is a gross deviation from the ordinary standard of conduct. The exception does not require proof that the actor knows the specific law at issue but does require conscious disregard of a substantial risk that the harm to property is lawful in some manner.

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

Relation to Current District Law. *The revised defense of property defense clearly changes current District law in two main ways.*

First, the revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a defense of property defense. However the D.C. Court of Appeals (DCCA) previously has approved use of a jury instruction that includes an immediacy requirement[22] and the District's current pattern jury instruction includes an even stronger immediacy requirement.[23] In contrast, the RCC statute requires the harm be imminent, but does not limit the precise timing of the harm to be avoided.. In unusual circumstances, conduct may be necessary to avoid non-immediate but otherwise inevitable harm.[24] This change improves the proportionality of the revised statutes.

Second, the revised statute includes harm to property belonging to a third person. The current D.C. Code does not codify a defense of property defense. However, the DCCA

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[19] For example, a person who is hired to work as a bouncer at the door of a bar has the effective consent of the bar to protect the land from a trespass.

[20] For example, a fashion model may be justified in using force to protect a runway from an intruder. *See* Jonah Engel Bromwich and Sanam Yar, *Meet the Chanel Crasher*, NEW YORK TIMES (October 4, 2019).

[21] For example, an actor is not justified in committing an assault to protect their vehicle from what they know to be a lawful repossession.

[22] *Gatlin v. United States*, 833 A.2d 995, 1008 (D.C. 2003) ("A person is justified in using reasonable force to protect his/her property from trespass or theft when s/he reasonably believes that his/her property is in immediate danger of an unlawful trespass or taking and that the use of such force is necessary to avoid the danger…")

[23] Crim. Jury Inst. for DC Instruction § 9.520 (2019) ("But s/he must act immediately after the taking has occurred, or in hot pursuit of the person who has taken the property. If time has elapsed, a person may not use force in repossessing the property.").

[24] As the Model Penal Code commentary to Necessity explains, "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." *See* Model Penal Code § 3.02 cmt. at 17 (1985).

has stated that the District follows the common law with regard to defense of property,[25] and at common law the defense is generally believed to be available only with respect to one's own property.[26] Also, in at least one case the DCCA has also held that the defense was available only if the evidence shows the property belonged to the defendant or that the defendant reasonably believed it did.[27] In contrast, the RCC provides that an actor may be justified in protecting another person's property or unowned property, provided that the actor reasonably believes the conduct is necessary in degree. In some circumstances, current law effectively punishes a person who is acting to protect the property of a family member or with reasonable and charitable intentions to help a stranger.[28] Current law also may punish a person who is acting according to their job duties.[29] However, the revised defense also provides an exception in paragraph (b)(2) for a person who is unilaterally acting to protect public or private land without permission from the owner to act.[30] This change improves the consistency and proportionality of the revised statutes.

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

First, the revised defense applies to all offenses. The D.C. Code does not codify a defense of property defense. The DCCA has recognized that defense of property is a defense to various offenses, including simple assault and a possession of a prohibited weapon offense[31] that requires proof of specific intent to use the weapon "unlawfully."[32] However, the scope of offenses to which the current defense of property defense applies is largely undefined. To resolve this ambiguity, the RCC clarifies that defense of property may justify any offense. Limiting the defense to crimes involving the use of physical force, as is common in many jurisdictions,[33] may lead to counterintuitive and undesirable outcomes.[34] This change improves the consistency and proportionality of the revised statutes.

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[25] *Jones v. United States*, 172 A.3d 888, 891 (D.C. 2017).
[26] § 10.6(e) Property of another, 2 Subst. Crim. L. § 10.6(e) (3d ed.).
[27] *Gatlin v. United States*, 833 A.2d 995, 1010 (D.C. 2003).
[28] Consider, for example, a person who observes a thief snatch a purse from an elderly person, runs after the thief, retrieves the purse, and returns it to the owner.
[29] For example, a bouncer at a bar.
[30] Consider, for example, Tourist A notices Tourist B continuing to take photographs instead of promptly leaving the National Arboretum at closing time. A is not justified under this section in assaulting B and removing them from the grounds unless A reasonably believes that the U.S. Department of Agriculture effectively consented to A protecting its property. *But see* D.C. Code § 23-582 (concerning citizen arrests).
[31] D.C. Code § 22-4514(b).
[32] *Jones v. United States*, 172 A.3d 888, 893 and n. 19 (D.C. 2017).
[33] *See* Model Penal Code § 3.06.
[34] Consider, for example, an actor who observes a person attempting to spray graffiti on their home. Under the Model Penal Code's formulation, the actor would have a defense to assault for tackling the graffiti artist to the ground but would have no defense to theft for instead stealing the spray paint and carrying it away.

Second, the revised defense of property defense does not apply when the person is reckless as to the fact that they are protecting against conduct that is lawful.[35] The current D.C. Code does not codify a defense of property defense. However, DCCA case law previously has approved a jury instruction that included an unlawfulness requirement,[36] and the District's current pattern jury instruction includes the same language.[37] However, there is no DCCA case law on point. Resolving this ambiguity, the revised statute clarifies that a person cannot assert the offense if they are defending against a damage, taking, trespass, or misuse of property that is lawful and they are reckless as the fact that it is lawful. This change clarifies the revised statute.

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

The revised defense codifies a rejection of the pre-20th century castle doctrine approach to defense of property (permitting deadly force in defense *of* one's "castle")[38] and categorically bars use of deadly force in defense of property only. The D.C. Code does not codify a defense of property defense. However, the DCCA recently has held that deadly force cannot be used to defend property alone.[39] Elsewhere, the RCC adopts a more

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[35] For example, an actor is not justified in committing an assault to protect their vehicle from what they know to be a lawful repossession.

[36] *Gatlin v. United States*, 833 A.2d 995, 1008 (D.C. 2003) ("A person is justified in using reasonable force to protect his/her property from trespass or theft when s/he reasonably believes that his/her property is in immediate danger of an *unlawful* trespass or taking and that the use of such force is necessary to avoid the danger…") (emphasis added).

[37] Crim. Jury Inst. for DC Instruction § 9.520 (2019).

[38] "It is a familiar maxim of the law, that 'a man's house is his castle,' and that he has a right to defend it." *State v. Hooker*, 17 Vt. 658, 670 (1845).

> It is sacred for the protection of his person, and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle, in order to reach the inmate. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in, by any means rendered necessary by the exigency-and upon the same ground and reason that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

State v. Patterson, 45 Vt. 308 (1873).

[39] *Jones v. United States*, 172 A.3d 888, 892 (D.C. 2017) ("It is never reasonable or justifiable, however, to use deadly force—force likely to cause death or 'serious' bodily harm or injury—merely to protect property, even if the intrusion or danger to the property cannot otherwise be prevented. This is because '[t]he preservation of human life, and of

modern castle doctrine approach, permitting deadly force under certain circumstances *within* one's castle.[40] Specifically, the revised defense of self or another person defense[41] provides that the use of deadly force is justified if the actor is inside their own dwelling and reasonably believes the conduct is necessary in degree to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement. However, the revised defense of property defense does not permit an actor to meet an intruder at the threshold of the home and prevent him from entering by deadly force, or to assume automatically that an intruder intended to commit an act of violence therein.[42] This change clarifies the revised statutes.

limb and member from grievous harm, is of more importance to society than the protection of property.'" (internal citations omitted)).

[40] "In some cases, this 'castle doctrine' is described as follows: '[W]hen one is violently assaulted in his own house or immediately surrounding premises, he is not obliged to retreat.'" *Jenkins v. State*, 942 So. 2d 910, 914 (Fla. Dist. Ct. App. 2006).

[41] RCC § 22E-403.

[42] *See, e.g.,* N.C. Gen. Stat. Ann. § 14-51.2 ("The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm…"); S.C. Code Ann. § 16-11-440 (same); *see also Howell v. State*, 144 So. 3d 211, 217 (Miss. Ct. App. 2014) ("[T]he castle doctrine 'creates a presumption of fear and abridges a duty to retreat in certain prescribed circumstances.'").

RCC § 22E-408. Special Responsibility for Care, Discipline, or Safety Defenses.

Explanatory Note. This section establishes several justification defenses based on the actor's special relationship to the complainant for the Revised Criminal Code (RCC). Each of the defenses is based on the special duty of care that an actor has toward a complainant. The defenses apply to most offenses against persons in Subtitle II and Subtitle III of the RCC. The revised special responsibility defenses are the first codification of general defenses and replace several defense provisions in specific statutes.[1]

Subsection (a) codifies the requirements of a general parental defense to offenses in Subtitle II and Subtitle III of the RCC, other than those offenses listed in subsection (e).[2]

Paragraph (a)(1) requires that, in fact, that actor reasonably believes[3] the circumstance elements specified in subparagraphs (a)(1)(A) and (a)(1)(B). Subparagraph (a)(1)(A) requires that the actor reasonably believes that the complainant is under 18 years of age. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[4] "Complainant" is a defined term in RCC § 22E-701 that refers to a person who is who is alleged to have been subjected to any criminal offense. Parents of adult children do not meet the requirements of the offense. The term "in fact" is defined in RCC § 22E-207 and specifies that there is no culpable mental state required as to the complainant's age.

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[1] D.C. Code § 22-3531(e)(4), Voyeurism ("This section does not prohibit the following: … (4) Any electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent.") and D.C. Code § 22-935, Exception [to Criminal Abuse and Neglect of Vulnerable Adults liability] (A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person."). For discussion of how the RCC changes current law for these specific offenses, see the commentary for each specific offense.

[2] Subsection (e) precludes application of the defense to sexual assault and certain human trafficking offenses. In addition, the revised kidnapping and criminal restraint statutes contain defenses to liability for parents and close relatives in certain circumstances. *See* RCC § 22E-1401(c) and RCC § 22E-1402(b).

[3] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[4] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

Subparagraph (a)(1)(B) requires the actor to have one of two types of relationship to the complainant. Sub-subparagraph (a)(1)(B)(i) first requires the actor reasonably[5] believes he or she is either a parent or a person acting in the place of a parent under civil law. The term "parent" is undefined and is intended to include persons with parental rights by blood or adoption. A "person acting in the place of a parent under civil law" is a defined term in RCC § 22E-701, and that definition is identical to how D.C. case law has defined a person who stands in loco parentis: "both a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and any person acting by, through, or under the direction of a court with jurisdiction over the child."[6] In addition to being a parent or a person acting in the place of a parent under civil law, an actor must also at the time of the alleged offense be responsible for the health, welfare, or supervision of the complainant.[7] Sub-subparagraph (a)(1)(B)(ii), alternatively, provides that the actor may also be a person who reasonably[8] believes that they are acting with the effective

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[5] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[6] *See Simms v. United States*, 867 A.2d 200, 205 (D.C. 2005) ("The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties."). *See also* Criminal Jury Instruction 4.121 (5th ed. 2018) ("… that person must have put himself or herself in the situation of a lawful parent, without going through the formalities necessary for legal adoption, by both assuming parental status and by discharging the duties and obligations of a parent toward a child. …You should consider the intent of the person claiming the status of in loco parentis and the scope of authority given to that person to so act.").

[7] For example, a parent by blood who has lost all custodial rights to a child cannot claim this defense. Whether a given parent is responsible for the health, welfare, or supervision of the child at the time of the offense when there are divorced parents with joint custody over a child is a fact-dependent inquiry that depends on the nature of the custody order.

[8] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually

consent of a person referred to in sub-subparagraph (a)(1)(B)(i).[9] A person acting without effective consent of a parent or person acting in the place of a parent under civil law may have another defense under RCC § 22E-408, depending on the circumstances, but does not have a defense under the parental defense.[10] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. There is no culpable mental state required as to the actor's relationship to the child, or as to whether the actor reasonably believed he or she was acting with the effective consent of a person referred to in sub-subparagraph (a)(1)(B)(i).[11]

Paragraph (a)(2) requires that for the defense to apply, the actor must act with intent to safeguard or promote the welfare of the complainant. The term "welfare" should be construed broadly but precludes application of the defense where the attack is "gratuitous."[12] Unlike the guardian and limited caretaker defenses, the parental defense may apply to the punishment of misconduct, in addition to safeguarding or promoting the welfare of the complainant.[13] "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the conduct would safeguard or promote the welfare of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to"

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existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[9] This legal recognition of others temporarily supervising children is consistent with current D.C. law. For example, the D.C. Code currently defines "lawful custodian" as a person designated by the Court "or a person designated by the lawful custodian temporarily to care for the child." D.C. Code § 16–1021.

[10] For example, consider a parent who leaves their young child in a babysitter's care with no instructions as to punishment for misbehavior. While the parent is gone the babysitter punishes the child for a misdeed by spanking, causing a bodily injury. Absent evidence that the babysitter reasonably believed that they had the effective consent of the parent to engage in such punishment, the babysitter could not avail themselves of this defense.

[11] Although no culpable mental state as defined in RCC § 22E-205 is required, subparagraph (a)(2)(B) still requires that the actor subjectively believed that he or she was acting with the effective consent of a person referred to in subparagraph (a)(2)(A)

[12] *See Newby v. United States,* 797 A.2d 1233, 1242–43 (D.C. 2002) (limiting application of the parental discipline defense to conduct "for the betterment of the child or promotion of the child's welfare—and not [ ] a gratuitous attack.") (quoting *Anderson v. State,* 61 Md.App. 436, 487 A.2d 294, 298 (Ct.Spec.App.1985)).

[13] This is consistent with D.C. case law. *See, e.g., Longus v. United States*, 935 A.2d 1108 (DC 2007) (Court found force reasonable where actor had slapped child on the back of the head with an open hand and grabbed child's clothing near neck as punishment for disobedience). *See also,* Model Penal Code § 3.08 cmt. at 140 (1985) (citations omitted) ("The law has universally allowed a privilege for the exercise of domestic authority, sometimes articulated in the statutes, though often without a definition of its scope.").

is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually safeguarded or promoted the complainant's welfare.[14]

Paragraph (a)(3) requires that, in fact, the actor's conduct satisfies two additional conditions. Subparagraph (a)(3)(A) requires that the actor's conduct be reasonable in manner and degree, under all circumstances. The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may take into account the complainant's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, or other relevant factors. This is a holistic, objective assessment of the actor's conduct, taking into account facts that may not have been known to the actor.[15] This requirement includes consideration of the actor who fails to gain relevant information before acting.[16] Per the rule of interpretation under RCC § 22E-207, the term "in fact" applies to this element. The term "in fact" is defined in RCC § 22E-207 and specifies that there is no culpable mental state required as to whether the actor's conduct was reasonable in manner and degree.

Subparagraph (a)(3)(B) limits the defense in two ways. Sub-subparagraph (a)(3)(B)(i) precludes the application of the defense where the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury. "Serious bodily injury" is defined in 22E-701 as bodily injury or significant injury that involves a "substantial risk of death"; "[p]rotracted and obvious disfigurement"; or "[p]rotracted loss or impairment of the function of a bodily member or organ." Sub-subparagraph (a)(3)(B)(ii) allows application of the defense to situations that do involve a substantial risk of, or cause, death

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[14] *See also,* Model Penal Code § 3.08 cmt. at 139 (1985) (citations omitted) ("To require belief in necessity to avoid criminal conviction was thought to be too extreme. Parents may defensibly use force less on the basis of a judgment of necessity than simply with the belief that it is an appropriate preventative or corrective measure.").

[15] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.")

[16] *See* Model Penal Code § 3.09 ("When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.").

or serious bodily injury when the case nonetheless involves the performance or authorization of medical procedures otherwise permitted under local or federal law "by a licensed health professional or by a person acting at the direction of a licensed health professional."[17] Non-medical and illegal medical treatments are not covered by subparagraph (a)(5)(B). Health professional is a defined term.[18] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury, or is the performance or authorization of a medical procedure, otherwise permitted under District or federal civil law, by a licensed health professional or by a person acting at the direction of a licensed health professional.

Subsection (b) codifies the requirements of a general guardian defense to offenses in Subtitle II and Subtitle III of the RCC, other than those offenses listed in subsection (e).

Paragraph (b)(1) requires that, in fact, that actor reasonably believes[19] the circumstance elements specified in subparagraphs (b)(1)(A) and (b)(1)(B). Subparagraph (b)(1)(A) requires that the actor reasonably[20] believes that the complainant, in fact, be an "incapacitated individual." "Incapacitated individual" is defined in D.C. Code § 21-2011

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[17] A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they meet the definition of medical procedure, are performed by a health professional, as defined, and are otherwise legal under District or federal law. The definition of medical procedure is intended to exclude cosmetic procedures. Non-medical and illegal medical treatments are not covered by subparagraph (a)(5)(B). When evaluating whether the parental defense justifies the actor's conduct, the jury must consider the other factors of the defense, such as the reasonableness of the conduct.

[18] "Health Professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3-1205.01. Examples of licenses health professionals include physician assistants, practical nurses, and psychologists. Health Professional also includes any professional certified by the Director of the District's Emergency Medical Services (EMS) under 29 DCMR § 515–524.

[19] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[20] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

as "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator." The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the complainant is an "incapacitated individual."

Subparagraph (b)(1)(B) requires the actor to have one of two types of relationship to the complainant. Sub-subparagraph (b)(1)(B)(i) first requires the actor to be a court-appointed guardian to the complainant, whether a guardian appointed by the District or another jurisdiction.[21] Sub-subparagraph (b)(1)(B)(ii), alternatively, provides that the actor may also be a person who reasonably believes that they are acting with the effective consent of the guardian referred to in sub-subparagraph (b)(1)(B)(i).[22] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[23] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. There is no culpable mental state required as the actor's relationship with the complainant, or whether the actor reasonably believes that they are acting with the effective consent of the guardian referred to in sub-subparagraph (b)(1)(B)(i).[24]

Paragraph (b)(2) requires that the actor acted with intent to safeguard or promote the welfare of the complainant. "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the conduct would safeguard or promote the welfare of the complainant. Per RCC § 22E-205, the object of the phrase "with

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[21] District law recognizes many types of guardianship. In this section, the term is used generally to refer to any person who is appointed by a court to have a special responsibility or duty of care to another person.

[22] For example, if an actor takes reasonable steps to confirm a consenting individual is the complainant's guardian, but is mistaken, the defense would apply to the actor's conduct based on that consent. Similarly, if an actor reasonably but mistakenly viewed a guardian's communication as consent, the defense would apply to the actor's conduct.

[23] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[24] Although no culpable mental state as defined in RCC § 22E-205 is required, subparagraph (b)(2)(B) still requires that the actor subjectively believed that he or she was acting with the effective consent of a guardian referred to in subparagraph (b)(2)(A).

intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually safeguarded or promoted the complainant's welfare.[25]

Paragraph (b)(3) requires that the conduct, in fact, satisfies three additional requirements, listed under subparagraphs (b)(3)(A)-(C). Subparagraph (b)(3)(A) requires that the actor's conduct be reasonable in manner and degree, under all circumstances. The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may take into account the complainant's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, or other relevant factors. This is a holistic, objective assessment of the actor's conduct, taking into account facts that may not have been known to the actor.[26] This requirement includes consideration of the actor who fails to gain relevant information before acting.[27] Per the rule of interpretation under RCC § 22E-207, the term "in fact" applies to this subparagraph. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the actor's conduct was reasonable in manner and degree.

Subparagraph (b)(3)(B) requires that the conduct is permitted under civil law controlling the actor's guardianship. The defense is not available of the conduct exceeds the authority of the actor's guardianship over the complainant, as determined under civil law. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the conduct is permitted under civil law.

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[25] *See also,* Model Penal Code § 3.08 cmt. at 139 (1985) (citations omitted) ("To require belief in necessity to avoid criminal conviction was thought to be too extreme. Parents may defensibly use force less on the basis of a judgment of necessity than simply with the belief that it is an appropriate preventative or corrective measure.").

[26] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.").

[27] *See* Model Penal Code § 3.09 ("When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.").

Subparagraph (b)(3)(C) specifies two additional requirements of the defense. Sub-subparagraph (b)(3)(C)(i) precludes the application of the defense where the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury. "Serious bodily injury" is defined in 22-701 as bodily injury or significant injury that involves a "substantial risk of death"; "[p]rotracted and obvious disfigurement"; or "[p]rotracted loss or impairment of the function of a bodily member or organ." Sub-subparagraph (b)(3)(C)(ii) allows application of the defense to the performance or authorization of medical procedures otherwise permitted under local or federal law "by a licensed health professional or by a person acting at the direction of a licensed health professional."[28] Health professional is a defined term.[29] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this subparagraph. There is no culpable mental state required as to whether the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury, or is the performance or authorization of a medical procedure, otherwise permitted under District or federal civil law, by a licensed health professional or by a person acting at the direction of a licensed health professional.

Subsection (c) codifies the requirements of a general Emergency Health Professional Defense to offenses in Subtitle II and Subtitle III of the RCC, other than those offenses listed in subsection (e).

Paragraph (c)(1) requires that, in fact, that actor reasonably believes[30] the circumstance elements specified in subparagraphs (c)(1)(A)-(F). Subparagraph (c)(1)(A) requires that the actor reasonably[31] believes that the complainant is unable to give effective

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[28] A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they meet the definition of medical procedure, are performed by a health professional, as defined, and are otherwise legal under District or federal law. The definition of medical procedure is intended to exclude cosmetic procedures. Non-medical and illegal medical treatments are not covered by subparagraph (a)(5)(B). When evaluating whether the guardian defense justifies the actor's conduct, the jury must consider the other factors of the defense, such as the reasonableness of the conduct.

[29] "Health Professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3-1205.01. Examples of licenses health professionals include physician assistants, practical nurses, and psychologists. Health Professional also includes any professional certified by the Director of the District's Emergency Medical Services (EMS) under 29 DCMR § 515–524.

[30] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[31] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving

consent at the time of the conduct.[32] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, a coercive threat, or deception." The term "in fact" is defined in RCC § 22E-207 and specifies that there is no culpable mental state required as to whether the complainant was unable to give effective consent at the time of the conduct.

Subparagraph (c)(1)(B) requires the actor to have one of two types of licensure or status. Sub-subparagraph (c)(1)(B)(i) first requires the actor reasonably believe that he or she is a licensed health professional. Health professional is a defined term.[33] Sub-subparagraph (c)(1)(B)(ii), alternatively, provides that the actor may also be a person who reasonably believe believed they were acting at the direction of a person referred to in sub-subparagraph (c)(1)(B)(i). Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[34] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this subparagraph. There is no culpable mental state required as to whether the actor reasonably believes he or she is a licensed health professional, or whether the actor reasonably believes they were acting at the direction of a person referred to in sub-subparagraph (c)(1)(B)(i).[35]

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criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[32] For example, if an actor takes reasonable steps to confirm a consenting individual is the complainant's guardian, but is mistaken, the defense would apply to the actor's conduct based on that consent. Similarly, if an actor reasonably but mistakenly viewed a guardian's communication as consent, the defense would apply to the actor's conduct.

[33] "Health Professional" means a person required to obtain a District license, registration, or certification per D.C. Code § 3-1205.01. Examples of licenses health professionals include physician assistants, practical nurses, and psychologists. Health Professional also includes any professional certified by the Director of the District's Emergency Medical Services (EMS) under 29 DCMR § 515–524.

[34] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (internal citations omitted).

[35] Although no culpable mental state as defined in RCC § 22E-205 is required, sub-subparagraph (c)(1)(B)(ii) still requires that the actor subjectively believed that he or she was acting with the effective consent of a a person referred to in sub-subparagraph (c)(1)(B)(ii).

Subparagraph (c)(1)(C) requires that the actor reasonably[36] believed that charged conduct is the performance or authorization of a medical procedure permitted under District or federal civil law. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this subparagraph. There is no culpable mental state required as to whether the conduct is the performance or authorization of a medical procedure permitted under District or federal law.

Subparagraph (c)(1)(D) requires that the actor reasonably[37] believed that the medical procedure is administered or authorized in an emergency. "Emergency" is defined in D.C. Code § 2-1542 as "an unforeseen combination of circumstances or the resulting state that calls for immediate action. The term 'emergency' includes, but is not limited to, a fire, a natural disaster, an automobile accident, or any situation that requires immediate action to prevent serious bodily injury or loss of life." Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this subparagraph. There is no culpable mental state required as to whether the actor reasonably believed that the medical procedure was administered or authorized in an emergency.

Subparagraph (c)(1)(E) requires that the actor reasonably[38] believed that no person who is legally permitted under District law to consent to the medical procedure on behalf

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[36] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[37] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[38] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually

of the complainant could be timely consulted. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this subparagraph. There is no culpable mental state required as to whether actor believed that no person who is legally responsible could be timely consulted. Subparagraph (c)(1)(F) requires that the actor reasonably[39] believed there was no legally valid standing instruction by the complainant declining the medical procedure. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether actor reasonably believed there was no legally valid standing instruction by the complainant declining the medical procedure.

Paragraph (c)(2) requires that the actor acted with intent to safeguard or promote the physical or mental health of the complainant.[40] "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the medical procedure would promote the complainant's physical or mental health. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually promoted the complainant's physical or mental health.

Paragraph (c)(3) requires that, in fact, a reasonable person desiring to safeguard the welfare of the complainant would consent to the medical procedure. This requirement precludes the applicability of the defense to negligent performance.[41] Reasonableness is

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existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[39] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[40] Physical or mental health should be construed broadly and should be read to include efforts to improve – or avoid the decline of – one's physical or mental condition.

[41] For example, a health professional that performed a medical procedure without taking reasonable steps to investigate and diagnose the complainant's condition would not be able to raise the Emergency Health Professional defense.

an objective standard that must take into account certain characteristics of the actor but not others.[42] The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether a reasonable person desiring to safeguard the welfare of the complainant would consent to the medical procedure.

Subsection (d) codifies the requirements of a limited caretaker defense to offenses in Subtitle II and Subtitle III of the RCC, other than those offenses listed in subsection (e).

Paragraph (d)(1) requires, in fact, that the actor reasonably believes[43] that the actor has a responsibility, under civil law, for the complainant's health, welfare, or supervision.[44] The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the actor reasonably believes the actor is responsible, under civil law, for the complainant's health, welfare, or supervision.

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[42] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (internal citations omitted).

[43] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[44] The determination of whether a person has a duty to the complainant under civil law may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, D.C. case law has found that schools do have a duty of care to their students. *See, e.g., District of Columbia v. Royal, 4*65 A.2d 367 (D.C. 1983) (recognizing a school's obligation to supervise its students). Consequently, teachers may utilize the defense under current D.C. case law. However, unlike the parental defense, the limited caretaker defense cannot be applied to the punishment or prevention of misconduct. The defense may apply where teachers are attempting to prevent injury though the conduct must still meet the other elements of the limited caretaker defense.

Paragraph (d)(2) creates two requirements for the actor's intent. Subparagraph (d)(1)(A) requires that the actor had intent that the conduct was necessary to fulfill the actor's responsibility to the complainant. Subparagraph (d)(1)(B) requires that the actor had intent that the conduct was consistent with the welfare of the complainant. "Intent" is a term defined in RCC § 22E-206 and here means that the actor was practically certain that the medical procedure would promote the complainant's physical or mental health. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor's conduct was actually necessary to fulfill the actor's responsibility to the complainant, or that it was consistent with the complainant's welfare.

Paragraph (d)(3) requires that, in fact, the actor's conduct satisfies two additional requirements defined under subparagraphs (d)(3)(A) and (d)(3)(B). Subparagraph (d)(3)(A) requires that the actor's conduct be reasonable in manner and degree, under all the circumstances. The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may take into account a complainant's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, or other relevant factors. This is a holistic, objective assessment of the actor's conduct, taking into account facts that may not have been known to the actor.[45] This requirement includes consideration of the actor who fails to gain relevant information before acting.[46] Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this subparagraph. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the conduct was reasonable in manner and degree.

Subparagraph (d)(3)(B) requires that the actor's conduct does not create a substantial risk of, or causes, death or serious bodily injury. Per the rule of interpretation

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[45] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (internal citations omitted).

[46] *See* Model Penal Code § 3.09 ("When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.").

under RCC § 22E-207, the term "in fact" also applies to this subparagraph. There is no culpable mental state required as to whether the actor's conduct creates a substantial risk of, or causes, death or serious bodily injury.

Paragraph (d)(4) requires that no other special responsibility defense applies to the conduct. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this paragraph. There is no culpable mental state required as to whether another special responsibility defense applies to the conduct.

Subsection (e) precludes application of the defenses in this title to offenses in Chapters 13 and certain offenses in Title 16 and in Title 18. Title 13 includes Sexual Assault and related offenses; Title 16 includes Human Trafficking offenses.[47] The conduct required to meet the elements of offenses in these chapters is never in fulfillment of the actor's duties to the complainant. Consequently, the defenses are categorically excluded from application to these offenses. Title 18 includes stalking, obscenity, and invasion of property offenses. Paragraph (e)(8) specifies that the defenses in this section do not apply to creating or trafficking an obscene image of a minor under RCC § 22E-1807, when the actor is charged under subparagraphs (a)(1)(B), (a)(1)(E), (b)(1)(B) or (b)(1)(E). In addition, paragraph (e)(9) specifies that the defense is categorically unavailable for arranging a live performance of a minor under RCC § 22E-1809.

Subsection (f) cross-references applicable definitions located elsewhere in Chapters 2 and 7 of the RCC and, for the term "incapacitated individual," in D.C. Code § 21-2011.

Relation to Current District Law. *Seven aspects of the special responsibility for care, discipline, or safety defenses may be viewed as possible changes of law.*

First, the RCC parental defense applies to most offenses against persons and all property offenses. While the District has not codified a parental defense, either generally or for any particular offense, current D.C. case law has recognized a parental defense to simple assault and cruelty to children.[48] Current D.C. case law has not addressed the parental defense's applicability outside of these two offenses. To resolve this ambiguity as to the availability of the defense, the RCC parental defense specifies that it applies to crimes against persons in Subtitle II of the RCC, and property offenses in Subtitle III, with the explicit exclusion of certain Human Trafficking, Sexual Assault, and Obscenity offenses as stated in subsection (e). Application of the defense is also limited by subparagraph (d)(3)(B) to conduct that neither causes nor creates a substantial risk of death or serious bodily injury—effectively precluding application of the offense to murder and certain other serious felony charges. This change improves the clarity and consistency of the revised statutes.

Second, the RCC parental defense requires that the actor must reasonably believe that the actor is a parent or person acting in place of parent who currently has responsibility for the health, welfare, or supervision of the complainant child. There is no relevant statute and current D.C. case law requires that the actor has "put himself in the situation of a lawful

[47] This subsection is intended to preclude application of the defense to the trafficking of individuals to exploit them for sex work or other labor.

[48] *See, e.g., Lee v. United States*, 831 A.2d 378, 380-81 (D.C. 2003); *Newby v. United States,* 797 A.2d 1233, 1241 (D.C. 2002); *Simms v. United States*, 867 A.2d 200, 205 (D.C. 2005).

parent by assuming the obligations incident to the parental relation."[49] The precise meaning of this case law—and the contemporaneous nature of the relationship and the alleged criminal conduct—is unclear, however. To resolve this ambiguity, the RCC parental defense requires that the actor reasonably believes that the actor has current responsibility for the health, welfare, or supervision of the complainant child. This change improves the clarity and proportionality of the revised statutes.

Third, the RCC parental defense applies to persons who reasonably believe that they are acting with the effective consent of either parents or those acting in loco parentis. There is no relevant statute and current D.C. case law does not address whether the defense is available to persons acting with the effective consent of parents or those acting in loco parentis,[50] let alone whether a reasonable mistake by the actor as to the existence of effective consent is sufficient. To resolve this ambiguity, the RCC parental defense is available to persons acting with such effective consent or reasonably believing they have such effective consent. This change improves the clarity and proportionality of the revised statutes.

Fourth, the RCC parental defense is generally limited to conduct not creating a risk of, or causing, serious bodily injury or death, but specifically allows the defense for the performance or authorization of certain medical procedures. Current case law does not address the parental defense's applicability to authorization of medical procedures that may be life threatening or involve serious bodily injury. Furthermore, current case law does not limit the applicability of the defense to a certain level of injury–it requires only that the force used cannot be "immoderate or unreasonable."[51] To resolve this ambiguity the RCC parental defense generally precludes application of the defense where the conduct created a risk of, or resulted in, actual serious bodily injury or death. However, the revised defense allows application where the actor has authorized or performed a medical procedure otherwise legal under District or federal law. This change improves the clarity and proportionality of the revised defense.

Fifth, the RCC recognizes a defense for guardians of incapacitated individuals. The District has not codified a general justification defense for guardians who act with intent to safeguard or promote the welfare of their ward, and case law has not addressed the existence of such a general justification defense.[52] In at least one instance, however, the

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[49] *See Simms v. United States*, 867 A.2d 200, 205 (D.C. 2005).

[50] The DCCA has noted the issue, but the specific question of whether such authority can be delegated has not been specifically addressed or presented. *See, e.g., Martin v. United States*, 452 A.2d 360, 363 (D.C. 1982) ("The complaining witness lived in her paternal grandmother's house, and at no time did the grandmother testify that disciplinary authority over the girl had been specifically delegated to appellant.") (internal citations omitted).

[51] *Newby v. United States*, 797 A.2d 1233, 1243 (D.C. 2002).

[52] Current District law assigns guardians of incapacitated individuals duties similar to those of parents and guardians of children. *See, e.g.,* D.C. Code § 21-2047 ("…Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health… Take reasonable care of the ward's personal effects and commence protective proceedings, if necessary, to protect other property of the ward… Apply any available money of the ward to the ward's current needs for support, care, habilitation, and treatment… Make decisions on behalf of the ward by conforming as closely as possible to a standard of substituted judgment or, if the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, make the decision on the basis of the ward's best interests…").

D.C. Code recognizes a special defense to a statute for persons acting according to a duty of care toward their ward.[53] To resolve this ambiguity the RCC guardian defense applies to guardians but is limited by the elements to specific complainants, actors, and conduct set out in paragraphs (b)(1)-(5). The requirements of the RCC guardian defense closely parallel those of the RCC parental defense but notably do not specifically include in paragraph (b)(3) conduct to punish misconduct.[54] This change improves the clarity, consistency, and proportionality of the revised defense.

Sixth, the RCC recognizes a defense for emergency health professionals. The District has not codified such a general justification defense for emergency health professionals who provide medical procedures with intent to safeguard or promote the physical or mental health of a patient, and case law has not addressed the existence of an emergency health professional justification defense.[55] In at least one instance, however, the D.C. Code recognizes a special defense to a statute for medical professionals acting when a patient cannot give consent.[56] To resolve this ambiguity, the RCC emergency health professional defense recognizes such a defense, which is limited by the elements to specific actors and conduct set out in paragraphs (c)(1)-(5). This change improves the clarity and proportionality of the revised defense.

Seventh, the RCC recognizes a limited caretaker defense. The District has not codified such a general justification defense for persons who act with intent to fulfill their duty to the complainant, and case law has not addressed the existence of a limited caretaker justification defense.[57] The RCC recognizes such a limited caretaker defense for those acting in accord with their responsibility under District civil law for the health, welfare, or

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[53] D.C. Code § 22-935, Exception [to Criminal Abuse and Neglect of Vulnerable Adults liability] ("A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.").

[54] The RCC guardian defense does apply to conduct to prevent future misconduct.

[55] In the analogous civil context, D.C. case law has found emergency medical personnel to be protected by the public-duty doctrine. *See Woods v. D.C.*, 63 A.3d 551, 556 (D.C. 2013) ("In both *Warren* and *Miller,* this court held that the public-duty doctrine barred a claim that a plaintiff's situation was made worse because the plaintiff relied upon actions taken by District emergency personnel in providing the kind of on-the scene emergency assistance that the District normally provides to the general public. Ms. Woods's claim takes the same form, and we therefore conclude that it is barred by the public-duty doctrine as this court has construed that doctrine. Although Ms. Woods makes three arguments to the contrary, we do not find those arguments persuasive.").

[56] D.C. Code § 22-3531(e)(4), Voyeurism ("This section does not prohibit the following: … (4) Any electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent.").

[57] This defense is distinct from the parental defense, which may be raised by caretakers acting *in loco parentis. In loco parentis* requires that the actor assume "the obligations incident to the parental relation without going through the formalities necessary to legal adoption." The limited caretaker defense applies where the actor has assumed less than the "obligations incident to the parental relation" but has a responsibility under District civil law for the health, welfare, or supervision of the complainant.

supervision of the complainant.[58] Notably, unlike the RCC parental and guardian defenses, the limited caretaker offense requires that the actor believe the conduct is necessary to fulfill their responsibility to the complainant—no practical alternatives exist to the conduct.[59] Also unlike the parental defense, the limited caretaker defense does not apply to "the prevention or punishment of [the complainant's] conduct."[60] This change improves the clarity and proportionality of the revised defense.

One other change to the special responsibility for care, discipline, or safety defenses statute is clarificatory in nature and is not intended to change current District law.

The revised parental defense codifies requirements that the parent's conduct be reasonable in manner and degree, under all the circumstances. The current D.C. Code does not codify a general parental defense or specify whether the parent's conduct must be reasonable or committed with a specified intent. However, the DCCA has repeatedly recognized in the context of assault and child cruelty that these limitations on a parental defense exist.[61] The RCC parental defense clarifies these requirements with language that is consistent with other defenses. The RCC parental defense does not specify the particular

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[58] The determination of whether a person has a duty to the complainant under civil law may depend on property law, contract law, family law, civil procedure, or other legal sources. *See, e.g., District of Columbia v. Royal,* 465 A.2d 367 (D.C. 1983) (recognizing a school's obligation to supervise its students); *Seganish v. District of Columbia Safeway Stores, Inc.,* 406 F.2d 653 (D.C. Cir. 1968) (finding business's duty to maintain its premises to be reasonably safe for customers); *Kline v. 1500 Massachusetts Avenue Apartment Corporation,* 439 F.2d 477 (D.C. Cir. 1993) (finding landlord had duty to make reasonable efforts to prevent crimes in apartment building's common area).

[59] By requiring that there be no alternative to the actor's conduct, the RCC reinforces the public policy that otherwise prohibited conduct is an act of last resort and will only be excused when used in those circumstances.

[60] The RCC precludes application of the limited caretaker defense to conduct intended to discipline the complainant in acknowledgment that the use of force toward a child or incapacitated person may only be justified in a narrow set of relationships, and actors attempting to justify such conduct must meet the heightened relationship requirements in the parental and guardian defenses. This follows the Model Penal Code Commentary's rationale for heightened requirements for a justification defense outside of a parental or guardian relationship. Model Penal Code § 3.08 cmt. at 141-42 (1985) ("The variation is designed to make clear the distinction between the position of a person charged with the general care of a minor and that of one performing a more limited protective function.").

[61] *See Lee v. United States*, 831 A.2d 378, 380-381 (D.C. 2003) (once the defense is raised, government has burden to prove the parent's purpose was not disciplinary or that the force was unreasonable); *Newby v. United States*, 797 A.2d 1233, 1237 (D.C. 2002); *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (the defense requires evidence that a jury could find reasonable discipline was used under the circumstances); *Powell v. United States*, 916 A.2d 890, 893 (D.C. 2006) ("In *Lee*, we reiterated that a parent's privilege to exercise reasonable parental discipline is presently recognized in the District of Columbia.").

circumstances that must be considered in determining whether conduct is reasonable but does set a threshold on the possible harm in subparagraph (a)(3)(A).[62]

[62] The RCC is consistent with current case law which, in particular cases, has examined different circumstances to determine reasonableness. The District Jury Instruction, recognized by D.C. case law as "widely accepted" include the following circumstances: "if the punishment thus inflicted is not excessive in view of all the circumstances, including the child's age, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other evidence that you deem relevant." *Newby v. United States*, 797 A.2d 1233, 1242, n. 12 (D.C. 2002). The RCC, however, is broader than current District practice, as exemplified by the pattern jury instructions, which appears to require consideration of certain factors while allowing the factfinder to, in addition, consider any other evidence relevant to assessing reasonableness. The RCC approach allows factfinders to consider any relevant factor, e.g., relative size of the child to the parent, in assessing reasonableness but does not require any particular circumstances.

RCC § 22E-501. Duress.

Explanatory Note. *This section establishes a duress defense for the Revised Criminal Code (RCC). The defense applies when a person is coerced to commit an offense by threat of unlawful force against himself or another. The RCC duress defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the affirmative defense. Under RCC § 22E-201(b), a defendant bears the burden of proving the affirmative defense by a preponderance of the evidence. However, the defense does not require an admission of guilt.[1] This defense is distinct from any culpable mental state requirements of a given offense and even if the elements of duress are not satisfied, evidence of duress may be relevant in determining if the defendant had the requisite mental state for a particular offense.[2] The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).[3]

Paragraph (a)(1) and subparagraph (a)(1)(A) require that the actor reasonably believe[4] that someone has threatened to cause a criminal bodily injury, sexual act, sexual contact, confinement, or death to the actor or to another person. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not

[1] *See McClam v. United States*, 775 A.2d 1100, 1104 (D.C. 2001) ("Once the defendant requests an instruction, it is not necessary that the evidentiary basis for the instruction stem from the defendant's evidence; it may also be derived from the government's evidence.").

[2] Belief that another person threatened to inflict criminal harm may be relevant to determining whether a defendant satisfied the gross deviation requirements for recklessness and negligence mental states under RCC § 22E-206, as well as the "extreme indifference" required for certain homicide and assault offenses. Extreme indifference, recklessness, and negligence all require risk creation *and* a finding that the actor grossly deviated from either the ordinary standard of conduct or ordinary standard of care. Factfinders may consider the reasons an actor engaged in risky behavior in determining whether the actor grossly deviated. For example, if a person drives at high speed under threat of being beaten and crashes the car causing property damage, even if the requirements of duress are not satisfied, the threat of being beaten is relevant in determining whether the person's conduct grossly deviated from either the ordinary standard of conduct or ordinary standard of care.

[3] RCC § 22E-207.

[4] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

others.[5] As in the revised criminal threats offense,[6] the verb "communicates" is intended to be broadly construed, encompassing all speech[7] and other messages,[8] which includes gestures or other conduct,[9] that are received and understood by another person.

Paragraph (a)(1) and subparagraph (a)(1)(B) specify that the actor must reasonably believe that someone is in imminent danger of the threatened harm. The word "imminent" should be construed to mean ready to take place or dangerously near. It should not be construed to have the same meaning as "immediate" or to require that the harm will occur at a specific moment in time.[10] The actor's belief that the threat is genuine may be mistaken, but it must be objectively reasonable. Similarly, the actor's belief that their conduct will prevent the harm may be mistaken but must be reasonable.[11] Reasonableness is an objective standard that must take into account certain characteristics of the actor but

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[5] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[6] RCC § 22E-1204.

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

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

[9] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others who know of the behavior. In addition ongoing infliction of harm may constitute communication, if it communicates that harm will continue in the future.

[10] There are circumstances in which it may be reasonable for a person to act without waiting for an immediate threat of death or serious bodily injury. Consider for example, Person A sends a note threatening to sexually assault Person B, who is confined at the D.C. Jail. If Person B escapes, to avoid the sexual assault, without waiting until he next encounters A, the duress defense may still apply, despite the time lapse, if the actor reasonably believed the harm was dangerously near and the other elements of the defense are satisfied.

[11] For example, a person does not lose a duress defense if the threatened harm is carried out.

not others.[12] Conduct is not necessary in degree if it can be avoided by a reasonable[13] "legal alternative available to the defendants that does not involve violation of the law."[14]

Paragraph (a)(2) requires that a reasonable person of the same background and in the same circumstances as the actor would engage in the conduct constituting the offense. In determining whether a reasonable person would do so, factfinders should consider the nature of the potential harm to the defendant or another, the defendant's particular circumstances and background, and the nature of the conduct constituting the offense. A potential harm may satisfy this element of the defense as to a particular defendant, but not another.[15] In addition, harms that would compel a reasonable person to commit a particular offense may not necessarily be sufficient to compel a reasonable person to commit a more serious offense.

Subsection (b) establishes three exceptions to the duress defense.

Paragraph (b)(1) precludes application of the defense if the defendant is reckless in bringing about the situation that places the defendant under duress. The term "brings about" requires that the actor caused the situation requiring the defense. The actor's conduct must have been a but-for cause of the situation, and the situation must have been reasonably foreseeable.[16] An actor can bring about the situation either by instigating others, or by placing him or herself in circumstances in which others pose a risk of harm.[17]"

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[12] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[13] Not every legal alternative will foreclose the defense. It must be reasonable to expect the actor to recognize a feasible opportunity to avoid criminal harm.

[14] *See* Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. U.S.*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

[15] For example, a threat to punch the actor may be sufficient to cause an infirm and elderly person to comply, but not necessarily a healthy younger person.

[16] Legal causation as defined in RCC § 22E-204 requires that the result is reasonably foreseeable, and that if the result is due to another person's volitional conduct, the actor may be justly be held responsible for the result. However, the term "brings about" only requires that the actor's conduct was a but-for cause of the situation, and that it was reasonably foreseeable. When the situation is the result of another person's volitional conduct, it is not necessary that the actor is justly responsible for the situation.

[17] For example, if a person chooses to participate in a criminal enterprise, reckless that a failure to commit criminal acts will be punished by physical harm, the defense may be unavailable if the person commits a criminal offense due to fear of the physical harm.

"Reckless" is defined in in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that they would cause the coercion to occur and that the person's disregard of the risk is a gross deviation from the ordinary standard of conduct.[18]

Paragraph (b)(2) precludes application of the defense if the defendant is negligent in bringing about the situation requiring the choice of harms an objective element of the offense requires only a negligence mental state. Negligence is a defined term in RCC § 22E-206 and here requires that the person should be aware of a substantial risk that they would cause the coercion to occur and that the person's failure to perceive the risk is a gross deviation from the ordinary standard of care.

Paragraph (b)(3) narrows the availability of a duress defense for the offense of escape from a correctional facility or officer under RCC § 22E-3401. The defense applies whether the duress was directed at a defendant while in official custody or prevented the defendant from returning to official custody following a temporary lawful absence.[19] The defendant must make reasonable efforts to safely return.

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

Relation to Current District Law. *The revised duress defense statute clearly changes current District law in one main way.*

The revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a duress defense. However, District case law requires a reasonable belief that the actor would suffer immediate harm.[20] In contrast, the RCC statute requires the harm be imminent but does not limit the timing of the harm being avoided.[21] This change improves the proportionality of the revised statutes.

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

First, the revised statute requires the defendant prove the affirmative defense by a preponderance of the evidence. The current D.C. Code does not codify a duress defense,

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[18] For example, if a defendant agrees to engage in a highly dangerous criminal endeavor, and a co-conspirator then threatens the defendant to commit an additional crime in furtherance of the conspiracy, the duress defense may not be available, if the defendant was aware of a substantial risk that a co-conspirator would compel him to commit an additional crime.

[19] *See Stewart v. U.S.*, 370 A.2d 1374, 1376-77 (D.C. 1977).

[20] *McClam v. U.S.*, 775 A.2d 1100, 1104 (D.C. 2001) ("A duress instruction is appropriate if the evidence is sufficient for a reasonable jury to find that the defendant participated in the offense as the result of a reasonable belief that he would suffer immediate serious bodily injury or death if he did not participate in the crime."). Note, however, that *McClam* also cites without distinction reference to a requirement the harm be "imminent" in *United States v. Jenrette*, 744 F.2d 817, 819 (1984). *Id.* at 1105.

[21] There are circumstances in which it may be reasonable for a person to act without waiting for an immediate threat of death or serious bodily injury. Consider for example, Person A sends a note threatening to sexually assault Person B, who is confined at the D.C. Jail. If Person B escapes, to avoid the sexual assault, without waiting for until he next encounters A, the duress defense should still apply."

and the District of Columbia Court of Appeals ("DCCA") has not addressed whether duress is a traditional defense that must be disproven by the government if it is supported by any evidence, "however weak,"[22] or an affirmative defense that must be proven by the defendant by a preponderance of the evidence. In federal court, a defendant must affirmatively present sufficient evidence of duress.[23] To resolve this ambiguity, the RCC specifies that the defendant must prove this defense by a preponderance of the evidence. This change clarifies the revised statute and improves its consistency and proportionality.

Second, the revised statute includes acting under threat of a criminal bodily injury, sexual act, sexual contact, or confinement. The current D.C. Code does not codify a duress defense. District case law has recognized a duress defense when a person fears serious bodily injury or death,[24] however it is unclear whether other harms may also be predicates for a duress defense. To resolve this ambiguity, the RCC statute specifies a range of threatened conduct that may place a person in duress, including behavior such as a severe beating, rape, or kidnapping. This recognizes that, in some circumstances, a criminal threat of a lesser injury might serve as a powerful incentive to participate in a crime.[25] This change improves the clarity and proportionality of the revised statutes.

Third, the revised statute includes threats to harm a third person other than the defendant. The current D.C. Code does not codify a duress defense. The DCCA has recognized a duress defense where a person fears their own death or serious bodily injury[26] but has not yet addressed whether the defense applies when a person fears harm to another person. There are instances in which a criminal threat of a harm to a third person might serve as a powerful incentive to participate in a crime.[27] To resolve this ambiguity, the RCC excuses conduct that is the result of a credible threat to harm another person. This change improves the clarity and proportionality of the revised statutes.

Fourth, the RCC duress defense does not apply when the person is reckless as to bringing about the choice of harms or, for negligence offenses, when the person is negligent about bringing about the choice of harms. The current D.C. Code does not codify a duress defense and current District case law on the duress defense does not address the actor's culpability where the actor is reckless or negligent in bringing about the circumstances requiring a choice of harms. Resolving this ambiguity, the RCC duress defense expressly limits the defense when the actor recklessly or negligently created or appraised the

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[22] *See* D.C. Crim. Jur. Instr. § 9.100.

[23] *Dixon v. U.S.*, 548 U.S. 1 (2006); *but see In re Warner*, 905 A.2d 233, 240 n.6 (D.C. 2006).

[24] *McClam v. U.S.*, 775 A.2d 1100, 1104 (D.C. 2001); *Stewart v. United States*, 370 A.2d 1374, 1376 (D.C. 1977) (recognizing in *dicta* that other jurisdictions include sexual attacks as a possible predicate for a duress defense but then describing only serious bodily injury and death as predicates in the District).

[25] Consider, for example, Person A threatens that he will beat B severely, if B does not close curtains to conceal A assaulting C. B reluctantly agrees and is charged as an accomplice to A's felonious assault. Under the revised statute, B may defend on grounds of duress even if B feared only a bodily injury or significant bodily injury.

[26] *McClam v. U.S.*, 775 A.2d 1100, 1104 (D.C. 2001).

[27] Consider, for example, a threat to rape a family member.

underlying situation that appeared to require a choice of evils. This change improves the clarity and proportionality of the revised statutes.

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

The revised statute requires that a person accused of escape[28] make "reasonable efforts to safely return." District case law requires that an escapee defending on grounds of duress "must have immediately returned to custody once the threat of harm was no longer imminent."[29] However, federal law more precisely requires a bona fide *effort* to return to custody as soon as the claimed duress had lost its coercive force.[30] The revised statute requires a reasonable effort to return. This change clarifies the revised statute.

[28] RCC § 22E-3401.
[29] *See Stewart v. U.S.*, 370 A.2d 1374, 1377 (D.C. 1977).
[30] *U.S. v. Bailey*, 444 U.S. 394, 412–13 (1980).

RCC § 22E-502. Temporary Possession.

Explanatory Note. *This section establishes a temporary possession affirmative defense for the Revised Criminal Code (RCC). The defense applies in several instances in which a person's possession or distribution of contraband is not blameworthy. The revised temporary possession defense is the first codification of a general defense for lawful possession in the District.*

Subsection (a) establishes the requirements for the affirmative defense. A defendant has the burden of proving an affirmative defense by a preponderance of the evidence per RCC § 22E-201(b)(3).

Paragraph (a)(1) specifies that the conduct constituting the offense[1] must be a "predicate possessory or distribution offense," as defined in paragraph (b)(2). The defense does not apply where a person is accused of taking,[2] using,[3] or destroying[4] an item. Nor does it apply to charges of tampering with evidence,[5] obstructing justice,[6] or serving as an accessory after the fact.[7] The term "in fact" specifies that the person is strictly liable as to whether the defense is available for a particular charge.[8]

Paragraph (a)(2) requires that the person possess or distribute the item, exclusively and in good faith, with one of several enumerated blameless intents. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that they would accomplish one of the goals specified in subparagraphs (a)(2)(A) – (F). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the intended outcome actually occurred, only that the defendant believed to a practical certainty that it would.[9]

Subparagraph (a)(2)(A) provides a defense where a person intends to surrender the item to a law enforcement officer or prosecutor to take appropriate action. The term "law enforcement officer" is defined in RCC § 22E-701. The person must be practically certain that the intended recipient is a law enforcement officer or prosecutor.[10] The defense does

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[1] *See* RCC § 22E-201 and the accompanying commentary for further explanation of objective elements, including conduct elements.

[2] The defense is not available to a person charged with theft under RCC § 22E-2101, which requires that the person "takes, obtains, transfers, or exercises control" over an item.

[3] The defense is not available to a person charged with unauthorized use of property under RCC § 22E-2102, which requires that the person "takes, obtains, transfers, or exercises control" over an item.

[4] The defense is not available to a person charged with criminal damage to property under RCC § 22E-2503, which requires that the person "damages or destroys" an item.

[5] D.C. Code § 22-723.

[6] D.C. Code § 22-722.

[7] D.C. Code § 22-1806.

[8] RCC § 22E-207.

[9] For example, a person may defend on the grounds that they intended to surrender the item to a prosecutor under subparagraph (a)(2)(A), even if it turns out that the defendant is mistaken and the intended recipient is actually not a prosecutor.

[10] *See* rules of interpretation in RCC § 22E-207.

not apply where, for example, a person sells contraband to an officer who is working undercover. The person must also intend that the recipient take appropriate and lawful action. The defense does not apply where, for example, a person sells contraband to someone who happens to be an officer, for that officer's personal use and enjoyment.

Subparagraph (a)(2)(B) provides a defense where a person intends to surrender the item to their supervisor or to a person in charge of the location where the item was found. The term "supervisor" is undefined and should be construed broadly to include any supervisory context.[11] The phrase "person in charge of the location" is undefined and, per its ordinary meaning, should be construed broadly to include any person with authority over the location.[12] The person must intend that the recipient take appropriate and lawful action. The defense does not apply where, for example, a person sells contraband to someone who happens to be their supervisor, for that supervisor's personal use and enjoyment.

Subparagraph (a)(2)(C) provides a defense for any person seeking legal services from an attorney and for any attorney providing legal services. For example, a person who is uncertain of their legal rights and liabilities may be justified in bringing an item to an attorney to seek advice about its legality or about how to proceed. An attorney may be justified in possessing an item during a meeting with a client, while reviewing evidence at the Metropolitan Police Department's Evidence Control Branch, or when distributing contraband to the Office of Bar Counsel. However, the defense does not apply where a person sells contraband to someone who happens to be an attorney, for that attorney's personal use and enjoyment.

Subparagraph (a)(2)(D) provides a defense for any person seeking medical services from a licensed health professional and for any licensed health professional providing medical services. The term "health professional" is defined in RCC § 22E-701. For example, a person who takes someone to a hospital following an overdose may be justified in bringing a controlled substance to the doctor so the doctor can properly diagnose and treat the patient.[13] A doctor may be justified in possessing contraband that is removed from a patient's clothing to administer emergency treatment. The defense does not apply where, for example, a person sells contraband to someone who happens to be a health professional, for that health professional's personal use and enjoyment.

Subparagraph (a)(2)(E) provides a defense where a person has a special responsibility for someone's health, welfare, or supervision and possesses or distributes an item with intent to investigate the circumstances surrounding the item's possession, acquisition. For example, if a parent discovers a controlled substance in their home, they may be justified in temporarily holding on to the substance until their child returns home from school, so that their can confront the child[14] before disposing of the item. However,

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[11] For example, the defense may be available to a student who finds illegal drugs and gives them to a teacher, a restaurant employee who finds a prohibited weapon and gives it to a manager on duty, and a child who finds contraband and gives it to a babysitter.

[12] For example, a customer in a retail store who discovers a prohibited weapon may be justified in giving that weapon to a manager, security guard, or cashier.

[13] *See also* D.C. Code § 7-403 (Seeking health care for an overdose victim).

[14] Confronting kids with evidence of their drug use is specifically endorsed as a strategy to combat youth drug abuse by the Partnership for Drug-Free Kids and other national

the parent would not be justified in using any portion of the controlled substance in the meantime.[15]

Subparagraph (a)(2)(F) provides a defense where a person possesses or distributes contraband with intent to permanently dispose of it.[16] The term "dispose" is undefined and should be construed broadly to include practical efforts to make the item unavailable to anyone.

Paragraph (a)(3) requires that the person not possess the item longer than is reasonably necessary to accomplish the intended outcome. Determining the time reasonably necessary is fact-sensitive inquiry.[17] The term "in fact" specifies that the person is strictly liable as to whether the duration of the possession is reasonable.[18]

Subsection (b) cross-references applicable definitions in the RCC and defines the term "surrender." In this section, the term "surrender" means to permanently relinquish the ability to exercise control over an item. A person does not surrender an item by giving it to another person or agency for temporary safekeeping.[19]

Relation to Current District Law. *Temporary possession is a new general defense and, in that sense, all aspects of the revised statute are substantive changes to District law. However, as compared to the closely related immunity provisions for voluntary surrender for certain crimes[20] and defenses of innocent[21] or momentary possession[22] recognized in case law for certain crimes, the RCC temporary possession defense statute clearly changes current District law in two main ways.*

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advocacy groups. *See* Partnership for Drug-Free Kids, *Prepare to Take Action if You Suspect Teen or Young Adult Drug Use* (available at https://drugfree.org/article/prepare-to-take-action/) (last visited April 15, 2020).

[15] Paragraph (a)(2) requires that the person act "exclusively and in good faith."

[16] For example, a person who discovers a controlled substance or weapon on the sidewalk may be justified in carrying it to a garbage can.

[17] For example, a parent who discovers a controlled substance may be justified in retaining it only until the child is confronted and disciplined, whereas a school security guard may be justified in retaining it only until a law enforcement officer arrives.

[18] RCC § 22E-207.

[19] *See, e.g., Stein v. United States*, 532 A.2d 641, 646 (D.C. App. 1987) (explaining, "'Abandoned property is that to which the owner has voluntarily relinquished all right, title, claim, and possession, with the intention of terminating his [or her] ownership, but without vesting it in any other person, and with the intention of not reclaiming future possession or resuming its ownership, possession, or enjoyment.'").

[20] *See* D.C. Code §§ 7-2507.05; 7-2510.07(f).

[21] Possession offenses "should not be construed to mean a possession…which might result temporarily and incidentally from the performance of some lawful act', particularly when, as is here claimed, the act was designed to meet the social policy of the law." *People v. La Pella*, 272 N.Y. 81, 83 (1936) (internal citations omitted); *accord Hines v. U. S.*, 326 A.2d 247, 249 (D.C. App. 1974).

[22] *See Hines v. United States*, 326 A.2d 247 (D.C. 1974); *Stewart v. U. S.*, 439 A.2d 461 (D.C. App. 1981); *see also* Crim. Jury Inst. for DC Instruction 6.501(c) (2019).

First, the RCC defense is an affirmative defense, which the defendant must prove by a preponderance of the evidence. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The current voluntary surrender provisions in the D.C. Code require a defendant to prove their intent to deliver and abandon a weapon to the police by "clear and unequivocal" evidence.[23] A trial court's decision to grant or deny immunity under D.C. Code § 7-2507.05 is a question of law.[24] The D.C. Court of Appeals (DCCA) case law recognizing an innocent or momentary possession defense[25] impose no burden of proof on the defendant insofar as the defense has been construed to negate the intent element of the possessory offense. In contrast, the RCC defense is an affirmative defense with a burden of proof consistent with all other affirmative defenses in the RCC. This change improves the clarity and consistency of the revised statutes.

Second, the revised statute does not require that the contraband or item be made safe prior to distribution. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. However, D.C. Code § 7-2507.05(a)(3) requires that every firearm to be delivered and abandoned to the Chief under the section shall be transported in accordance with § 22-4504.02, which specifies that the weapon must be unloaded and transported safely. In contrast, the revised statute does not require proof that a firearm, ammunition, or any other object is made safe for the defense to apply. With respect to firearms, a person should not be subject to liability for surrendering a loaded firearm to law enforcement, as some individuals may not know how to safely check or unload a firearm. This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these two changes to current District law, three other aspects of the RCC statute may constitute substantive changes to District law.

First, the RCC defense applies to a wide array of specified predicate offenses where the primary element that must be proven is possession or distribution of an item. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The current voluntary surrender provisions in the D.C. Code apply only to selected firearm, ammunition, and destructive device charges.[26] Under DCCA case law, an innocent or momentary possession defense has been recognized as applicable to

[23] *Lewis v. United States*, 871 A.2d 470, 474-745 (D.C. App. 2005).
[24] *Lewis v. United States*, 871 A.2d 470, 473 (D.C. App. 2005).
[25] Crim. Jury Inst. for DC Instruction 6.501(c) (2019).
[26] D.C. Code § 7-2507.05 applies only to provisions "in [that] unit," which appears to apply only to Title 7, Chapter 25, although closely related offenses also appear in Title 22, Chapter 45 of the D.C. Code and Title 24, Chapter 23 of the DCMR. *See Stein v. United States*, 532 A.2d 641, 647 (D.C. App. 1987) (interpreting the phrase "in this chapter" in an earlier version of the statute to apply only to offenses that were enacted as part of the same act and declining to extend immunity to include other firearms offenses). D.C. Code § 7-2510.07(f), the immunity provision in the District's recent extreme risk protection order statutes, precludes arrest and prosecution under D.C. Code §§ 7-2506.01, 22-4503 and 22-4504(a) and (a-1) only.

the offense of carrying a pistol without a license[27] and possession of a controlled substance,[28] but District courts have not yet clarified whether it is available as a defense to other offenses. District case law does not address whether these immunity provisions and defenses are more broadly available in a prosecution for possession of other contraband[29] or for distribution offenses.[30] To resolve these ambiguities, the RCC statute creates consistent defenses across RCC possession and distribution offenses for possession and distribution that is not blameworthy and may serve socially beneficial interests. There is a strong public safety interest in encouraging all District residents to safely dispose of contraband or turn contraband over to relevant authorities. The defense does not extend to offenses that are not predicate crimes, maintaining liability for blameworthy conduct.[31] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC statute specifies culpable mental state requirements that must be proven for the defense. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The current voluntary surrender provisions in the D.C. Code do not appear to specify an intent requirement for immunity.[32] The innocent or momentary possession defense recognized in DCCA case law requires a showing of "an absence of criminal purpose" and "an affirmative effort to aid and enhance

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[27] *See Hines v. U. S.*, 326 A.2d 247, 249 (D.C. App. 1974).

[28] *Stewart v. U. S.*, 439 A.2d 461 (D.C. App. 1981).

[29] E.g., drug paraphernalia (D.C. Code § 48-1103), bump stocks (D.C. Code § 22-4514(a)), knuckles (D.C. Code § 22-4514(a)), blackjacks (D.C. Code § 22-4514(a)), slungshots (D.C. Code § 22-4514(a)), sand clubs (D.C. Code § 22-4514(a)), sandbags (D.C. Code § 22-4514(a)), switchblade knives (D.C. Code § 22-4514(a)), silencers (D.C. Code § 22-4514(a)), weapons of mass destruction (D.C. Code § 22-3154).

[30] For example, a person who discovers a drug stash and gives it to the police distributes a controlled substance in violation of D.C. Code § 48-904.01(a)(1). *See* D.C. Code § 48-901.02 ("'Distribute' means the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship.")

[31] Notably, the temporary possession defense does not apply to charges of tampering with physical evidence, obstruction of justice, or serving as an accessory after the fact. *See* D.C. Code §§ 22-722 and 723. The following examples are illustrative. During the execution of a search warrant, Roommate A flushes Roommate B's drug stash down the toilet. A is not guilty of possession of a controlled substance as a principal, but may be guilty as an accessory after the fact. A is also guilty of tampering with physical evidence and obstruction of justice. Consider also a pedestrian who discovers an extended magazine on the side of the road, picks it up, and throws it in the garbage. The pedestrian may be justified in committing second degree possession of a dangerous weapon but may still be guilty of tampering with physical evidence upon proof that their intent was "to impair its integrity or its availability for use in the official proceeding."

[32] D.C. Code § 7-2507.05 requires that the surrender be voluntary and peaceable, undefined. D.C. Code § 7-2510.07(f) requires that the surrender be peaceable, undefined.

social policy underlying law enforcement."[33] Dicta suggests that this includes, at minimum, any motive "to protect the finder or others from harm, to turn it over to the police, or to otherwise secure [the contraband]."[34] To resolve these ambiguities, the revised statute specifies six different scenarios in which acting with a specified intent renders a person's temporary possession justified. The RCC statute also specifies that no culpable mental state is necessary as to whether the duration of the possession or distribution is no longer than reasonably necessary, making the matter an objective question of fact. This change improves the clarity, consistency, and proportionality of the revised statutes.

Third, the RCC statute specifies that the defendant may not possess an item longer than is reasonably necessary to accomplish the intended goal. The current D.C. Code does not codify any general defenses, for possession and distribution offenses or otherwise. The DCCA-recognized innocent or momentary possession defense[35] requires remedial action be undertaken with reasonable immediacy. To resolve this ambiguity, the RCC statute includes a standard requirement that the item is possessed no longer than is reasonably necessary effectuate one of the specified goals. This change improves the clarity and proportionality of the revised statutes**.**

[33] *Hines v. U. S.*, 326 A.2d 247, 248 (D.C. App. 1974) (further stating that the court agrees with a New York opinion which characterized the defense more broadly, explaining that possession "should not be construed to mean a possession…which might result temporarily and incidentally from the performance of some lawful act', particularly when, as is here claimed, the act was designed to meet the social policy of the law." *People v. La Pella*, 272 N.Y. 81, 83 (1936) (internal citations omitted)).

[34] *See also Logan v. U.S.*, 402 A.2d 822, 826 (D.C. App. 1979) (explaining, "intent may be demonstrable, in part, by a defendant's actions when he picks up a pistol (1) to protect himself or others from harm, or (2) to otherwise secure it.").

[35] *Logan v. U. S.*, 402 A.2d 822, 827 (D.C. App. 1979) ("[T]o warrant an instruction a defendant's actions must demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct."); *Worthy v. U. S.*, 420 A.2d 1216, 1218 (D.C. App. 1980) (rejecting a claim of innocent possession where there was no evidence that the defendant "found the prohibited weapon recently"); *Hines v. U. S.*, 326 A.2d 247, 249 (D.C. App. 1974).

RCC § 22E-503. Entrapment.

Explanatory Note. *This section establishes an entrapment defense for the Revised Criminal Code (RCC). The defense applies when law enforcement induces a person to commit a particular crime. The defense is not available if the person was otherwise predisposed to commit the particular crime. The RCC entrapment defense is the first codification of such a defense in the District.*

Subsection (a) provides the requirements of the entrapment defense. The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).[1] Under RCC § 22E-201(b), a defendant bears the burden of proving the affirmative defense by a preponderance of the evidence. However, the defense does not require an admission of guilt.[2] The subsection specifies that the defense requires action by a law enforcement officer or a person cooperating with a law enforcement officer.[3] The term "law enforcement officer" is defined in RCC § 22E-701. It does not include other state actors outside the definition of law enforcement.[4]

Subsection (a) also requires that the law enforcement officer was acting under the color or pretense of official right. The phrase "under color or pretense of official right" has the same meaning as used in the abuse of government power penalty enhancement,[5] and as the term "under color of law" in 42 U.S.C. § 1983, 18 U.S.C. § 242, and elsewhere in the United States Code.[6] It includes not only acts done within a law enforcement officer's lawful authority, but also acts done beyond the bounds of lawful authority when there is a nexus between the conduct and the position given to him by the State.[7] For

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[1] RCC § 22E-207.

[2] *See, e.g., McClam v. United States*, 775 A.2d 1100, 1104 (D.C. 2001) ("Once the defendant requests an instruction, it is not necessary that the evidentiary basis for the instruction stem from the defendant's evidence; it may also be derived from the government's evidence.").

[3] *See Johnson v. United States*, 317 F.2d 127, 128 (D.C. Cir. 1963) ("The entrapment defense does not extend to inducement by a private citizen; yet it has found general application to cases where the officer acts through a private citizen.").

[4] Both the exclusionary rule and the entrapment defense serve as a deterrent to government overreach and police misconduct. However, the RCC entrapment statute is limited to the sphere of criminal investigations by law enforcement officers, whereas the exclusionary rule applies more broadly to other state action. *See New Jersey v. T. L. O.*, 469 U.S. 325, 335 (1985) (explaining the protections of the Fourth Amendment go beyond operations conducted by the police); *Michigan v. Tyler*, 436 U.S. 499, 506 (U.S. 1978); *City of Ontario v. Quon*, 560 U.S. 746, 755-756 (2010); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 613-614 (1989).

[5] RCC § 22E-610.

[6] Unlike 42 U.S.C. § 1983 and 18 U.S.C. § 242, however, the entrapment defense does not apply to private persons acting under color of law.

[7] *See West v. Atkins*, 487 U.S. 42, 49–50 (1988) ("It is firmly established that a defendant…acts under color of state law when he abuses the position given to him by the State.")

example, the entrapment defense may apply to conduct by a law enforcement officer that violates department policy[8] or who is off-duty at the time of the inducement.[9] The phrase "under color or pretense of official right" does not include purely personal conduct.[10]

Paragraph (a)(1) provides that the first way entrapment may occur is directly, if the officer or cooperator commands, requests, tries to persuade,[11] or otherwise induces the defendant to engage in the conduct constituting the offense. The phrase "commanded, requested, or tried to persuade" should be construed to have the same meaning as in RCC § 22E-302, Criminal Solicitation.[12]

Paragraph (a)(2) provides that the second way entrapment may occur is derivatively, if the officer or cooperator commands, requests, tries to persuade,[13] or otherwise induces a third party to engage in criminal conduct, reckless as to the fact that the third person would solicit or induce the defendant to engage in the conduct constituting the offense.[14] "Reckless" is defined in RCC § 22E-206 and here requires that the officer or cooperator consciously disregards a substantial risk that the third person would solicit or induce the defendant into engage in or assist with the criminal conduct. Subparagraph (a)(2)(B) further requires that the third party's efforts to persuade the defendant to engage in criminal conduct did, in fact, persuade the defendant to engage in the conduct constituting the offense. The term "in fact" indicates that no culpable mental state is required with respect to the inducement succeeding.

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[8] For example, reportedly, Officer Brian Trainer was found to have violated department policy when he pursued motorcyclist Terrence Sterling before fatally shooting him in the neck and back. *See* Delia Goncalves, Officer 'broke policy' in fatal shooting of Terrence Sterling, WUSA 9 (December 5, 2017).

[9] For example, reportedly, Officer James Haskel was off duty and looking for his stolen minibike, when he fatally shot 14-year-old Deonte Rawlings, suspected of stealing the bike, in the back of the head. *See* Timeline: The Deonte Rawlings Shooting, WASHINGTON POST; see also *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (holding a state employee who accesses confidential information through a government-owned computer acts under state law, even when the motives are entirely personal).

[10] For example, the defense is not available to a person hired to commit murder when the person soliciting the murder happens to be a law enforcement officer acting in a purely personal capacity when committing the crime of solicitation of murder.

[11] Persuasion can take many forms including threats, coercive tactics, harassment, promises of reward (e.g., money, sex, immunity), or pleas based on need, sympathy or friendship.

[12] *See also* Commentary to RCC § 22E-302.

[13] Persuasion can take many forms including threats, coercive tactics, harassment, promises of reward (e.g., money, sex, immunity), or pleas based on need, sympathy or friendship.

[14] Consider, for example, a law enforcement officer who runs a sting operation to take down a fraudulent college admissions scheme. The officer arrests the owner of the business running the scheme and, by offering a plea bargain, persuades the owner (cooperator) to wear a wire and ask a desperate parent (third person) to sign up her child (actor) to participate. The parent subsequently agrees and then convinces her child to participate in the scheme. The child may raise a derivative entrapment defense (but must also satisfy subsection (b)).

Paragraphs (a)(1) and (a)(2) require that the officer or person acting at the encouragement of an officer act purposely when inducing the actor to engage in the conduct. The term "purposely" is defined in RCC § 22E-206 and here requires that the person consciously desire that they are conveying a command, request, or effort to persuade the defendant to engage in the criminal conduct. Although the solicitor need not explicitly state the conduct constituting the offense,[15] the evidence must demonstrate that the solicitation was for the very conduct constituting the offense charged and not for some lesser or different conduct. The defense does not apply where the officer did not seek to solicit or induce the criminal behavior.[16]

Subsection (b) provides an exception to the entrapment defense. The defense is not available if the defendant was predisposed to engage in the conduct constituting the offense and the actor was merely afforded the opportunity or means to engage in the conduct. If there is any evidence present that the exception should apply, the government must prove beyond a reasonable doubt that the defendant was predisposed in conduct constituting the offense and was merely afforded the opportunity or means to engage in such conduct. The defense is not available if the defendant was ready and willing to commit these crimes whenever an opportunity presented itself.[17] A defendant's disposition is a temporary condition, not an immutable characteristic.[18] Subsection (b) applies only when the defendant is predisposed to engage in all of the conduct constituting the offense[19] or enhancement[20] that was induced.

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

Relation to Current District Law. *The revised statute changes current District law in one main way.*

The revised statute requires that the defendant prove the elements of entrapment by a preponderance of the evidence, but that the government prove predisposition beyond a reasonable doubt in order for the exception to apply. The DCCA has not addressed whether

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[15] Consider, for example, an undercover officer who uses the phrase "Let's make this move" as slang for "let's commit a robbery together."

[16] Consider, for example, an undercover officer instructs the defendant to rob a convenience store and the defendant inexplicably burns the store down after robbing it. The defendant does not have an entrapment defense to the arson under RCC § 22E-2501 because the officer did not solicit a fire, explosion, or property damage.

[17] *See, e.g., Hampton v. U.S.*, 425 U.S. 484 (1976); *U.S. v. Russell*, 411 U.S. 423 (1973).

[18] *See U.S. v. Vaughn*, 80 F.3d 549 (D.C. Cir. 1996) (explaining that *Jacobson v. U.S.*, 503 U.S. 540 (1992) allows a jury to consider the possibility that a defendant's disposition to commit a crime changed over time).

[19] For example, if a defendant is charged with trafficking of a controlled substance on a possession with intent to distribute theory, the entrapment defense applies even if the defendant is predisposed to possessing a controlled substance, but not predisposed to distributing a controlled substance.

[20] For example, if a defendant is charged with trafficking of a controlled substance with an enhanced penalty for possessing a firearm, if the defendant was not predisposed to possess a firearm, the entrapment defense applies to the penalty enhancement. The defendant may only be convicted of trafficking of a controlled substance, not subject to the enhanced penalty.

entrapment is a traditional defense that must be disproven by the government if it is supported by any evidence, "however weak,"[21] or an affirmative defense that must be proven by the defendant by a preponderance of the evidence. In federal court, a defendant must affirmatively present sufficient evidence of inducement and the government must present sufficient evidence of predisposition.[22] However, the current practice in the Superior Court for the District of Columbia is to require the government to disprove both elements.[23] The RCC specifies that if the defendant bears the burden of proving the elements of entrapment by a preponderance of the evidence, but in order for the exception to apply, the government must prove beyond a reasonable doubt that the defendant was predisposed to engage in the specific criminal conduct.[24] This change clarifies the revised statute.

Beyond this change to current District law, three other aspect of the revised statute may constitute substantive changes to District law.

First, the revised statute applies standardized definitions for the "purposely" culpable mental state and uses "in fact" to indicate strict liability. The D.C. Code does not codify an entrapment defense, however D.C. Court of Appeals (DCCA) case law generally recognizes the existence of the defense.[25] DCCA case law does not clearly specify a culpable mental state as to the law enforcement officer's conduct or other requirements, however, the United States Supreme Court has explained that the defense is available when the act for which defendant was prosecuted was instigated by a law enforcement officer and "was the creature of his purpose," without defining the word "purpose."[26] Resolving this ambiguity, the revised statute uses the RCC's general provisions that define "purposefully" and "in fact" and specify that culpable mental states and strict liability apply until the occurrence of a new culpable mental state or strict liability in the offense.[27] These changes clarify and improve the consistency of District statutes.

Second, the revised statute applies the RCC definition of "law enforcement officer." The D.C. Code does not codify an entrapment defense. However, District case law has held that the entrapment defense is available only where conduct was induced by a law enforcement official or by private persons who occupy semi-official status in the scheme of law enforcement but does not extend to inducement by a private citizen.[28] It remains unclear however, whether the law enforcement official must be on-duty or engaged in officially-sanctioned action to invoke entrapment. To resolve this ambiguity, the revised statute defines the meaning of a "law enforcement officer" and requires such a person to be "acting under color or pretense of official right." The phrase "acting under color or pretense of official right" has the same meaning as "under color of law" in 42 U.S.C. §

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[21] *See* D.C. Crim. Jur. Instr. § 9.100.
[22] *U.S. v. Glover*, 153 F.3d 749, 754 (D.C. Cir. 1998); *U.S. v. Jenrette*, 744 F.2d 817, 821–22 (D.C. Cir. 1984).
[23] D.C. Crim. Jur. Instr. § 9.310.
[24] RCC § 22E-201(b)(2).
[25] *See, e.g., Williams v. United States*, 342 A.2d 367 (D.C. 1975); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993).
[26] *Sorrells v. United States*, 287 U.S. 435, 441 (1932).
[27] RCC §§ 22E-206 and 207.
[28] *See Johnson v. United States*, 317 F.2d 127, 128 (D.C. Cir. 1963).

1983, 18 U.S.C. § 242, and elsewhere in the United States Code and in RCC § 22E-610, Abuse of Government Power Penalty Enhancement. The phrase includes not only acts done within an official's lawful authority, but also acts done beyond the bounds of lawful authority while the official is purporting or pretending to act in the performance of their official duties. The RCC definition of law enforcement officer includes both sworn officers and others, such as special police officers, acting in a semi-official role. This change clarifies and improves the consistency of District statutes.

Third, the revised statute clarifies the scope of a derivative entrapment defense. The DCCA has not yet addressed whether an entrapment defense is available in cases in which unwitting intermediaries deliver the government's inducement to another party. However, the District of Columbia Circuit has held that such a defense is available only if the alleged inducement communicated by the unwitting intermediary is the *same* inducement, directed at the *same* target as the inducement that the government agent directs the intermediary to communicate.[29] Resolving this ambiguity, the revised statute requires that the criminal conduct is the result of the same encouragement, inducement, or creative activity by the law enforcement officer or cooperator—that is, it does not apply where an intermediary deviates from the government's plan—but it does not require that the inducement be directed at the same target. This change improves the clarity of the revised statute.

[29] *U.S. v. Washington*, 106 F.3d 983, 993 (D.C. Cir. 1997); *see also United States v. Luisi*, 482 F.3d 43 (1st Cir. 2007) (requiring requires the government to attempt to induce the defendant, fail, and then use an unsuspecting middleman who then puts pressure on the defendant); *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994).

RCC § 22E-504. Mental Disability Defense.

Explanatory Note. *This section establishes a mental disability defense for the Revised Criminal Code (RCC). This affirmative defense applies in a criminal proceeding when a person satisfies all the elements of an offense but is deemed excused from responsibility because the person lacks substantial capacity to conform their conduct to the law or recognize the wrongfulness of the offending actions as a result of a mental disability. The RCC mental disability statute codifies the current insanity defense recognized in District caselaw.*[1] *Codification of the defense is not intended to change statutorily specified procedures for the insanity defense described elsewhere in the D.C. Code.*[2]

Subsection (a) establishes the requirements for the affirmative defense in a criminal proceeding. Under RCC § 22E-201(b), a person bears the burden of proving an affirmative defense by a preponderance of the evidence.[3] This defense is distinct from any culpable mental state requirements of a given offense and does not require proof of the negation of a culpable mental state.[4] The mental disability defense is available only in criminal trials and is unavailable in juvenile delinquency proceedings.[5]

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[1] *See* Model Penal Code § 4.01 ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct too the requirements of law."); *Bethea v. United States*, 365 A.2d 64, 78-80 (D.C. 1976) (adopting the MPC standard "with certain minor modifications," These modifications include using the word "recognize" rather than "know" or "appreciate" and using the word "wrongfulness" rather than "criminality.").

[2] E.g., notice requirements in D.C. Code § 24-501(j).

[3] *Pegues v. United States*, 415 A.2d 1374, 1377 (D.C. 1980) ("In this jurisdiction, the defendant has the burden of proving insanity by a preponderance of the evidence…If he fails to present a prima facie case, the judge is justified in removing the issue from the jury.").

[4] While a mental disability can affect a person's ability to form a culpable state of mind, the court in *Bethea v. United States* explicitly declined to allow expert medical testimony regarding insanity to be used to establish that a defendant lacked the ability to form the requisite state of mind, rejecting a "diminished capacity" defense. 365 A.2d 64, 83 (D.C. 1976); *see also O'Brien v. United States*, 962 A.2d 282, 300-301 (D.C. 2008) (characterizing *Bethea* as announcing "a general rule for this jurisdiction prohibiting differentiation of a defendant's intellectual abilities outside the context of the insanity defense."); *Jackson v. United States*, 76 A.3d 920, 935 (D.C. 2013).

[5] *Matter of C. W. M.*, 407 A.2d 617, 622 (D.C. 1979) ("Nevertheless, it is well settled now that unlike a criminal trial a juvenile factfinding hearing does not result in a determination of criminal responsibility."); *see also Kent v. United States*, 383 U.S. 541, 554 (1966); *District of Columbia v. M.E.H.*, 312 A.2d 561, 562 (D.C. 1973); *Pee v. United States*, 274 F.2d 556 (D.C. 1959) ("Nor is the succeeding dispositional hearing intended to result in the imposition of any penal sanction on the child. Rather, the purpose is to determine the treatment required to rehabilitate him. Accordingly, the insanity defense would be superfluous in a juvenile delinquency proceeding.")

Subsection (a) requires that the actor must be suffering a "mental disability," a defined term, at the time the offense is committed.[6] The disability[7] may affect either volitional control,[8] under paragraph (a)(1), or cognitive understanding,[9] under paragraph (a)(2).[10] Volitional incapacity as a result of a mental disability is distinct from a mere lack of voluntariness as defined under RCC § 22E-203. Voluntariness applies to the conduct elements of an offense and requires only that the conduct be the product of conscious effort

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[6] *Id*. ("To establish a prima facie case, the defendant must present evidence to show that, *at the time of the criminal conduct*, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law." (*Emphasis added*.)).

[7] The disability may be cognitive, intellectual, emotional, psychological, psychiatric, or something else.

[8] The classic formulation of volitional impairment is the actor who suffers from an "irresistible impulse;" that is, one who is unable to control themselves despite knowing that their action is morally wrong or criminal. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (e)(2).

[9] A cognitive impairment excuses when it prevents a person from being able to "'perceive the physical nature or consequences' of [the] conduct constituting the offense." *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (c) (March 1982) (internal quotations omitted). That is, the actor's ability to distinguish the reality of their circumstances or the consequences of their own actions is substantially impaired to such a degree that they cannot fairly be held responsible for their actions. Professor Robinson offers the example of actors *A* and *B*, both of whom suffer from schizophrenia. *A* chops off a victim's head because he believes it to be a block of wood as a result of hallucination; his impairment prevents him from perceiving the physical nature of his circumstances. *B* chops off a victim's head while the victim sleeps because *B* thinks it would be funny to see the victim search for his head when he wakes up; his impairment causes a delusion that prevents him from understanding the consequences of the act. *See* Robinson, *Criminal Law Defenses: A Systematic Analysis*, Ch.5 § 173 (c)(1). Both *A* and *B* are included in the cognitive prong under paragraph (a)(1), despite the difference in expression of their impairments.

[10] The RCC provision is heavily influenced by the MPC approach, which also includes both a volitional and a cognitive prong. *See* Model Penal Code § 4.01; *Bethea v. United States*, 365 A.2d at 78-79 (D.C. 1976) ("Accordingly, we join those jurisdictions which have adopted either [the MPC's] language or its fundamental principles.") The volitional prong relates to the actor's ability to control their impulses while the cognitive prong relates to the actor's ability to understand or appreciate the morality or consequences of their actions. Furthermore, the RCC statute and the MPC approach require only "substantial" impairment of the actor's mental faculties, not total incapacity. This approach is distinguished from the "irresistible impulse" approach, which requires total volitional incapacity, and the M'Naghten approach, which does not account for volitional incapacity at all and requires total cognitive incapacity. *See* Wayne LaFave, *Substantive Criminal Law* § 7.1(a) (3d ed).

or determination.[11] However, the volitional prong of the mental disability defense specifically applies to circumstances where the criminal conduct either is still "the product of conscious effort or determination" or "subject to the person's control" to some degree, but a mental disability substantially prevents the person from exercising control over their actions and abstaining from the conduct, or the criminal conduct would be "the product of conscious effort or determination" or "subject to the person's control" but for a mental disability.[12]

Under both the volitional and cognitive prongs of subsection (a), a person must lack "substantial" capacity but need not be *totally* unable to either conform their conduct to the requirements of law[13] or *totally* unable to appreciate the wrongfulness of their actions.[14] The degree of incapacity that qualifies as "substantial" is not defined by the statute and is intended to be broad enough to account for the inevitable evolution of psychiatric medicine and the inherent uncertainty in dealing with the complexities of the human mind.

Subsection (a) also requires that the mental incapacity exists "as a result of" the mental disability existing at the time that the offense was committed. This requires that the mental disability is the cause of the actor's substantial inability to conform their conduct to the requirements of law or recognize the wrongfulness of their conduct.[15]

Subsection (b) refers to D.C. Code § 24-501, which describes the procedural effects of an acquittal by reason of mental disability only.[16] D.C. Code § 24-501 requires that a

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[11] For further explanation of the voluntariness requirement for criminal liability, see Commentary to RCC § 22E-203.

[12] RCC § 22E-203(b)(1).

[13] This differs from the so-called "irresistible impulse" test. *See* Robinson, *Criminal Law Defenses: A Systematic Analysis*, Ch.5 § 173 (e)(2); *see also State v. Parsons*, 81 Ala. 577, 597 (Holding that a person with knowledge of right and wrong may be found not guilty by reason of insanity "[i]f, by reason of the duress of [a] mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed"*). The classic "irresistible impulse test requires that the ability to choose be entirely "destroyed" and that the criminal conduct was "the product of [the mental disease] solely." Id.*

[14] This differs from the so-called "M'Naghten" test. *See* M'Naghten's Case, 8 Eng. Rep. 718 (1843) ("[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing off the act the party accused was laboring under such defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.") *See* Paul H. Robinson, et. al., The American Criminal Code: General Defenses, 7 J. Legal Analysis 37, 68 (2015) (*available at* https://www.law.upenn.edu/live/files/4100-american-criminal-code-general-defenses).

[15] It is insufficient that an actor merely suffers from a mental condition; the mental condition must precipitate the actor's substantial incapacity to comply with the law under subparagraph (a)(1)(A) or (a)(1)(B). *See Howard v. United States*, 954 A.2d 415, 420 (D.C. 2008) ("The existence of a mental illness does not suffice, as a defendant must establish a 'causal relationship between the criminal conduct and his mental disease.'" (quoting *Pegues*, 415 A.2d at 1378)).

[16] RCC § 22E-504 does not repeal, replace, or amend D.C. Code § 24-501.

defendant who is found not guilty by reason of insanity (now "not guilty by reason of mental disability") is to be committed to a hospital for the mentally ill with a hearing within 50 days of confinement (unless waived) to determine whether the defendant is eligible for release.

Subsection (c) cross-references applicable definitions in the RCC and provides a definition for "mental disability." While medical evidence is highly relevant to the question of the existence of a mental disability, the provision that this definition relates to "any abnormal condition of the mind, *regardless of medical label*"[17] specifies that the legal standard for a relevant mental incapacitation is not identical to the medical definition of a mental disability.[18] Voluntary intoxication alone cannot serve as the basis for a mental disability defense.[19]

Subsection (d) provides that this section should not be construed to create or limit the court's ability, on its own initiative, to order a psychiatric examination or to raise a mental disability defense.[20]

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[17]A mental disease or defect is defined in current District practice as including "any abnormal condition of the mind, regardless of medical label, which affects mental or emotional processes and substantially impairs a person's ability to regulate and control his/her conduct." 1 Criminal Jury Instructions for DC Instruction 9.400. "Mental disease" and "mental defect" (now "mental disability") are currently distinguished from each other based on the permanence of the abnormal mental condition. A disease may be temporary and is capable of improvement or deterioration. A defect or disability is inherent in the actor and permanent, though it may be treatable. *See Id*.

[18] *McDonald v. United States*, 312 F.2d 847, 851 (D.C. 1963) ("What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility."). As discussed earlier under note 7, *supra*, it is not sufficient for the basis of an insanity defense that the defendant is medically diagnosed with a mental condition. *See Howard*, 954 A.2d at 420. It is for finder of fact to determine whether a mental disability sufficiently affects the relevant mental processes as to constitute legal insanity.

[19] *McNeil v. United States*, 933 A.2d 354, 365 (D.C. 2007) ("[w]hen drug or alcohol abuse is proffered as the basis for a mental disease or defect, there is significant tension between the insanity defense and the universally-accepted tenet that voluntary intoxication does not excuse criminal behavior."). Note, however, that evidence of voluntary intoxication may be relevant under the mental disease or disability defense of RCC § 22E-504 to a factfinder's determination of whether the person lacked substantial capacity to conform or recognize the wrongfulness of their conduct. (Conversely, evidence of mental disease or disability may be relevant under the voluntary intoxication provisions of RCC § 22E-209 to a factfinder's determination of whether the person's voluntary intoxication negated the existence of a culpable mental state.)

[20] If a judge finds that the defendant is capable of making a voluntary and intelligent decision to forego an insanity defense, the judge must respect the defendant's decision and permit the jury's verdict to stand. If, on the other hand, the judge is convinced that the defendant cannot or has not made such a voluntary and intelligent waiver, the judge has

Relation to Current District Law. *The revised statute changes current District law in one main way.*

The revised statute does not categorically exclude abnormalities "manifested only by repeated criminal or otherwise antisocial conduct" from the definition of "mental disability." Current DCCA case law, following a provision in the Model Penal Code, holds that: "[T]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."[21] Specifically, D.C. courts have held that this exclusion prevents expert witnesses from testifying that the illegal act alone is sufficient to establish a mental disability.[22] Similar provisions in other jurisdictions have been interpreted to exclude psychopaths or those suffering from antisocial personality disorder from the protection of an insanity defense.[23] In contrast, the RCC statute does not impose a blanket exclusion from the defense for psychopathic diseases. Such exclusion provisions have been heavily criticized by experts as being unsupported by current medical understanding.[24] Modern medical evidence suggests that psychopathy and many personality disorders may well affect cognitive and volitional functions that fall squarely within the ambit of the insanity defense as formulated in the MPC insanity provision (depending, as with all mental conditions, on severity).[25] Under the RCC statute, the availability of a mental disability defense will rely solely on the requirement that the conduct occurred as a result of either cognitive understanding or volitional control be substantially impaired, without categorical exclusion for specific disorders or symptoms. This change allows for expert testimony as to whether a mental disability exists, though the sufficiency of such testimony remains subject to jury determination. This change improves the clarity and proportionality of the revised statutes.

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the discretion to raise that defense *sua sponte*. *Frendak v. United States*, 408 A.2d 364, 380 (D.C. 1979); *see also Briggs v. United States*, 525 A.2d 583, 594 (D.C. 1987).

[21] *Bethea*, 365 A.2d at 79.

[22] *Bethea*, 365 A2.d at 81 (explaining such testimony would allow the expert witness to "come to close to the ultimate question of responsibility"); *see also Jackson*, 76 A.3d at 920, 939 (D.C. 2013) ("If a defendant were allowed to prove his mental disease from the mere fact of criminal behavior, the court reasoned, then an expert could testify that he was 'satisfied that an illegal act alone conclusively establishes a mental illness or defect,' a determination that, without more, would 'come too close to the ultimate question of responsibility.'") (quoting *Bethea*, 365 A.2d at 81).

[23] Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Colum. L. Rev. Ch.5 § 173 (b)(2) (March 1982).

[24] *See, e.g.,* Ralph Slovenko, *Commentary: Personality Disorders and Criminal Law*, 37 J. Am. Acad. Psych. Law 182, 183 (2009). It is widely suggested among critics of this provision that such categorical exclusions are not based on current medical evidence and seek to reinforce a laymen's understanding of moral culpability against individuals with real mental impairments, supported by scientific evidence.

[25] Joseph Langerman, *The Montwheeler Effect: Examining the Personality Disorder Exclusion in Oregon's Insanity Defense*, 22 Lewis & Clark L. Rev. 1027, 1049-50 (2018). *See also* Robert Kinscherff, Proposition: A Personality Disorder May Nullify Responsibility for A Criminal Act, 38 J. L. Med. & Ethics 745, 748 (2010).

RCC § 22E-601. Offense Classifications.

Explanatory Note. Subsection (a) classifies all felonies and misdemeanors for the Revised Criminal Code ("RCC"). Felonies, offenses for which more than a year of imprisonment may be imposed, are grouped into nine classes. Misdemeanors, offenses for which a year or less of imprisonment may be imposed, are grouped into five classes. This classification system and definitions provide a clear, consistent, logical framework for organizing offenses of similar seriousness. Subsection (b) cross-references definitions of "felony" and "misdemeanor" in RCC § 22E-701.

Relation to Current District Law. Subsection 22E-601(a) codifies new District law. Current District law does not have any penalty classification scheme.[1] However, the various penalties prescribed for specific offenses *de facto* cluster into approximately nine felony and five misdemeanor groups (see Commentary to RCC § 22E-603, below). Consequently, the classification distinctions in subsection 22E-601(a) approximate the number of distinct felony and misdemeanor penalties in current law.

Subsection 22E-601(b) cross-references standard definitions of "felony" and "misdemeanor" and does not change current District law.

[1] A few offenses in Title 22 are designated "Class A" offenses, but this is not tied to maximum statutory penalties. The "Class A" designation denotes how supervised release following revocation and "backup time" work for purposes of sentencing per D.C. Code 24-403.01. Class A offenses were so designated because they had "life" penalties prior to the Sentencing Reform Amendment Act of 2000 which abolished the existing parole system. There are no "Class B" offenses in current law, just "Class A" and all other offenses.

RCC § 22E-602. Authorized Dispositions.

Explanatory Note. Subsection (a) cross-references the typical sanctions that a court may impose upon conviction, which are elsewhere authorized. This is a non-exhaustive list and does not preclude the availability of other sanctions authorized by statute. This provision provides notice of the typical dispositions that are authorized in scattered sections and titles of the D.C. Code.

Subsection (b) limits the range of dispositions available under subsection (a) for specified offenses prosecuted by the Attorney General for the District of Columbia. Subsection (b) provides that for the listed offenses a court may sentence a person to either imprisonment or a fine, but not both. The listed offenses include: [RESERVED]. This section is intended to preserve the existing authority of the Attorney General for the District of Columbia to prosecute select crimes and does not itself authorize sanctions.

Subsection (c) specifies judicial deferred dismissal procedures when an actor is found guilty of a Class A, B, C, D, or E (misdemeanor) offense. The procedure authorized in subsection (c) is a new procedural mechanism for when "justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction."[1] With one exception,[2] the procedure authorized in subsection (c) is not intended to replace or impinge upon the operation of other mechanisms, statutory or otherwise, for deferral or diversion of proceedings.

Paragraph (c)(1) provides that when "a person is found guilty of violation of a Class A, B, C, D, or E offense, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings on that offense and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe." Under paragraph (c)(1), if the person violates a condition of probation, the court "may enter an adjudication of guilt and proceed as otherwise provided." If the person does not violate probation, paragraph (c)(1) provides for an early dismissal of the proceedings, and once the period of probation expires, paragraph (c)(1) states that "the court shall discharge such person and dismiss the proceedings against the person." Under paragraph (c)(1), such a dismissal "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime," including repeat offender penalties such as in RCC § 22E-606. Under paragraph (c)(1), a judge may defer and dismiss proceedings for the case, even if the defendant has previously had a case dismissed.

Paragraph (c)(2) states that upon discharge of the proceedings under paragraph (c)(1), the person may apply to the court for an order to seal the publicly available records of the arrest and court proceedings. If the court determines, the proceedings were dismissed and the person discharged, paragraph (c)(2) provides that "it shall grant the motion to seal under the procedures in D.C. Code § 16–803(l)."

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[1] Model Penal Code: Sentencing § 6.02B PFD (2017)

[2] The procedure in RCC § 22E-602(c) does replace the current deferral procedure for prostitution charges under D.C. Code § 22–2703. See commentary to RCC § 22E-4401, prostitution. Notably, the mechanism in RCC § 22E-602(c) does not apply to the revised statute for possession of a controlled substance, RCC § 48-904.01a, which has its own deferral mechanism (as does current D.C. Code § 48–904.01(e)).

Paragraph (c)(3) further states that the person to whom relief is granted shall have the protections and legal obligations under D.C. Code § 16–803(l) and (m)[3].

Relation to Current District Law.

RCC § 22E-602(a) cross-references existing District law except for its references to RCC § 22E-603 and RCC § 22E-604, which provide new RCC imprisonment and fine penalties.

RCC § 22E-602(b) codifies limitations on available dispositions for RCC offenses that currently exist in those offenses' comparable D.C. Code offenses. To the extent that prosecutorial authority of the Attorney General for the District of Columbia may turn on that limitation,[4] the revised statute preserves the limitation and the designation of prosecutorial authority. No substantive change in law is intended.

RCC § 22E-602(c) changes current District law by specifying deferred disposition procedures for Class A, B, C, D, and E offenses. The current D.C. Code includes judicial deferred disposition procedures for prostitution offenses[5] and possession of a controlled substance[6], but there is no generally applicable judicial deferred disposition statutory provision. In contrast, subsection (c) grants judges the authority, when a defendant is convicted of a Class A, B, C, D, or E offense, to defer disposition and place the defendant on probation. If the defendant complies with the terms of probation, the judge shall dismiss the proceedings against the defendant. This discretionary authority should be offered when

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[3] D.C. Code § 16–803(m) states: "No person as to whom such relief has been granted shall be held thereafter under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge his or her arrest, charge, trial, or conviction in response to any inquiry made of him or her for any purpose except that the sealing of records under this provision does not relieve a person of the obligation to disclose the sealed arrest or conviction in response to any direct question asked in connection with jury service or in response to any direct question contained in any questionnaire or application for a position with any person, agency, organization, or entity defined in § 16-801(11)."

[4] D.C. Code § 23–101(a) ("Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia [Attorney General for the District of Columbia] or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section."). Under DCCA case law, the limitation in as to the offense being fine-only or up to one year imprisonment only applies to "penal statutes in the nature of police or municipal regulations." *D.C. v. Smith*, 329 A.2d 128, 130 (D.C. 1974) ("Here, the context, legislative history, and the long-established application of the statute all support our conclusion that the 'fine only, or imprisonment' phrase modifies only the 'penal statute' phrase. The Corporation Counsel's basic prosecutorial jurisdiction over violations of 'police or municipal ordinances or regulations' is unaffected by the subsequent limitation concerning penal statutes.").

[5] D.C. Code § 22-2703.

[6] D.C. Code § 48-904.01.

it is necessary "to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction."[7] While the particular language of subsection (c) is largely modeled on D.C. Code § 48-904.01 (e), it differs in three key ways. First, subsection (c) applies to all Class A, B, C, D, and E offenses, not just possession of a controlled substance.[8] Second, subsection (c) does not require that the defendant have no prior convictions; the court may provide deferred dispositions multiple times to a person. Third, subsection (c) does not authorize the court to retain a non-public record of the dismissed proceeding in the same manner as D.C. Code § 48-904.01(e), instead referring to the general record sealing provisions in D.C. Code § 16–803(l) and (m).[9] This change improves the clarity, consistency, and proportionality of the revised criminal code.

[7] Model Penal Code: Sentencing § 6.02B PFD (2017)

[8] Some jurisdictions provide broader mechanisms for judicial probation before judgement or dismissal in the interest of justice. *See, e.g.* Md. Code Ann., Crim. Proc. § 6-220 (West) (authorizing judicial probation before judgment procedures for virtually all felonies and misdemeanors other than certain traffic offenses and sex crimes against minors). *See also* see Margaret Love and David Schlussel, *The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities After Arrest or Conviction* (September 2020) at 62-70 (available online at https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf) ("19 states now make deferred adjudication broadly available, in many cases for any offense eligible for a probationary sentence and without regard to prior record, leaving it up to the court (and in some states also the prosecutor) to determine the appropriateness of the disposition on a case-by-case basis." (internal citation omitted)).

[9] These provisions specifically provide for prosecutors and law enforcement to keep a non-public record of the arrest and proceedings. *See* D.C. Code § 16–803(l)(1)(B).

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

Explanatory Note. Subsection (a) provides specific, standardized imprisonment penalties for offenses under Title 22E. Subsection (a) designates for each class a maximum term of imprisonment beyond which a court may not sentence a defendant. Subsection (b) cross-references the definitions for "felony" and "misdemeanor" in RCC § 22E-701.

Relation to Current District Law. RCC § 22E-603(a) codifies new law. Current District law does not codify generally applicable offense classes that provide specific imprisonment penalties for each offense. Currently, each offense has its own penalty which has been determined through piecemeal legislation, without a comprehensive review of other offenses' penalties. Without a formal scheme of offense classification to guide legislative decision making and facilitate comparison of offense penalties, a wide range of authorized imprisonment penalties has organically arisen across current District offenses.[1]

Nonetheless, in practice, most current D.C. Code imprisonment penalties use one of the following nine felony and five misdemeanor numbers: Life (without parole, LWOP),[2] 60 Years (Y), 40Y, 30Y, 20Y, 15Y, 10Y, 5Y, 3Y, 1Y, 180 days, 90 days, 30 days, and fine-only. The RCC penalty classes generally track these *de facto* felony and misdemeanor penalties in the District by providing nine felony classes and five misdemeanors, though differing in the exact penalties.[3]

The apparent discrepancy between RCC and D.C. Code statutes for low and mid-level felonies is largely a result of the different treatments of "backup" time under the RCC and D.C. Code. Under RCC § 24-403.01(b-1) the amount of possible imprisonment ("backup") time for revocation from supervised release no longer must be subtracted from the maximum statutory penalty when calculating the sentence that a court can impose. In contrast, current D.C. Code § 24-403.01(b-1) has the opposite procedure and requires the court to deduct backup time, such that a person being sentenced for committing an offense with a 3-year statutory maximum can actually only be sentenced to imprisonment for 2 years maximum to allow for the one-year backup time under D.C. Code § 24-403.01 (b)(7). (Similarly, under current law a court can only impose a prison sentence for a maximum of 3 years even though the statutory maximum is 5 years, because every offense that has a statutory maximum of 5 years or more (but less than 25) is subject to 2 years backup time which must be deducted from the 5 year maximum.[4]) The RCC's elimination of the

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[1] For additional background on the frequent imprisonment penalties in D.C. Code offenses, see CCRC Advisory Group Memorandum #9, *Offense Classes & Penalties* (May 5, 2017).

[2] Since Congressional elimination of parole in the District under the Revitalization Act (discussed below), a "life" sentence in the District is the effective equivalent of "life without parole."

[3] Compare the most common D.C. Code offense penalties (first line, usually increments of 5), with those of the RCC (second line):

LWOP, 60Y, 40Y, 30Y, 20Y, 15Y, 10Y, 5Y, 3Y, 1Y, 180 days, 90 days, 30 days

45Y, 40Y, 30Y, 24Y, 18Y, 12Y, 8Y, 4Y, 2Y, 1Y, 180 days, 60 days, 10 days.

[4] *See* D.C. Code § 24-403.01 (7) ("An offender whose term of supervised release is revoked may be imprisoned for a period of: (A) Not more than 5 years, if the maximum term of

requirement that the court deduct backup time when calculating the term of imprisonment that can be imposed makes the RCC's stated statutory maximum a statement of the imprisonment time a judge can impose at sentencing. The change also means that the slight 1-3 year reductions in the RCC low and mid-felony penalty classes, as compared to the common penalties in the D.C. Code,[5] are largely moot in practice. The amount of the reduction in most cases simply accounts for the fact that backup time no longer has to be subtracted under D.C. Code § 24-403.01(b-1).[6] Consequently, while a number of the RCC low and mid-felony penalty class maximums appear different than those in the D.C. Code, these classes are functionally equivalent in most cases.

The fact that the RCC penalty classes generally track the number of *de facto* felony and misdemeanor penalties commonly used in the District does not mean, however, that all RCC classes or the RCC penalties for specific offenses are the same as under current law. On the contrary, as described below, the RCC takes a sharply different approach to sentencing for the most serious offenses by eliminating life without release sentences and, for most people, the effective life without release sentences. Also, the RCC classes assigned to each revised offense typically differ sharply from what is authorized for under current District law. Commonly, current District law authorizes penalties that far exceed the sentences issued by sentencing judges in practice. Giving more weight to recent practice than the legal maximums authorized decades ago, the RCC assigns penalties for most revised offenses that accommodate all (or all but the highest 5% of) adult sentences in the last decade. For some offenses, the RCC penalty classes would more severely restrict current sentencing practices to help ensure more proportionate sentences.

This commentary primarily describes the reasons why these particular maximum imprisonment numbers are imposed for the most severe RCC classes (Class 1 and Class 2). Additional commentary briefly addresses: the penultimate level of severity (Class 3); the second misdemeanor level (Class B); the absence of statutory or mandatory minimum sentences; and considerations in the assignment of penalty classes to particular RCC

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imprisonment authorized for the offense is life or the offense is specifically designated as a Class A felony; (B) Not more than 3 years, if the maximum term of imprisonment authorized for the offense is 25 years or more, but less than life and the offense is not specifically designated as a Class A felony; (C) Not more than 2 years, if the maximum term of imprisonment authorized for the offense is 5 years or more, but less than 25 years; or (D) Not more than 1 year, if the maximum term of imprisonment authorized for the offense is less than 5 years.").

[5] Compare the most common D.C. Code offense penalties (first line, usually increments of 5), with those of the RCC (second line):

LWOP, 60Y, 40Y, 30Y, 20Y, 15Y, 10Y, 5Y, 3Y, 1Y, 180 days, 90 days, 30 days

45Y, 40Y, 30Y, 24Y, 18Y, 12Y, 8Y, 4Y, 2Y, 1Y, 180 days, 60 days, 10 days.

[6] As discussed further in the commentary to RCC § 24-403.01 under the revised statute, backup time continues to exist, it just is no longer deducted from the statutory maximum. The total term of imprisonment imposed for revocation of supervised release in addition to the initial sentence imposed may exceed the statutory maximum sentence authorized for any given offense.

offenses.

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The RCC realistically sets the two most severe imprisonment punishments at terms that, for most persons incarcerated, would equate to just short of a life without release (LWOR) sentence: 45 years and 40 years for aggravated first degree murder and first degree murder, respectively.

Authorities vary on what imprisonment term constitutes a *de facto* LWOR sentence, but recent case law from state high courts indicates that a term of 50 years is an effective LWOP sentence for *juvenile* offenders.[7] Because adult offenders are older at the time of entry into incarceration, a *de facto* LWOP sentence for adults logically would be shorter than 50 years. In fact, the federal Bureau of Prisons (BOP) calculates persons incarcerated for a "life" sentence, including District persons in BOP custody, as serving a 470-month (39 years and two months) sentence based on their life expectancy.[8]

In individual cases, the length of incarceration that actually constitutes a LWOP sentence for a particular individual is fundamentally speculative and variable. Life expectancy is only an estimate of the average time before death (which, by definition, half the prison population is predicted to exceed), and a minority of incarcerated individuals may significantly outlive what for others are *de facto* LWOP sentences. Nonetheless, it appears that for many of the District's incarcerated persons, incarceration in the range of 40-50 years would mean those individuals would die in prison.

The District's criminal justice system disproportionately incarcerates black men.[9] Demographic information on adult dispositions in Superior Court between 2010-2019 indicates that 91% of those convicted of felonies were black and 91% were men, making the odds that any given felony conviction in the District would be of a black male 83%.[10] Similar to other felonies, about 89% of first degree murder convictions in the District between 2010-2019 were of black men.[11] Yet, black men comprise only about 20% of the District's population.[12]

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[7] *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.")

[8] *See* United States Sentencing Commission, Sourcebook 2017 Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").

[9] The District's Department of Youth Rehabilitation Services (DYRS) also manifests stark racial disparities. Since FY 2010, 95-100% of newly committed youth to DYRS have been African American. *See*, https://dyrs.dc.gov/page/youth-snapshot.

[10] CCRC analysis based on Superior Court data. See Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information.

[11] CCRC analysis of the D.C. Sentencing Commission's dataset "Homicides sentenced between 2010 and 2019." This and other breakdowns of District sentencing practices from 2010 to 2019 can be found online at https://scdc.dc.gov/node/1467606.

[12] CCRC analysis of 2021 race and gender data provided by the DC Health Matters Collaborative, available online at

This sharp disparity in the incarceration of black men compared others must be considered when realistically assessing what would be a life sentence for most sentenced in the District. The current life expectancy for non-Hispanic black men in the District is just under 69 years.[13] Precise data on the age of persons convicted of murder in the District is unavailable, but a review of publicly accessible data shows that the median age for those convicted of first degree murder between 2010 and 2019 is in the mid-to-late twenties.[14] Given the RCC Class 1 and 2 maximum penalties of 45 and 40 years, without early release a 25 year old adult could still be incarcerated until they are 70 or 65. If that adult were black, this sentence would be in the range of their current life expectancy. An 18 year old black male, without early release, could be incarcerated under an aggravated first degree murder or a first degree murder conviction until they are 63 or 58 - about five to ten years short of their current life expectancy. Adults 30 years or older, when incarcerated with RCC Class 1 and 2 maximum penalties would be, absent early release, in their 70s or older if they outlive their life expectancy and complete their sentence. Bottom line, based on current life expectancies, without early release a sentence of the RCC Class 1 and Class 2 maximum penalties (45 and 40 years, respectively) would result in many, if not most, of the persons so incarcerated dying while in prison.

The RCC and current law do provide a variety of early release mechanisms, however, that are likely to lower the imprisonment term for some people sentenced to the RCC Class 1 and Class 2 maximum penalties. Most significantly, the RCC provides a possibility of early release through its revision to judicial second look procedures,[15] available to persons of all ages after serving at least 15 years in prison. Under existing BOP rules and regulations applicable to the District's incarcerated persons there is a deduction of up to 15% of the sentence for "good time credit."[16] The maximum good time credit deduction of 15% would be 6.75 years from a 45 year sentence (leaving a 38.25 year sentence) and 6 years from a 40 year sentence (leaving a 34 year sentence). With RCC Class 1 and 2 maximum penalties of 45 and 40 years and a maximum good time credit, a 25 year old black adult could still be incarcerated until they are 63.25 or 59, about five to ten years short of their current life expectancy. Existing BOP rules and regulations applicable to the District's incarcerated persons also include compassionate release for elderly persons in poor health.[17]

The above statistics support setting the RCC Class 1 and Class 2 maximum

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https://www.dchealthmatters.org/demographicdata?id=130951&sectionId=940#sectionPiece_109.

[13] *See* D.C. Department of Health, *District Of Columbia Community Health Needs Assessment, Volume 1* (March 15, 2013) at 16; Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020).

[14] CCRC analysis of the D.C. Sentencing Commission's dataset "Homicides sentenced between 2010 and 2019." This and other breakdowns of District sentencing practices from 2010 to 2019 can be found online at https://scdc.dc.gov/node/1467606.

[15] See RCC § 24-403.03.

[16] D.C. Code § 24-403.01; 18 U.S.C. § 3624(b).

[17] *See* 28 CFR part 571, subpart G; D.C. Code § 24–403.04, Motions for compassionate release for individuals convicted of felony offenses.

penalties at 45 and 40 years to provide life *with* the possibility of release for most incarcerated persons convicted of one of these offenses. Somewhat lower or higher maximum penalties, e.g. 40 and 35 years or 50 and 45 years for Classes 1 and 2, would provide more or fewer individuals with effective life *with* the possibility of release sentences.

Setting the RCC Class 1 and Class 2 maximum penalties at 45 and 40 years ends the District's current authorization of life without release (LWOR) sentences and extreme term-of-years sentences that, practically, are LWOR sentences.

Since the District's repeal of the death penalty in 1981,[18] the most severe punishment under the current D.C. Code is "life without release," a punishment specifically authorized for: aggravated murders,[19] aggravated first degree sexual abuse,[20] aggravated first degree child sexual abuse,[21] and the third conviction for any "crime of violence."[22] However, since Congressional elimination of parole in the District,[23] second degree murder[24] and certain terrorism offenses carrying a term of "life"[25] similarly have no provision for release or automatic review and are *de facto* LWOR sentences.

In addition, a wide range of District crimes carry term-of-years punishments of 60 years that, in the absence of parole, function as *de facto* LWOR sentences based on the life expectancy of those incarcerated. These 60-year offenses include: unaggravated first degree murder,[26] first degree burglary while armed,[27] kidnapping while armed,[28] distribution of a controlled substance while armed,[29] possession with intent to distribute a controlled substance while armed,[30] and manslaughter while armed.[31] Since Congressional elimination of parole, incarcerated persons from the District must serve at least 85% of their sentence,[32] meaning that even an incarcerated person with a perfect record while incarcerated would not be eligible for release from a 60 year sentence until they serve at

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[18] District of Columbia Death Penalty Repeal Act of 1980, D.C. Law 3-113 (Feb. 26, 1981).
[19] D.C. Code §§ 22–2104(a) (aggravated first degree murder); 22–2106 (murder of law enforcement officer).
[20] D.C. Code §§ 22-3002; 22-3020; 24–403.01.
[21] D.C. Code §§ 22-3008; 22-3020; 24–403.01.
[22] D.C. Code § 22–1804a(a)(2) (repeat offender penalty). "Crime of violence" for purposes of the statute has the same meaning as provided in D.C. Code § 23-1331(4) and includes crimes that require no physical harm to persons (e.g. burglary) and low felony assaults (e.g. significant bodily injury assault, punishable by up to 3 years incarceration).
[23] National Capital Revitalization and Self-Government Improvement Act ("D.C. Revitalization Act"), Pub. L. No. 105-33, 111 Stat. 712 (1997).
[24] D.C. Code § 22–2104 (second degree murder).
[25] D.C. Code § 22–3153 (kidnapping, use and possession of a weapon of mass destruction, manslaughter, murder committed as an act of terrorism).
[26] D.C. Code § 22-2104.
[27] D.C. Code §§ 22-801(a); 22-4502.
[28] D.C. Code §§ 22-2001; 22-4502.
[29] D.C. Code §§ 48-904.01(a)(2); 22-4502.
[30] D.C. Code §§ 48-904.01(a)(2); 22-4502.
[31] D.C. Code §§ 22-2105; 22-4502.
[32] D.C. Code § 24-403.01; 18 U.S.C. § 3624(b).

least 51 years.

In the District, the effect of the RCC Class 1 and Class 2 penalties being set at 45 and 40 years is exclusively, or almost exclusively, on penalties for aggravated first degree murder. During the ten year period of 2010-2019, analysis of District court data indicates that sentences to life and life without parole were given almost exclusively for aggravated first degree first degree murder.[33] Similarly, the analysis found that, over the same period, all District sentences other than those for aggravated first degree murder were less than 40 years (when analyzed at the 97.5th quantile).[34] However, a significant number of aggravated first degree murder sentences were for 40 years or more, so it is reasonable to estimate that up to a quarter of the adult sentences for aggravated murder from 2010-2019 were higher than the RCC Class 1 and 2 maximum penalties would allow.[35] Moreover, depending on the behavior at issue a murder charge and penalty is just one way the criminal law provides accountability for an actor's conduct, and in any given case there may be additional convictions and additional enhancements that bring penalties that run

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[33] CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix C - Count of Life Sentences by Charge (Last in Time Data). (Analysis indicates that, over the 10-year period of 2010-2019, there were 30 convictions carrying life sentences for first degree murder, 6 convictions for first degree child sexual abuse, 1 conviction for first degree sex abuse (force), and 1 conviction for second degree murder.) For any of these charges to carry a life sentence, one or more aggravators would have to be found. *See* D.C. Code §§ 22–2104.01; 22-3020. Six other charges are listed as having 1 conviction for a life sentence, but it is unclear if these are errors in the record or the statistical analysis since under current law these offenses legally could only have a life sentence under the rarely used repeat offender enhancement in D.C. Code § 22–1804a.

Notably, public records indicate that all six of the life sentences for first degree child sexual abuse applied to one individual in one case, which also included numerous additional term-of year sentences. Under the RCC, each conviction for enhanced first degree sex abuse of a child would carry up to a 30-year penalty as a Class 3 offense; a *de facto* LWOP term of years sentence would be available for two (or more) convictions for such severe conduct.

[34] See Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data. Note that 97.5% (as high as the analysis goes) of sentences for *unenhanced* first degree murder were under 40 years.

[35] The same analysis of adult dispositions over the timespan 2010-2019 shows that for other than "felony murder" forms of first degree murder, including both aggravated and unenhanced charges, the 75th quantile of sentences was 40 years, the 90th quantile was 45 years, and 95th quantile was nearly 50 years. The analysis also showed that for "felony murder" first degree murder, including both aggravated and unenhanced charges, the 75th quantile of sentences was 42.5 years, the 90th quantile was 60 years, and 95th quantile was nearly 62 years. Combined, convictions for all forms of first degree murder (felony murder and non-felony murder, enhanced and unenhanced) totaled 168 during the 2010-2019 period. See Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data.

consecutive to the murder penalty or can further raise the penalty.[36]

The grim reality, however, is that any apparent differences among the 45 and 40 year RCC penalties for Class 1 and Class 2 offenses, the current D.C. Code authorized penalties, and recent District practice may be irrelevant in many cases. As described above, the life expectancy for non-Hispanic black men in the District is just under 69 years.[37] If the life expectancy of the incarcerated person is less than either the imprisonment time authorized under the statute (be it RCC or D.C. Code) or the total imprisonment time to which an individual is subject in the case (including charges beyond a single murder charge), then whether the statutorily-authorized murder penalty is 40, 45, or 100 years makes no practical difference. Many people sentenced under these circumstances can be expected to die in prison.

Establishing the most severe RCC Class 1 and Class 2 penalties as life *with* the possibility of release is strongly supported by the recent sentencing recommendations of the American Law Institute (ALI).[38] The *ALI Model Penal Code: Sentencing* recommends that, except in jurisdictions where it is the only alternative to the death penalty, imposition of the most severe penalty in criminal law should be life imprisonment with a "meaningful possibility of release before the prisoner's natural death."[39] The rationale for the ALI rejection of life imprisonment without release is grounded not only in a realistic assessment of life expectancy but in skepticism as to the abilities of a sentencing judge:

> Natural-life sentences rest on the premise that an offender's blameworthiness cannot change substantially over time—even very long

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[36] For example, depending on the facts of the case, there may be additional liability for possession of a firearm, kidnapping, or additional violent acts done on the occasion, or general enhancements for hate crimes or otherwise.

[37] *See* D.C. Department of Health, *District Of Columbia Community Health Needs Assessment, Volume 1* (March 15, 2013) at 16; Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020).

[38] The ALI is a longstanding, leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. Its diverse national membership includes judges, scholars, and practitioners of law. Over the course of eight years, the organization drafted and approved an update to the sentencing provisions in the ALI *Model Penal Code*. The *Model Penal Code: Sentencing* was approved April 10, 2017 and the final text is available online at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[39] *Model Penal Code: Sentencing* (Am. Law Inst., 2017), Comment k(2)at 159. ("With one narrow exception, the revised Code continues the policy judgment of the original Code that the most severe sanction in the criminal law should be a life prison term with a meaningful possibility of release before the prisoner's natural death. In a departure from the Institute's previous position, the Code now also concedes the policy advisability of life prison sentences with no prospect of release—the equivalent of "life without parole" in some systems—but only when this sanction is the sole alternative to a death sentence."). As the District is not a death penalty jurisdiction, the ALI recommendation is to reject a life without possibility of release sentence.

> periods of time. The sanction denies the possibility of dramatically altered circumstances, spanning a prisoner's acts of heroism to the pathos of disease or disability, that might alter the moral calculus of permanent incarceration. It also assumes that rehabilitation is not possible or will never be detectable in individual cases. Such compound certainties, reaching into a far-distant future, are not supportable.[40]

The ALI recommendation that the most severe sentence in a criminal code be life *with* the possibility of release is made in conjunction with recommendations for a variety of early release mechanisms, including a judicial review of the sentence after 15 years akin to the RCC second look provision.[41]

Despite strong support by legal experts for life *with* possibility of release sentences, the RCC maximum authorized imprisonment penalties set a new national precedent. All states except Alaska authorize "life without release" sentences for at least some offenses,[42] and Alaska authorizes a mandatory 99 year term for aggravated murder, a *de facto* life without possibility of release sentence.[43] Nationally, it has been estimated that over 50,000 people are serving life without parole sentences, although just 5 jurisdictions impose the majority of these terms and seven states have fewer than 50 people serving such sentences.[44] Approximately 44,000 people across the country are also serving sentences of 50 years or greater, though, again, seven states have fewer than 50 people serving such sentences.[45]

Yet, the high statutory penalties authorized and imposed by many other states may not be an accurate indicator of actual imprisonment time given the widespread availability of parole in other jurisdictions. Data from other jurisdictions indicates that of those in prison for murder and non-negligent manslaughter (combined), 39.6% served less than 10 years before their first release, 50% served 13.4 years or less before their first release, and 69.6% served less than 20 years before their first release.[46] The average length of sentences imposed for these offenses was much, much higher than what was actually served—40.6

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[40] *Model Penal Code: Sentencing* (Am. Law Inst., 2017), Comment k(2) at 162.

[41] *See* RCC § 24-403.03.

[42] *See* The Sentencing Project, *Virtual Life Sentences* (August 2019) at 9.https://www.sentencingproject.org/wp-content/uploads/2019/08/Virtual-Life-Sentences.pdf (last visited Jan. 9, 2021).; Death Penalty Information Center, Life without Parole, at http://www.deathpenaltyinfo.org/life-without-parole (last visited Jan. 9, 2021).

[43] Alaska Stat. § 12.55.125.

[44] The Sentencing Project, *Still Life – America's Increasing Use of Life and Long-Term Sentences* (2017) at 9, 10 ("LWOP sentences have been administered disproportionately in a handful of states: combined, Florida (16.7%), Pennsylvania (10.1%), California (9.6%), Louisiana (9.1%), and the federal system (7.2%) comprise just over half (52.7%) of the nation's total LWOP population. In Delaware, Louisiana, Massachusetts, and Pennsylvania more than 10 percent of the state prison population is serving a life sentence with no chance for parole.").

[45] The Sentencing Project, *Still Life – America's Increasing Use of Life and Long-Term Sentences* (2017) at 9, 10.

[46] U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016,* NCJ 252205 (November 2018) at 2, 3.

years by one calculation, of which only 57.2% was served before first release.[47] So, while the purported length of sentences imposed for the most serious crimes in other jurisdictions may be substantially longer than provided in the RCC, it does not appear that higher authorized penalties translate into longer incarceration periods.

While determination of the appropriate penalty level for the most severe crimes turns on many considerations, the impact on public safety is minimal when comparing life with or without the possibility of release penalties. In terms of general deterrence, longstanding research indicates that lengthy prison sentences—and even the death penalty—do little or nothing to deter criminal behavior.[48] Individuals "age out" of crime with a sharp drop in criminal behavior as people enter mid and later life.[49] Given the extraordinary length and severity of a 40-45 year sentence, an individual released after such a period generally would not be expected to pose a significant public safety threat.

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The RCC provides a penultimate level of punishment, below life with the possibility of release, of a 30-year maximum imprisonment for a Class 3 offense. This remains an extremely severe penalty and only five RCC charges are designated Class 3 offenses—enhanced second degree murder and several forms of enhanced sex offenses that are particularly egregious.[50]

While the 30-year maximum for Class 3 offenses stands in sharp contrast to many of the more severe penalties authorized in the D.C. Code for non-murder offenses,[51] it is sufficiently severe to encompass nearly all District sentences actually given to adults between 2010-2019 for all charges other than first degree murder. Based on analysis of District court data over that 10 year period, up to about 20 convictions for crimes other than first degree murder had sentences in excess of 30 years or were for life.[52] Less than

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[47] *Id.* at 4. See note in text regarding the assumptions used to incorporate life and death sentences into this reported average sentence length and percent of sentence served.

[48] *See, e.g.,* National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016) at 1, 2 (citing relevant research and summarizing that, "There is no proof that the death penalty deters criminals," and "Increasing the severity of punishment does little to deter crime.").

[49] Michael R. Gottfredson and Travis Hirschi, *A General Theory of Crime* (Stanford University Press, 1990), at 124-130 (stating that "the shape or form of the [age-crime] distribution has remained virtually unchanged for about 150 years"); National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016) at 2 ("Even those individuals who commit crimes at the highest rates begin to change their criminal behavior as they age. The data show a steep decline at about age 35. A more severe (i.e., lengthy) prison sentence for convicted individuals who are naturally aging out of crime does achieve the goal of punishment and incapacitation. But that incapacitation is a costly way to deter future crimes by aging individuals who already are less likely to commit those crimes by virtue of age.").

[50] *See* RCC §§ 22E-1101 enhanced second degree murder, 22E-1301 enhanced first degree sex assault, 22E-1302 enhanced first degree sex abuse of a minor, 22E-1602 enhanced forced commercial sex, and 22E-1608 first degree commercial sex with a trafficked person.

[51] See discussion above regarding life and term of years sentences that are *de facto* life sentences authorized under the current D.C. Code.

[52] *See generally,* Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data.

5% of the 148 sentences for first degree sexual abuse were for more than 30 years,[53] and 8-14 life sentences were given for first degree child sexual abuse, first degree sexual abuse, second degree murder, and perhaps some other offenses.[54] While the RCC Class 3 maximum of 30 years would encompass all but these few sentences and first degree murder subject to the Class 1 and 2 penalties, capping the Class 3 penalty may have a significant effect on plea bargaining. About 10% of second degree murder and first degree sexual abuse sentences of District adult offenders between 2010-2019 are for 25 years or more,[55] and lowering the authorized maximum may put a downward pressure on sentences near the top of the authorized penalties.

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The RCC provides for a 180-day penalty for Class B misdemeanors but makes no allowance for a six-month penalty as is currently used for several offenses in the D.C. Code. The distinction between 180 days and six months in current District law does not reflect a substantive distinction in the seriousness of the offense or its imprisonment penalty but triggers a procedural distinction not mentioned in those offenses. Under Supreme Court precedent, offenses involving penalties of more than six months are subject to a Sixth

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[53] See Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data. (Stating that the 95th quantile for the 124 convictions for D.C. Code § 22-3302(a)(1) was 26 years, while the 97.5 quantile was 37 years.).

[54] CCRC Research Memorandum #40 - Statistics on District Adult Criminal Charges and Convictions, Appendix C - Count of Life Sentences by Charge (Last in Time Data). (Analysis indicating over the 10 year period 2010-2019 there were life sentences for 6 convictions for first degree child sexual abuse, 1 conviction for first degree sex abuse (force), and 1 conviction for second degree murder.) For any of these charges to carry a life sentence, one or more aggravators would have to be found. *See* D.C. Code §§ 22–2104.01; 22-3020. Initial CCRC research indicates that all six of these first degree child sexual abuse sentences may have originated from one case. Under the RCC, each conviction for enhanced first degree sex abuse of a child would carry up to a 30-year penalty as a Class 3 offense; a *de facto* LWOP term of years sentence would be available for two (or more) convictions for such severe conduct.

[55] See Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data. Notably, RCC § 22E-1301 enhanced first degree sex assault and RCC § 22E-1302 enhanced first degree sex abuse of a minor are Class 3 offenses carrying a 30 year maximum penalty, whereas the unenhanced versions—RCC § 22E-1301 first degree sex assault and RCC § 22E-1302 first degree sex abuse of a minor—are Class 4 offenses, carrying a 24 year maximum penalty. Analysis of court data indicates that, for adult sentences during 2010-2019, the 97.5 quantile of all (enhanced and unenhanced) first degree child sexual abuse (D.C. Code § 22-3008) sentences was 20 years. Similarly, for adult sentences during 2010-2019, the 90th quantile of all (enhanced and unenhanced) first degree sexual abuse (D.C. Code § 22-3002) sentences was 25 years, and the 75th quantile of all (enhanced and unenhanced) first degree sexual abuse was 16.5 years.

Amendment right to a jury trial, whereas offenses with lesser penalties generally are not.[56] However, nothing prevents a jurisdiction from voluntarily extending jury trial rights to offenses subject to penalties of six months or less and RCC makes all offenses with an imprisonment penalty over 60 days jury demandable.[57] Rather than perpetuate a distinction between 180 day and six month penalties in the absence of a difference in jury demandability, the RCC classification system makes all Class B offenses subject to a maximum 180 day imprisonment.[58]

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The RCC penalty classes do not include a minimum term of imprisonment of any sort for any offense. Sentencing guidelines, rather than statutory mandates, are a more appropriate way to guide judicial decision making among competing[59] sentencing priorities. The ability of the legislature to foresee all circumstances that may be relevant to sentencing is limited, and even the most severe criminal offense, aggravated first degree murder, may not merit a lengthy imprisonment term in some circumstances.[60] Elimination of legislatively-mandated minimum sentences is consistent the reasoning of the Council in recent years when considering whether to extend mandatory minimum sentences.[61]

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[56] *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (holding that "we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.' A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."). See also D.C. Code § 16-705 (permitting jury trials when the possible cumulative punishment exceeds two years).

[57] *See* revised D.C. Code § 16-705 (Jury trial; trial by court) and accompanying commentary.

[58] A 180 day penalty was selected over 6 months solely because of its slightly greater clarity and specificity.

[59] D.C. Code § 24–403.01(a) ("For any felony committed on or after August 5, 2000, the court shall impose a sentence that:

(1) Reflects the seriousness of the offense and the criminal history of the offender;

(2) Provides for just punishment and affords adequate deterrence to potential criminal conduct of the offender and others; and

(3) Provides the offender with needed educational or vocational training, medical care, and other correctional treatment.").

[60] For example, a spouse or child acting with a bona fide compassionate motive to administer a fatal medication to end the life of a terminally-ill, elderly person may be charged with aggravated first degree murder under RCC § 22E-1101(d)(3)(A) and current D.C. Code § 22–2104.01(b)(10). If compliance with the procedures for physician assisted death in D.C. Code § 7–661.11 cannot be proven, the actor would face a maximum imprisonment of 60 years for a Class 1 offense under the RCC, or a maximum of life without parole and a mandatory minimum of 30 years under D.C. Code § 22–2104.01.

[61] *See, e.g.,* Committee on the Judiciary, *Report on Bill 16-247, the "Omnibus Public Safety Act of 2006"* at 8-9 (April 28, 2006). ("Mandatory minimum sentences base punishment solely on perceived gravity of the criminal offense. By law, judges must sentence the

Decades of research indicate that mandatory minimums do not solve the problems of inconsistent sentences that they were intended to solve and, instead, exacerbate disproportionality while creating numerous negative effects on the justice system.[62] In light of this evidence, the most prominent legal authorities have called for an end to mandatory minimums, including the Judicial Conference of the United States,[63] the

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defendant to a mandated prison term regardless of the defendant's role in the offense, culpability, or seriousness of the actual occurrence. Mandatory minimums severely limit or eliminate a judge's ability to distinguish between the least and most culpable defendants, even though the judge is the most impartial and most familiar with the facts of the case, and the judge's actions are public. Instead, mandatory minimums vest sentencing discretion in the prosecutor, even though the prosecutor is not impartial, and the prosecutor's decision is insulated from public and judicial scrutiny. The prosecutor is the one who seeks to plea bargain. Or who decides what charge (i.e, crime) to prosecute. So the prosecutor decides whether to threaten a mandatory minimum in order to force a plea bargain. Or the prosecutor decides whether to charge a lesser offense, that does not entail a mandatory minimum, because the chance of conviction is better. However the prosecutor chooses to use the range of offenses available to charge in order to obtain a conviction, the fact is that with mandatory minimums the role of discretion is great with the prosecutor and virtually nonexistent with the judge.").

[62] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 149 ("During the past several decades, accumulating knowledge has only strengthened the case that mandatory sentencing provisions do not further their purported objectives and work substantial harms on individuals, the criminal-justice system, and society. Empirical research and policy analyses have shown time and again that mandatory-minimum penalties fail to promote uniformity in punishment and instead exacerbate sentencing disparities, lead to disproportionate and even bizarre sanctions in individual cases, are ineffective measures for advancing deterrent and incapacitate objectives, distort the plea-bargaining process, shift sentencing authority from courts to prosecutors, result in pronounced geographic disparities due to uneven enforcement patterns in different prosecutors' offices, coerce some innocent defendants to plead guilty to lesser charges to avoid the threat of a mandatory term, undermine the rational ordering of graduated sentencing guidelines, penalize low-level and unsophisticated offenders more so than those in leadership roles, provoke nullification of the law by lawyers, judges, and jurors, and engender public perceptions in some communities that the criminal law lacks moral legitimacy.").

[63] Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017) ("The Commission is well aware of the Judicial Conference's longstanding position opposing mandatory minimum penalties and its support of legislative efforts such as expansion of the "safety valve" at 18 U.S.C. 3553(f). Mandatory minimum sentences waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately foster a lack of confidence in the criminal justice system. For over sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentencing provisions and has supported measures for their repeal or to ameliorate their effects. The Judicial Conference also supports the Commission in its

American Law Institute,[64] and the American Bar Association.[65]

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Finally, several points are notable on the classification of particular RCC offenses using the punishments authorized under RCC 22E-603(b).

First, as applied to specific RCC offenses, the RCC penalty classifications seek to ensure proportionate punishment for criminal behavior as a whole, including for the most serious harms inflicted. However, where conduct can be charged under multiple offenses (as is common in particularly egregious cases) the RCC may not rely on the statutory maximum of just one criminal charge to provide a proportionate response to the conduct as a whole. The government may need to charge and prove multiple offenses, each carrying its own penalty, if it chooses to prosecute all aspects of the behavior. If a sentencing judge deems it necessary under the goals of sentencing,[66] they continue to have discretion under the RCC to run sentences consecutively.[67] For example, if a home burglary occurs and the homeowner experiences a serious bodily injury during the encounter, the RCC provides liability for both burglary and aggravated assault and allows for the sentences to run consecutively. This is a different, more tailored approach, compared to current District law and practice which provides, for example, a very high (30 year) penalty for any burglary of an occupied dwelling, regardless of whether anyone was even encountered, on the theory that the penalty would suffice to cover any further bad harms therein.[68]

Second, as applied to particular RCC offenses, the RCC penalty classes typically provide more proportionate punishment than under current District law because the revised offenses are themselves structured to have more gradations. Typically, District offenses

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work in pursuit of an amendment to 18 U.S.C. § 924(c) to preclude the stacking of counts and make clear that additional penalties apply only when, prior to the commission of such offense, one or more convictions of such person have become final.") (https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf).

[64] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 166 ("Even if it were a desirable policy in the abstract, legislatively mandated sentencing uniformity has never been achieved in practice. Studies of the operation of mandatory-minimum penalties show that they are not enforced by prosecutors in all eligible cases. Selective charging and the plea-bargaining process lead to uneven application of the seemingly flat penalties. Evidence suggests that racial and ethnic biases sometimes influence the application of mandatory-minimum statutes. In addition, mandatory sentencing laws tend to be applied differently in different locales within a single state. Empirical, theoretical, and anecdotal accounts all support the conclusion that the attempt to eliminate judicial sentencing authority through mandatory-penalty provisions does not promote consistency, but merely shifts the power to individualize punishments from courts to prosecutors.").

[65] ABA House of Delegates, Resolution 10B on Mandatory Minimums (2017), at 4. ("RESOLVED, That the American Bar Association opposes the imposition of a mandatory minimum sentence; and FURTHER RESOLVED, That the American Bar Association urges Congress, state and territorial legislatures to repeal existing criminal laws requiring minimum sentences, and to refrain from enacting laws punishable by mandatory minimum sentences.").

[66] D.C. Code § 24-403.01(a).

[67] D.C. Code § 23-112.

[68] D.C. Code § 22-801.

have at most two gradations (versions of the offense to which different penalties apply based on the seriousness of the conduct involved). For example, the District's current theft statute has two gradations (first degree and second degree) and two corresponding penalties (10 years and 180 days), depending on whether the property taken was worth at least $1,000 (first degree) or less (second degree).[69] In contrast, the RCC theft offense has five gradations, each with a different penalty classification, with thresholds at $500, $5,000, $50,000, and $500,000.[70] While the top penalties under the RCC and current D.C. Code may be same for an offense, the RCC's use of more gradations, each with a distinct penalty classification, allows for greater differentiation of penalties according to the amount of harm.

Third, as applied to most RCC offenses, the maximum imprisonment authorized in 22E-603 classes encompass all, or all but the top 5%, of sentences issued by District judges in recent years.[71] In some instances, however, the RCC penalty classification for a particular offense would appear to exclude an even larger percentage of sentences under recent court practice. For example, the RCC proposes penalties for various degrees of burglary under RCC § 22E-2701 ranging from Class 7 (8 years) to Class A (1 year). These RCC burglary maximum penalties are dramatically lower than the statutory penalties under the current D.C. Code—which authorizes up to 60 years even when the burglar encounters no one and takes nothing[72]—and are substantially lower than current District court practice.[73] However, for burglary and other instances, the review of sources beyond current District statutory law and practice, such as the precedent of other jurisdictions[74] and District

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[69] D.C. Code § 22-3212.

[70] RCC § 22E-2101.

[71] *See* Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data.

[72] For example, under the current D.C. Code first degree burglary while armed carries a 60 year statutory maximum. D.C. Code §§ 22-2001; 22-4502.

[73] See Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data. Analysis of court data indicates that, for adult sentences between 2010-2019, (enhanced and unenhanced) for first degree burglary (D.C. Code § 22-801) sentences were 15 years for the 97.5 quantile, 12 years for the 90th quantile, 8.5 years for the 75th quantile, 5 years for the 50th quantile, and 3 years for the 25th quantile.

[74] *See e.g.* Cal. Penal Code § 461 (providing for maximum penalties for first degree (residential) burglary of two, four, or six years based on prior offenses); Haw. Rev. Stat. §§ 708-810, 706-660 (providing a maximum of 10 years for first degree burglary while armed); U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016*, November 2018 at 3 (Nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when the burglary was the most serious crime. The statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon.)

public opinion research on the relative severity of offenses,[75] have indicated the need for a change to District law.

Fourth, while the RCC's penalty classes and classifications for particular offenses seek to authorize proportionate punishment for all crimes, the RCC also seeks to reduce the District's historic over-reliance on incarceration to achieve criminal justice. Prior to the 2020 Covid-19 emergency, the District's incarceration rate was the highest or nearly the highest of any state in the nation.[76] The broad societal costs of such high levels of incarceration are staggering, even if they are largely hidden in the District due to federal assumption of the costs of incarcerating persons from the District.[77] And those incarcerated from the District have been disproportionately black—91% of all adult felony convictions

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[75] See the responses to survey questions in Advisory Group Memo #27 - Public Opinion Surveys on Ordinal Ranking of Offenses. (Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.)

[76] *See* Charles Allen and Karl Racine, *Opinion: No, D.C.'s Criminal Justice Reform Efforts Don't Go Too Far*, Washington Post (August 16, 2019) (citing Prison Policy Initiative *District of Columbia Profile,* available online at https://www.prisonpolicy.org/profiles/DC.html); https://www.sentencingproject.org/news/fact-dc-mass-incarceration-problem/); Fact: DC Has a Mass Incarceration Problem, THE SENTENCING PROJECT (Sept. 11, 2019), https://www.sentencingproject.org/news/fact-dc-mass-incarceration-problem/.

[77] Nearly 4,600 of D.C.'s incarcerated residents are serving time across the country in federal facilities run by the U.S. Bureau of Prisons (BOP) (*See,* Martin Austermuhle, "District Of Corrections: Does D.C. Really Have The Highest Incarceration Rate In The Country?", *WAMU*, September 2019). For FY19, BOP's continuing resolution budget was $7,275,600,000 (*See,* US BOP, *FY20 Budget*, https://www.justice.gov/jmd/page/file/1142606/download.). Using BOP's cost of incarceration from FY18 ($37,449.00 per inmate), roughly $172,265,400 of its FY19 budget was spent on D.C. residents ($37,449 * 4,600 = $172,265,400; *See,* US BOP, *Annual Determination of Average Cost of Incarceration Fee,* Federal Register (2019), https://www.federalregister.gov/documents/2019/11/19/2019-24942/annual-determination-of-average-cost-of-incarceration-fee-coif).

this past decade.[78] That same percentage holds for crimes like possession of a controlled substance where research shows that there are no racial differences in the use of drugs.[79]

Public safety requires incarceration of criminal actors in many cases and may necessitate lengthy terms in some instances. However, the RCC penalties recognize that incarceration is an inadequate tool to ensure public safety and the need for public safety does not justify current levels of incarceration. In terms of deterrence, the broad consensus of criminal justice research is that effective law enforcement apprehension is far more effective than the length of incarceration.[80] In fact, research by the National Academy of Sciences and others shows that as a form of punishment, the public safety benefits of incarceration in terms of incapacitation and deterrence for some people may be outweighed by the fact that incarceration is inherently "criminogenic"—i.e., incarceration actually increases the likelihood an individual will reoffend, as compared to a scenario where the individual was not incarcerated.[81] Incarceration typically exacerbates the underlying drivers of crime, including social isolation, poverty, substance abuse, and physical and mental health problems.[82] This effect of incarceration on perpetuating violence may

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[78] See Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data.

[79] About 90% of adults convicted in Superior Court for misdemeanor possession of a controlled substance under D.C. Code § 48-904.01(d)(1) were black in the years 2010-2019. *See* Advisory Group Memorandum #40 and Appendices (available at https://ccrc.dc.gov/page/ccrc-documents) for explanation and more information. Analysis by CCRC based on Superior Court data. Despite decriminalization of marijuana possession in the District, the racial disparity in convictions for drug possession under D.C. Code § 48-904.01(d)(1) has only edged higher, up to 92% in 2018-2019. *Id.* Despite the starkly different conviction statistics, research indicates that black and white Americans use drugs at similar rates. *See* the Center for Disease Control and Prevention, National Center for Health Statistics' *Health, United States 2019* report, Table 20. "Use of selected substances in the past month among persons aged 12 years and over, by age, sex, and race and Hispanic origin: United States, selected years 2002–2018" (https://www.cdc.gov/nchs/data/hus/2019/020-508.pdf).

[80] *See, e.g.,* National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016) at 1 (citing relevant research and summarizing that: "Research shows clearly that the chance of being caught is a vastly more effective deterrent than even draconian punishment.").

[81] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), https://doi.org/10.17226/18613; Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 Crime Justice 115–200 (2009); Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, University of Michigan Working Paper (August 18, 2015) (https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf).

[82] *See generally,* Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair* (2019).

undergird the fact that most victims of crime, including victims of violent crime, support shorter prison sentences and a greater focus on prevention and rehabilitation programs.[83]

Fifth, and finally, the RCC penalty classes and classifications for particular offenses are not intended to be a static or fully detailed guide to what constitutes proportionate sentences for crimes. The RCC 22E-603 penalty classifications reflect the first comprehensive review and systematic change to District statutory penalties since the D.C. Code was first enacted in 1901. As crime rates change, public norms shift, and piecemeal amendments are made to District criminal laws to address particular problems, continual monitoring and legislative changes will be necessary to ensure that the overall system of laws authorizing imprisonment and punishment remains proportionate.[84] Further, the District's sentencing guidelines must also be reformed in light of the changes in RCC 22E-603, the classification of specific offenses, and the changes to offense elements and grading in order to further improve the consistency and proportionality of sentencing in individual cases. RCC 22E-603 provides maximum imprisonment sentences to accommodate extreme forms of a particular crime, but it is expected that imprisonment terms for ordinary forms of RCC crimes, following updated sentencing guidelines, will be substantially lower than the statutory limits. The RCC penalty classes and classifications for particular offenses are the crudest measure of the severity of an offense. In practice, the proportionality of penalties under RCC 22E-603 will depend on the ongoing efforts of not only sentencing judges and attorneys but the community as a whole to ensure that penalties are tailored and just in each individual case.

Subsection 22E-603(b) cross-references standard definitions of "felony" and "misdemeanor" and does not change current District law.

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[83] *See generally*, Alliance for Safety & Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims' Views of Safety and Justice* (2016) at 14, 16.

[84] *See* James Forman, Jr., *Locking Up Our Own: Crime and Punishment in Black America* (2017) at 13-14 ("Mass incarceration wasn't created overnight; its components were assembled piecemeal over a forty-year period. And those components are many. The police make arrests, pretrial service agencies recommend bond, prosecutors make charging decisions, defense lawyers defend (sometimes), juries adjudicate (in the rare case that doesn't plead), legislatures establish the sentence ranges, judges impose sentences within these ranges, corrections departments run prisons, probation and parole officers supervise offenders, and so on. The result is an almost absurdly disaggregated and uncoordinated criminal justice system—or "non-system" as Daniel Freed once called it. Although the existence of this diffuse structure is not news, we have yet to comprehend how the lack of coordination has contributed to the growth of our carceral system. In a tough-on-crime era, no single actor doubles or triples the incarceration rate. But as we shall see, if all the actors become even somewhat more punitive, and if they all do so at the same time, the number of people in prison and under criminal justice supervision skyrockets. Yet nobody has to take responsibility for the outcome, because nobody is responsible—at least not fully. This lack of responsibility is crucial to understanding why even reluctant or conflicted crime warriors (which some African Americans were and are) become part of the machinery of mass incarceration and why the system continues to churn even to this day, when its human toll has become increasingly apparent." (internal citation omitted)).

RCC § 22E-604. Authorized Fines.

Explanatory Note. Subsection (a) provides specific, standardized imprisonment penalties for offenses under Title 22E.

Subsection (b) sets alternative maximum fine penalties, as compared to the standard fines otherwise authorized under subsection (a) or, if applicable, a fine amount expressly specified in another statute. The provisions in paragraphs (b)(1) and (b)(2) are also alternatives to one another—an actor may be subject to an alternative fine under either paragraph (b)(1) or paragraph (b)(2), but not both. Paragraph (b)(1) states that if the offense of conviction is proven to have resulted in pecuniary loss to someone other than the actor, or a pecuniary gain to any person, then the fine imposed may be up to double the pecuniary loss or gain provided that the government's information or indictment alleges the amount of loss or gain and liability for a double fine. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the amount of pecuniary gain or loss. Paragraph (b)(2) states that if the actor is proven to be an organizational defendant then the fine may be up to triple the fines otherwise authorized, provided that the government's information or indictment alleges the actor is an organizational defendant and liability for a triple fine. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the actor's status. Both paragraphs (b)(1) and (b)(2) are subject to the limitations in subsection (c).

Subsection (c) states that courts must take into account the defendant's financial circumstances when sentencing a defendant to pay a fine. In particular, the court must consider how imposing the fine will affect the defendant's ability to pay restitution (if restitution has been ordered). The court may not impose a fine that would leave the defendant without the means to provide for his or her reasonable living expenses. The court must also take into account the defendant's obligations to financially support family members.

Paragraph (d)(1) cross-references the definition of "in fact" in RCC § 22E-207 and the definitions of "actor," "felony," "misdemeanor," "pecuniary gain," and "pecuniary loss" in RCC § 22E-701. Paragraph (d)(2) defines the term "organizational defendant" as any actor other than an individual human being. The term encompasses a range of non-natural organizations such as corporations.

Relation to Current District Law. Subsection (a) codifies entirely new law. District law does not set a schedule of fines by offense class. However, the Criminal Fine Proportionality Act of 2012 (FPA) now codified in D.C. Code §§ 22-3571.01 and 22-3571.02 sets fines for most current District offenses that generally correspond to the imprisonment penalty (although not the class) of each offense. The FPA does not precisely track imprisonment penalties insofar as D.C. Code § 22-3571.01(12) provides a separate maximum fine of $250,000 if the offense resulted in death, regardless of the imprisonment penalty, and D.C. Code 22-3571.02(a) provides that specific offenses may state they are exempt from D.C. Code § 22-3571.01 and state a different penalty.

In contrast, RCC § 22E-604(a) provides for fines that are mostly higher than existing District law and does not treat a result of death as categorically different.[1] The higher authorized fines may provide an alternative punishment to incarceration for some persons,[2] including legal entities like businesses and corporations,[3] while low-income and

[1] The FPA authorizes a higher fine for 3-year felonies. This appears to be due to the fact that the FPA does not provide a distinct fine for 3-year felonies, instead grouping such fines with 5-year felonies which are subject to a $12,500 fine. For comparison: a fine-only offense is subject to a $100 fine under the FPA and a $250 fine under the RCC; a 30-day offense is subject to a $250 fine under the FPA and a $500 fine under the RCC; a 90-day offense is subject to a $500 fine under both the FPA and a $1,000 fine under the RCC; a 180-day offense is subject to a $1,000 fine under the FPA and a $2,500 fine under the RCC; a one-year offense is subject to a $2,500 fine under the FPA and a $5,000 fine under the RCC; a 3-year offense is subject to a $12,500 fine under the FPA and a $10,000 fine under the RCC; a 5-year offense is subject to a $12,500 fine under the FPA and a $25,000 fine under the RCC; a 10-year offense is subject to a $25,000 fine under the FPA and a $50,000 fine under the RCC; a 15-year offense is subject to a $37,500 fine under the FPA and a $75,000 fine under the RCC; a 20-year offense is subject to a $50,000 fine under the FPA and a $100,000 fine under the RCC; a 30-year offense is subject to a $125,000 fine under the FPA and a $250,000 fine under the RCC. The RCC further provides escalating fines up to $1,000,000 for 40-, 60-, and 80-year offenses whereas the FPA provides fines above $125,000 only where death results (regardless of the imprisonment penalty) and sets that penalty at $250,000.

[2] *See* American Law Institute *Model Penal Code: Sentencing* (2017) commentary to 6.04 (renumbered 6.06 in final text) ("[T]he Code would preserve, and in some instances expand, the use of economic sanctions for defendants of sufficient means, who might be strongly affected by those penalties without being driven below the threshold of reasonable law-abiding subsistence. While not a majority of offenders, there is a significant subset for whom economic penalties can further such goals as proportionate punishment, victim restitution, general deterrence, specific deterrence, and disgorgement of criminally gotten gains. As the original Code also assumed, some classes of offenses require the availability of muscular financial penalties—albeit often for use in conjunction with other sanctions (in original § 7.02(2)(a), where "the defendant has derived a pecuniary gain from the crime"). Effective criminal-justice response to many kinds of organized crime, corporate offending, environmental crime, and fraudulent financial schemes requires an array of economic penalties that can mete out punishments proportionate to the enormous monetary harms suffered by victims, disgorge illegal profits, lower the ex ante incentives of crimes involving large returns and small risks of detection, and disable the operations of criminal enterprises by depriving them of necessary resources. Indeed, historically, for crimes at the high end of the spectrum of white-collar crime, one serious problem in American law has often been the failure of state codes to authorize economic sanctions of sufficient severity to serve the purposes of deterrence and punishment. When they are enforced with seriousness and do not drive offenders into poverty, economic sanctions have advantages not shared by other forms of criminal punishments… [M]any have urged that economic penalties, despite current problems in their use, will ultimately be important sanctioning tools to a nation engaged in downsizing its prison systems. These claims are predictive in nature, and rely on European rather than U.S. precedents. Still, some observers of American criminal justice have argued that undue limitations on the use of economic penalties may close off an important avenue of deincarceration policy. The relevant Code provisions are written to keep the door of experimentation open.").

[3] With respect to Subtitle III of Title 22E, property offenses, "person" is specifically defined to include non-natural persons. *See* RCC § 22E-701 (defining person to mean "an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency,

indigent persons would not be subject to the higher crimes under RCC § 22E-604(c) (discussed below). Making fines track the imprisonment penalty rather than whether the crime resulted in death allows for differentiation in the seriousness of crimes such as negligent homicide and aggravated murder. These changes improve the consistency and proportionality of the revised statutes.

RCC § 22E-604(b) makes several changes to the D.C. Code's FPA provisions in §§ 22-3571.01 and 22-3571.02 regarding alternative fines. First, the current FPA provisions do not specify what, if any culpable mental state applies to the pecuniary loss or gain that must be proven, either the existence or amount of the pecuniary loss or pecuniary gain, or the nature of the actor(s) as an organizational defendant. Resolving this ambiguity, the revised statute specifies, through use of "in fact," that no culpable mental state requirement exists as to these elements in order to be liable for the alternative fines. Second, the FPA provides double fines, and limits the fines to offenses punishable by six months or more imprisonment.[4] In contrast, the revised statute provides for treble fines and is applicable to all misdemeanors. Third, the FPA does not have any requirements as to the potential for heightened fines (unlike the alternative fine for pecuniary loss or pecuniary gain). In contrast, the revised statute requires the information or indictment to state that defendant is an organizational defendant subject to treble fines. These changes improve the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-604(c) codifies a new provision of District law limiting the applicability of fines to ensure that victim restitution is a priority over the collection of fines, to deter possible criminogenic effects of fines due to rendering a defendant destitute, and to ensure that family members or dependents of a defendant do not suffer additional negative consequences.[5] The current D.C. Code FPA provisions in § 22-3571.01 and § 22-

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or government-owned corporation, or any other legal entity."). For other RCC and D.C. Code offenses, "person" generally includes non-natural entities. *See* D.C. Code § 45-604 ("The word 'person' shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.").

[4] Although unclear from legislative history, presumably the underlying concern in this FPA provision was ensuring that such additional penalties only be levied in cases that are jury-demandable (which per current D.C. Code § 16-705 includes offenses with a six month or greater imprisonment). The increased fines for organizational defendants under the current D.C. Code statute has the effect of making charges for 180 day imprisonment offenses jury demandable for organizational defendants but not for natural persons, and this discrepancy would be exacerbated if the alternative fines for organizational defendants apply to all misdemeanors and treble damages are allowed. The revised statute provides the government the choice between pursuing treble fines which would make the charge jury-demandable for even very low-level (Class C or Class D) offenses, or pursuing normal fines with the same jury demandability as for natural persons. The revised D.C. Code § 16-705(b)(1) generally makes all offenses punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days jury demandable.

[5] This RCC provision is modeled on a provision and associated commentary in the Model Penal Code. *See generally* American Law Institute *Model Penal Code: Sentencing,* (2017)

3571.02 have no comparable provision. However, the DCCA's reasoning in the case *One 1995 Toyota Pick-up Truck v. District of Columbia*[6] and the consideration of financial means and family obligations when ordering restitution[7] suggest a similar approach. Notably, subsection RCC § 22E-604(c) does not restrict a court's lawful authority to require victim restitution, or otherwise address the relative priority of victim restitution and the defendant's means for reasonable living expenses and family obligations. Subsection (c) clarifies that a person who is eligible for appointed counsel under D.C. Code § 11-2601, whether or not such a person elects to proceed *pro se* or actually is represented by appointed counsel, shall not be subject to a fine under subsection (a). This change improves the clarity and proportionality of the revised statutes.

RCC § 22E-604(d) codifies a definition for "organizational defendant" that is currently undefined in the D.C. Code §§ 22-3571.01 and 22-3571.02. The Fine Proportionality Act fails to define any this term, and no case law is on point. The definition of "organizational defendant" is intended to broadly reach any non-individual person recognized by law and is modeled on a definition in the Federal Sentencing Guidelines.[8] This change improves the clarity and completeness of the revised statutes.

6.06(6) ("No economic sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.").

[6] 718 A.2d 558 (D.C. 1998). The DCCA held that, in the conceptually related arena of asset forfeiture, the Eighth Amendment poses *substantive limits* on financial sanctions. A salient fact in the DCCA's analysis was that the truck may have "played a significant role in the maintenance of [the defendant's] livelihood." *Id*. at 566.

[7] D.C. Code § 16-711 provides authority for requiring restitution or reparation and states in subsection (b) that, when ordered: "[T]he court shall take into consideration the number of victims, the actual damage of each victim, the resources of the defendant, the defendant's ability to earn, any obligation of the defendant to support dependents, and other matters as pertain to the defendant's ability to make restitution or reparation."

[8] U.S. Sentencing Guidelines Manual § 8A1.1 (2016). The Sentencing Guidelines in turn reference 18 U.S.C. § 18.

RCC § 22E-605. Charging and Proof of Penalty Enhancements.

Explanatory Note. RCC § 22E-605 sets certain procedural requirements for a penalty enhancement, whether a general penalty enhancement under RCC chapter 6 or any other penalty enhancement expressly specified by statute, to apply to an offense. Subsection (a) requires that notice of a penalty enhancement be provided in the information or indictment for the offense. Subsection (b) codifies the constitutional requirement[1] of proof beyond a reasonable doubt for the objective elements and culpable mental states specified in a penalty enhancement, excepting the ability of a court to take judicial notice of prior convictions if certain detailed procedures are followed under D.C. Code § 23-111.

Relation to Current District Law. Subsections (a) and (b) codify procedural requirements for penalty enhancements that the Supreme Court held to be constitutionally required in *Apprendi v. New Jersey* and subsequent case law. The subsections do not change current District law and provide improved clarity and notice of relevant limitations on penalty enhancements.

In 2000, the Supreme Court held in *Apprendi v. New Jersey* that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[2] The *Apprendi* decision was foreshadowed by the Court's earlier decision in *Jones v. United States*, which reasoned that: "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[3] The *Apprendi* rule has been called "[O]ne of the most important developments in sentencing law since the criminal procedure revolution of the mid-twentieth century,"[4] because of its widespread implications for penalty enhancements and other provisions. Subsequent constitutional jurisprudence in *Alleyne v. United States* clarified that the notice and standard of proof requirements in *Apprendi* also extend to facts that establish mandatory minimum penalties at sentencing[5] and increase fines.[6] However, facts concerning prior convictions are not subject to the notice and standard of proof requirements under longstanding tradition.[7]

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[1] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000), and subsequent case law.

[2] *Apprendi*, 530 U.S. at 490. Note, however, that jury findings are not necessary if the defendant consents to judicial factfinding. *Blakely v. Washington*, 542 U.S. 296, 310 (2004).

[3] *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999)).

[4] Wayne R. LaFave et al., Criminal Procedure § 26.4(i) (4th ed.).

[5] 133 S. Ct. 2151, 2155 (2013) ("Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury." (internal citation omitted)).

[6] *S. Union Co. v. United States*, 567 U.S. 343, 132 S. Ct. 2344, 2357 (2012).

[7] *Almendarez-Torres v. United States,* 523 U.S. 224, 243 (1998).

The DCCA has repeatedly recognized the *Apprendi* rule in the context of aggravating factors.[8] The DCCA has also recognized exception for facts concerning prior convictions,[9] and questions of law concerning the nature of prior convictions as crimes of violence.[10] Subsections (a) and (b) do not change this case law.

Currently, the D.C. Code does not contain a provision that broadly requires penalty enhancements to be alleged in the predicate offense's information or indictment, or establishes the standard of proof for penalty enhancement elements. D.C. Code § 23-111 addresses charging and standards of proof in the limited context of penalty enhancements that involve proof of prior convictions. However, subsections (a) and (b) and the provisions of D.C. Code § 23-111 are not in conflict. The charging requirement in subsection (a) is also imposed by D.C. Code § 23-111. Although D.C. Code § 23-111 provides greater procedural detail, those details supersede the more general requirement in subsection (a).[11] Similarly, the standard of proof requirement in subsection (b) explicitly allows for a lower standard of proof for the establishment of prior convictions as provided in D.C. Code § 23-111.[12]

[8] *See, e.g., Keels v. United States*, 785 A.2d 672, 687 (D.C. 2001) (aggravating factors in homicide sentencing).

[9] *See, e.g., Eady v. United States*, 44 A.3d 257, 261 (D.C. 2012); *Magruder v. United States*, 62 A.3d 720, 721–22 (D.C. 2013).

[10] *Dorsey v. United States*, 154 A.3d 106, 126 (D.C. 2017).

[11] The repeat offender penalty enhancement in RCC § 22E-606 explicitly recognizes the continued applicability of D.C. Code § 23-111. See Commentary to RCC § 22E-606 for more details.

[12] D.C. Code § 23-111 does not state that alleged facts concerning prior convictions must be proven beyond a reasonable doubt in all instances, but it does state that if a defendant denies any allegation in the information concerning a prior conviction the defendant shall file a response and the court shall hold a hearing on the issue. At the hearing, "the prosecuting authority shall have the burden of proof beyond a reasonable doubt on any issue of fact" except for claims that a conviction was obtained in violation of the Constitution of the United States—in which case the defendant "shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response."

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

Explanatory Note. *This section provides penalty enhancements for repeat offenders. To provide proportionate penalties, the penalty enhancements are differentiated according to the type of instant offense and prior convictions, as well as the number of prior convictions. The revised repeat offender penalty enhancement statute replaces the general repeat offender statutes[1] in the current D.C. Code.*

Paragraph (a)(1) specifies the requirement for application of a felony repeat offender penalty enhancement to be proof that the actor in fact presently commits a felony offense under Subtitle II (Offenses Against Persons) or an enhanced burglary offense. "In fact," a defined term in RCC § 22E-207, is used in paragraph (a)(1) to indicate that there is no additional culpable mental state for the current felony beyond what is otherwise required for proof of the felony. "Enhanced burglary offense" is a defined term in paragraph (f)(2).

Paragraph (a)(2) specifies that at the time the actor commits the felony, the actor must have at least one prior conviction of a specified type. The prior conviction or convictions must be for one or more felony offenses in Subtitle II (Offenses Against Persons) of Title 22E, an enhanced burglary offense or offenses, or a comparable offense or offenses. Further the prior conviction or convictions must be for an offense or offenses committed within 10 years of the current offense being enhanced and must not be committed on the same occasion as the offense being enhanced. Subtitle II includes murder, sex offenses, robbery, assaults, kidnapping, human trafficking, and almost all of the other most serious offenses in the entire D.C. Code.[2] The term "enhanced burglary offense" is a defined term in subsection (f)(2) and means enhanced first and enhanced second burglary under RCC § 22E-2701(a)-(b), (d)(4). Only one prior conviction for a felony in Subtitle II, an enhanced burglary offense, or a comparable offense is necessary for application of a felony repeat offender penalty enhancement. If there is more than one such conviction, there still can be only one application of a repeat offender penalty enhancement. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "in fact" in paragraph (a)(1) applies to each following element in paragraph (a)(2). "In fact," a defined term in RCC § 22E-207, is used in paragraph (a)(2) to indicate that there is no additional culpable mental state requirement as to the prior convictions or their circumstances.

The terms "felony," "prior conviction," and "comparable offense" are defined terms in RCC § 22E-701. A "felony" is an offense with an authorized penalty of over one year of imprisonment. "Prior conviction" broadly refers to final orders by District or other courts, with exclusions for juvenile delinquency adjudications, District convictions with pending diversion requirements or probation requirements under D.C. Code § 48-904.01(e), and convictions that have been vacated, sealed, expunged, commuted, or

[1] D.C. Code §§ 22–1804; 22–1804a.

[2] Felony offenses in Subtitle II of Title 22E include many offenses that are comparable to those currently deemed a "crime of violence" as defined in D.C. § 23–1331(4), except for property crimes of arson and burglary, which are not in Subtitle II. The felony offenses in Subtitle II of Title 22E include many additional offenses not in the current definition of "crime of violence" despite their direct and severe impact on complainants, such as human trafficking.

pardoned. "Comparable offense" broadly refers to a crime in the District or other jurisdiction with elements that would necessarily prove the elements of a corresponding District offense—here, a felony in Subtitle II of Title 22E or enhanced first and enhanced second burglary. The determination of whether another jurisdiction's statute (or an older District statute) is equivalent to a current District offense is a question of law.

Paragraph (b)(1) specifies the requirement for application of a misdemeanor repeat offender penalty enhancement to be proof that the actor in fact presently commits a misdemeanor offense under Subtitle II of Title 22E (Offenses Against Persons) "In fact," a defined term in RCC § 22E-207, is used in paragraph (b)(1) to indicate that there is no additional culpable mental state for the current misdemeanor beyond what is otherwise required for proof of the misdemeanor.

Paragraph (b)(2) specifies that at the time the actor commits the misdemeanor, the actor must either have at least two prior convictions for a misdemeanor in Subtitle II of Title 22E, or a comparable offense, or at least one prior conviction for a felony in Subtitle II of Title 22E, an enhanced burglary offense, or a comparable offense. Further the prior conviction or convictions must be for an offense or offenses committed within 10 years of the current offense being enhanced and must not be committed on the same occasion as the offense being enhanced. Subtitle II includes misdemeanor sex offenses, assaults, and other direct harms to persons. The term "enhanced burglary offense" is a defined term in subsection (f)(2) and means enhanced first and enhanced second burglary under RCC § 22E-2701(a)-(b), (d)(4). Only two prior convictions for a misdemeanor offense in Subtitle II or a comparable offense, or one prior conviction for a felony in Subtitle II, an enhanced burglary offense, or a comparable offense, is necessary for application of a misdemeanor repeat offender penalty enhancement. If there is more than two such misdemeanor convictions or one such felony conviction, there still can be only one application of a repeat offender penalty enhancement. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "in fact" in paragraph (b)(1) applies to each following element in paragraph (b)(2). "In fact," a defined term in RCC § 22E-207, is used in paragraph (a)(2) to indicate that there is no additional culpable mental state requirement as to the prior convictions or their circumstances.

The terms "misdemeanor," "prior conviction," and "comparable offense" are defined terms in RCC § 22E-701. A "misdemeanor" is an offense with an authorized penalty of one year or less of imprisonment. "Prior conviction" broadly refers to final orders by District or other courts, with exclusions for juvenile delinquency adjudications, District convictions with pending diversion requirements or probation requirements under D.C. Code § 48-904.01(e), and convictions that have been vacated, sealed, expunged, commuted, or pardoned. "Comparable offense" broadly refers to a crime in the District or other jurisdiction with elements that would necessarily prove the elements of a corresponding District offense—here, any misdemeanor in Subtitle II of Title 22E, or , a felony in Subtitle II of Title 22E or enhanced first and enhanced second burglary. The determination of whether another jurisdiction's statute (or an older District statute) is equivalent to a current District offense is a question of law.

Subsection (c) states that the procedural requirements of D.C. Code § 23-111, regarding the establishment of prior convictions, continue to apply to RCC § 22E-606. D.C. Code § 23-111 specifies the manner in which the government must provide notice of the prior convictions to be relied upon for a penalty enhancement, as well as hearing

procedures should a defendant either deny an alleged prior conviction or claim that the alleged prior conviction was unlawfully obtained.

Subsection (d) specifies the nature and extent of the punishments for the felony and misdemeanor repeat offender penalty enhancements.

Paragraph (d)(1) specifies the additional imprisonment penalty and fine for a felony repeat offender penalty enhancement. The additional authorized penalty depends on the classification of the current offense and is: for a Class 1 or Class 2 offense is 6 years and $50,000; for a Class 3 or Class 4 felony, 4 years and $40,000; for a Class 5 or Class 6 felony, 2 years and $30,000; for a Class 7 or Class 8 felony, 1 years and $20,000; and for a Class 9 felony, 180 days and $10,000.

Paragraph (d)(2) specifies the additional imprisonment penalty and fine for a misdemeanor repeat offender penalty enhancement. The additional authorized penalty depends on the classification of the current offense and is: for a Class A or Class B misdemeanor, 60 days and $500; for a Class C, Class D, or Class E misdemeanor, 10 days and $50.

Subsection (e) specifies that application of an enhancement under this section is in addition to, and does not bar, application of any other penalty enhancements specified in Chapter 6 or elsewhere in the Title 22E. Also, in calculating the class of the offense under subsection (d), the penalty class of the unenhanced offense is to be used.[3]

Subsection (f)(1) cross-references the RCC § 22E-207 standard definition of "in fact," and the RCC § 22E-701 standard definitions of "comparable offense," "felony," "misdemeanor," and "prior conviction." Subsection (f)(2) defines the term "enhanced burglary offense" to mean, in this section, enhanced first and enhanced second burglary under RCC § 22E-2701(a)-(b), (d)(4).

Relation to Current District Law. *The RCC repeat offender penalty enhancement statute changes current District law in twelve main ways.*

These changes to current District law are chiefly a result of the fact that the revised statute divides the penalty enhancement into two gradations based on the current offense's seriousness and general nature (i.e. whether the offense is a felony or misdemeanor offense against persons in Subtitle I of Title 22E, enhanced burglary offense, or a comparable offense), and the number, seriousness, and general nature of prior convictions. These changes to current District law generally reflect a modest expansion in liability for prior offenses against persons, elimination of repeat offender liability for non-violent offenses and consideration of non-violent offenses as relevant to this enhancement, and a sharp reduction in the authorized punishments for all repeat offender enhancements. The changes eliminate the three-strikes life without possibility of release punishment under D.C. Code § 22-1804a(a)(2).

[3] For example, consider a person who commits offense fourth degree assault under RCC § 22E-1202(d) and that offense is subject to enhancement under RCC § 22E-1202(h)(7) for being against a protected person and under RCC § 22E-608 for being a hate crime. If a repeat offender penalty enhancement is also applied, the calculation would be based on the class of the unenhanced fourth degree assault—not, on the offense classification after application of enhancements in RCC § 22E-1202(h)(7) and/or RCC § 22E-608.

Currently, the D.C. Code contains two separate repeat offender penalty enhancements, each with two penalty gradations, for a total of four gradations. D.C. Code § 22-1804 creates two gradations based on whether the defendant had one, or more than one, prior conviction, but the prior convictions must have been for an offense that "is the same as, constitutes, or necessarily includes" the instant offense. Thus, D.C. Code § 22-1804 does not grade according to the seriousness (misdemeanor or felony) of the current offense or prior convictions, or the nature of the offense (e.g., an offense against persons). Rather, D.C. Code § 22-1804 grades solely on the number and specific nature of the prior conviction (for the same or nearly same kind of offense). A different approach is taken in current D.C. Code § 22-1804a, which grades its penalty enhancement on the seriousness of the current offense and prior convictions (felonies), the number of prior convictions (two or more), and whether the prior convictions were for a "crime of violence."[4] The current penalty enhancement statutes overlap with each other to the extent that they both are applicable to felonies (including crimes of violence) where the prior convictions are the same or nearly same kind as the instant offense.[5] Nothing in the statutory language for either current D.C. Code §§ 22-1804 or 22-1804a prevents "stacking" both penalty enhancements.[6]

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[4] "Crime of violence" is a defined term in D.C. Code § 22-1804a which refers to the definition in D.C. Code § 22–4501, which in turn refers to D.C. Code § 23–1331(4). The definition of "crime of violence" in D.C. Code § 23–1331(4) includes many (but not all) crimes comparable to felony offenses against persons in the RCC, as well as some crimes comparable to property crimes in the RCC.

[5] For example, consider a person who commits first degree fraud under current D.C. Code § 22-3222(a) for stealing property by deception worth more than $1,000, and has three prior convictions for first degree fraud not committed on the same occasion. That person appears to be subject to both the repeat offender provision of D.C. Code § 22-1804 (because the prior convictions were the same as the current offense) and D.C. Code § 22-1804a(a)(1) (because the person committed two prior felonies not on the same occasion). Each enhancement involves proof of a fact not required by the other, and the limitation in D.C. Code § 22-1804(b) regarding stacking with a "provision of law which provides an increased penalty for a specific offense by reason of a prior conviction" does not apply to D.C. Code § 22-1804a because it is not concerned with a specific offense. Consequently, whereas first degree fraud is currently subject to up to 10 years imprisonment, the enhancement under D.C. Code § 22-1804 would treble that amount to 30 years, and D.C. Code § 22-1804a would enhance the statutory maximum another 30 years. Stacked, the enhancements would raise the penalty to 60 years for first degree fraud with three prior first degree fraud convictions.

[6] In general, a legislature can impose cumulative punishments, through multiple statutes, for the same conduct. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Thus, if a defendant were convicted of first-degree burglary and that defendant had two prior convictions for first-degree burglary, then that defendant may be subject to both the enhancement in D.C. Code §§ 22-1804 and 22-1804a. But, where the legislative intent to impose cumulative punishments is unclear, there may be litigation challenging the cumulative punishments under the Double Jeopardy Clause. *See, e.g., Whalen,* 445 U.S. at 687. Notably, the legislative history is silent as to the issue of stacking of the overlapping repeat offender

First, in contrast to current District law, the revised repeat offender penalty enhancement is structured as one statute that precludes "stacking" repeat offender penalties with other repeat offender penalties (the application of multiple repeat offender penalty enhancements). Under the revised statute, subsection (a) applies only to felonies and subsection (b) applies only to misdemeanors. This change improves the clarity and proportionality of the revised statutes.

Second, in contrast to current District law, the revised felony repeat offender penalty enhancement narrows liability by providing an enhancement only when the instant offense is an offense against persons in Subtitle II of Title 22E or an enhanced burglary offense. For example, a theft charge is not subject to the repeat offender penalty enhancement because it is not an offense in Subtitle II. While burglary may be a felony crime, it does not require injury to people—and where burglary involves infliction of bodily injury or some other harm of a person (e.g., threats, sexual harms), those charges may be brought and, as charges in Subtitle II, they are subject to this enhancement as currently drafted. Consequently, the revised statute includes only the most serious burglary charges, enhanced first degree and enhanced second degree burglary, involving entry into a building or dwelling with a dangerous weapon and intent to commit a specified crime. This change improves the proportionality of the revised statutes.

Third, in contrast to current District law, the revised felony repeat offender penalty enhancement expands liability somewhat by providing an enhancement when a person has only one prior conviction for any felony in Subtitle II of Title 22E or an enhanced burglary offense (not just for a crime that has the same elements or a crime that necessarily includes the current offense[7]). For example, under the revised statute, a person who commits a sex assault under RCC § 22E-1301 and has a single prior conviction for kidnapping under RCC § 22E-1401 would be subject to the felony repeat offender enhancement provision. This change improves the proportionality of the revised statutes.

Fourth, in contrast to current District law, the revised misdemeanor repeat offender penalty enhancement expands liability somewhat by providing an enhancement when a person has two or more prior convictions for any misdemeanor in Subtitle II of Title 22E (not just for a crime that has the same elements or a crime that necessarily includes the current offense[8]). For example, under the revised statute, a person who commits a fourth degree assault that causes bodily injury to a protected person under RCC § 22E-1301 and has two prior convictions for committing first degree criminal threats under RCC § 22E-1204 would be subject to the misdemeanor repeat offender enhancement provision. This change improves the proportionality of the revised statutes.

Fifth, in contrast to current District law,[9] the revised repeat offender penalty enhancement (felony and misdemeanor) expands liability for prior convictions that were

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enhancements in D.C. Code § 22-1804 and D.C. Code § 22-1804a which were established by Congress in 1971. *See, e.g.,* H.R. REP. NO. 907, 91st Cong., 2d Sess. 73-74 (1970).

[7] *Compare with* D.C. Code § 22-1804.

[8] *Compare with* D.C. Code § 22-1804.

[9] D.C. Code § 22-1804 is limited to prior convictions under "a criminal offense under any law of the United States or of a state or territory of the United States," and D.C. Code § 22-1804a refers to a conviction by "a court of the District of Columbia, any state, or the United States or its territories."

adjudicated by courts of federally-recognized Indian tribes. For example, a conviction for an assault adjudicated by the Navajo Nation may be a prior conviction under the revised statute. This change updates District law in line with the recent Supreme Court opinion in *United States v. Bryant,*[10] recognizing that convictions of federally recognized Indian tribes which are subject to the Indian Civil Rights Act (ICRA) of 1968[11] could be used as prior convictions under the federal repeat offender law there at issue.[12] This change fills a possible gap in the revised statutes.

Sixth, in contrast to current District law, except for prior convictions for a felony offense against persons in Subtitle II of Title 22E or an enhanced burglary offense, the revised misdemeanor repeat offender penalty enhancement eliminates liability for having just one prior conviction that has the same elements or a crime that necessarily includes the current offense. For example, under the revised statute, a person who commits a misdemeanor third degree criminal threat and has a single prior conviction for a third degree criminal threat would not be subject to any repeat offender penalty enhancement. This change improves the proportionality of the revised statutes.

Seventh, in contrast to current District law the revised repeat offender penalty enhancement (felony and misdemeanor) eliminates liability for prior convictions of offenses that occurred over 10 years ago.[13] For example, under the revised statute, a person who commits fraud under RCC § 22E-2201 and has two prior convictions for assault committed over 10 years ago would not be subject to any repeat offender penalty enhancement. The current D.C. Code repeat offender provisions do not have any time limitation and can be applied decades after the prior conviction. This change improves the proportionality of the revised statutes.

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[10] *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016), *as revised* (July 7, 2016).
[11] 25 U.S.C.A. § 1302.
[12] 18 U.S.C. § 117.
[13] Research suggests both a low incidence of recidivism after a 7 year gap. *See* Richard S. Frase, *Criminal History Sentencing Enhancements Imprison Too Many Aging, Low-Risk Offenders* (September 20, 2017), online at https://sentencing.umn.edu/content/criminal-history-sentencing-enhancements-imprison-too-many-aging-low-risk-offenders (last visited 2/1/2021) *citing* Piquero, Alex R., David Farrington, and Alfred Blumstein, *Key Issues in Criminal Career Research*, Cambridge University Press (2007). Notably, there is a significant drop-off in public support for increasing sentences based on prior convictions as the priors are more than 10 years or so old. *See* Julian Roberts, *Public Attitudes Regarding Look-Back Limits: Findings from New Robina Institute Research* (September 20, 2017), online at https://sentencing.umn.edu/content/public-attitudes-regarding-look-back-limits-findings-new-robina-institute-research (last visited 2/1/2021) (Reviewing results of a public opinion survey and stating: "The most significant finding is that in the eyes of the public, older prior convictions carry less weight than more recent priors: the public was less punitive when the prior crime was older. In addition, there was substantial public support for look-back limits on counting prior convictions. Two-thirds of respondents were in favour of a policy that restricted judges from considering old offenses, and of those, three quarters believed the time limit should be set at ten years or less.").

Eighth, in contrast to current District law,[14] the revised repeat offender penalty enhancement (felony and misdemeanor) eliminates liability for prior convictions based on conduct on the same occasion as one another. For example, under the revised statute, a person who commits a bodily injury fourth degree assault crime and has two prior convictions, one a state charge and the other a federal charge arising out of the same occasion as one another, would not be subject to any repeat offender penalty enhancement. While current D.C. Code § 22–1804a doesn't count more than one prior conviction based on the same occasion, D.C. Code § 22–1804 does count multiple convictions arising from the same occasion. This change improves the proportionality of the revised statutes.

Ninth, in contrast to current District law, the revised repeat offender penalty enhancement (felony and misdemeanor) eliminates liability for prior convictions that were juvenile delinquency adjudications, prior convictions subject to diversion or probation under D.C. Code § 48-904.01(e), convictions that were vacated, sealed, or expunged, and convictions that were pardoned.[15] For example, a person who commits a misdemeanor offense under Subtitle II of Title 22E and has only one prior conviction for a misdemeanor offense under Subtitle II of Title 22E which was sealed, would not be subject to any repeat offender penalty enhancement. This change improves the proportionality of the revised statutes.

Tenth, in contrast to current District law, the revised felony repeat offender penalty enhancement eliminates liability for prior convictions that were felonies or crimes of violence in another jurisdiction or under prior District law, but not under current District law.[16] For example, a person who engages in pickpocketing and receives a felony

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[14] D.C. Code § 22-1804a excludes multiple prior felonies or crimes of violence "committed on the same occasion." D.C. Code § 22-1804, however, has no limitations regarding the prior convictions occurring "on the same occasion."

[15] Neither D.C. Code §§ 22-1804 nor 22-1804a limit application in these circumstances, though both statutes specifically exclude prior convictions that were "pardoned."

[16] The plain language of D.C. Code § 22-1804a(b)(1) refers simply to being "convicted of a felony by a court of the District of Columbia, any state, or the United States or its territories," without any limitation as to whether the felony in the other jurisdiction would count as a felony under current District law. While jurisdictions may vary on what crimes constitute felonies and misdemeanors, for most offenses and jurisdictions there is a consistent differentiation between misdemeanors and felonies based solely on whether the imprisonment penalty is over one year. However, the meaning of a "crime of violence" in another jurisdiction is unclear and the meaning of the current D.C. Code § 22-1804a(b)(2) is arguably ambiguous when it requires that a person "was convicted of a crime of violence as defined by § 22-4501, by a court of the District of Columbia, any state, or the United States or its territories." This language may be construed to mean that a conviction for any crime in another jurisdiction, regardless of its elements, is a "crime of violence" conviction if it has the label of "burglary" or one of the other enumerated "crimes of violence" in the D.C. Code. Alternatively, it may be that a conviction in another jurisdiction that has the same elements as "burglary" in the D.C. Code, but has a different name, would still be considered a predicate "crime of violence" for purposes of D.C. Code § 22-1804a(b)(2). Given the ambiguity of the current D.C. Code § 22-1804a(b)(2), the revised felony repeat

conviction in another jurisdiction for a "robbery" that does not meet the requirements for robbery under RCC § 22E-1201 or any other felony in Subtitle II of Title 22E, would not be subject to a felony repeat offender penalty enhancement based on that prior conviction because it would not be a "comparable offense." This change requires prior convictions that are used for the revised repeat offender penalty enhancement to meet the requirements of current District laws and excludes convictions based on lower standards.[17] This change improves the proportionality of the revised statutes.

Eleventh, in contrast to current District law, the revised repeat offender penalty enhancement eliminates a "three strikes" penalty of life imprisonment without release and authorizes an increase in penalty that is significant but generally less than half the penalty otherwise applicable to the current offense. This change is consistent with the District's ongoing reliance on prior convictions to determine punishments within the statutorily-authorized range. This change improves the proportionality of the revised statutes.

Twelfth, in contrast to current District law, the revised repeat offender penalty enhancement is not classified as a "Class A" offense for purposes of imprisonment following revocation of release. Current D.C. Code § 22–1804a(a)(3) provides that any felony enhanced under that statute is a "Class A" felony for purposes of imprisonment following revocation of release authorized by § 24-403.01.[18] However, under the RCC there are no designated Class A offenses.[19] This change improves the proportionality of the revised statutes.

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offender enhancement's requirements for a "comparable offense" may be viewed as a possible, rather than a clear, change in law.

[17] For example, theft of $200 would constitute a felony in the Commonwealth of Virginia punishable by one to twenty years imprisonment (Va. Code § 18.2-95), but under the current D.C. Code would constitute a misdemeanor in the District punishable by up to 180 days (D.C. Code § 22-3212).

[18] D.C. Code § 22–1804a(a)(3) ("For purposes of imprisonment following revocation of release authorized by § 24-403.01, the third or subsequent felony committed by a person who had previously been convicted of 2 prior felonies not committed on the same occasion and the third or subsequent crime of violence committed by a person who had previously been convicted of 2 prior crimes of violence not committed on the same occasion are Class A felonies.").

[19] *See* RCC § 24-403.01 and associated commentary.

RCC § 22E-607. Pretrial Release Penalty Enhancement.

Explanatory Note. *RCC § 22E-607 provides a penalty enhancement for offenses committed while on pretrial release under D.C. Code § 23-1321. The revised Pretrial release penalty enhancement statute replaces the penalty enhancement for offenses committed during release (OCDR) statute*[1] *in the current D.C. Code.*

Subsection (a) specifies the requirement for application of a pretrial release penalty enhancement to be proof that the actor in fact commits an offense and, at the time the actor commits the offense, the actor is on pretrial release under D.C. Code § 23-1321. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "in fact" in subsection (a) applies to each following element in subsection (a). "In fact," a defined term in RCC § 22E-207, is used in subsection (a) to indicate that there is no additional culpable mental state for the current offense beyond what is otherwise required for proof of the offense, and no culpable mental state requirement as to the fact that the actor is on pretrial release under D.C. Code § 23-1321.

Subsection (b) specifies offenses to which the pretrial release penalty enhancement does not apply. Paragraph (b)(1) provides that the enhancement does not apply to contempt, tampering with a detection device under 22E-3402(a)(1)(B) (which specifically addresses detection devices worn pretrial), or a violation of a condition of release under D.C. Code § 23-1329. Paragraph (b)(2) provides that the enhancement does not apply to any offense when the person is convicted of contempt, escape from a Correctional Facility or Officer under RCC § 22E-3401(c), tampering with a detection device under RCC § 22E-3402, or a violation of a condition of release under D.C. Code § 23-1329 for the same conduct.

Subsection (c) specifies the nature and extent of the punishments for the pretrial release penalty enhancement. Subsection (c) specifies the additional imprisonment penalty and fine an actor is subject to for the enhancement, which depends on the classification of the current offense. The additional authorized penalty for commission of a Class 1 or Class 2 offense is 6 years and $50,000; for a Class 3 or Class 4 felony, 4 years and $40,000; for a Class 5 or Class 6 felony, 2 years and $30,000; for a Class 7 or Class 8 felony, 1 years and $20,000; for a Class 9 felony, 180 days and $10,000; for a Class A or B misdemeanor, 60 days and $500; for a Class C, Class D, or Class E misdemeanor, 10 days and $50.

Subsection (d) specifies that application of an enhancement under this section is in addition to, and does not bar, application of any other penalty enhancements specified in Chapter 6 or elsewhere in the Title 22E. Also, in calculating the class of the offense under subsection (c), the penalty class of the unenhanced offense is to be used.[2]

Subsection (e) cross-references the RCC § 22E-207 standard definition of "in fact,"

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[1] D.C. Code § 23–1328. Notably, although the language of D.C. Code § 23-1328 has led to confusion by some as to whether OCDR is a separate offense or a penalty enhancement, the DCCA has clearly ruled that OCDR is a penalty enhancement. *See Tanismore v. United States*, 355 A.3d 799, 803 (D.C. 1979).

[2] For example, consider a person who commits offense fourth degree assault under RCC § 22E-1202(d) and that offense is subject to enhancement under RCC § 22E-1202(h)(7) for being against a protected person and under RCC § 22E-608 for being a hate crime. If a pretrial release penalty enhancement is also applied, the calculation would be based on the class of the unenhanced fourth degree assault—not, on the offense classification after application of enhancements in RCC § 22E-1202(h)(7) and/or RCC § 22E-608.

and the RCC § 22E-701 standard definitions of "actor," "felony," and "misdemeanor."

Relation to Current District Law. *The RCC pretrial release penalty enhancement changes current District law in three main ways.*

First, the revised pretrial release penalty enhancement penalties vary by the particular penalty classification of the current offense, authorizing more severe fine and imprisonment punishment for committing a more severe offense during pretrial release. Current D.C. Code § 23-1329(a) grades the offense by whether the current offense is a felony (subject to up to 5 years additional imprisonment) or a misdemeanor (subject to up to 180 days additional imprisonment), with fines dependent on a more precise breakdown of the length of imprisonment penalty specified in D.C. Code § 22-3571.01. In contrast, the revised statute specifies six different penalties, imprisonment and fine, based on the penalty classification of the offense committed during release. This change improves the proportionality of the revised statutes.

Second, a revised pretrial release penalty enhancement penalty may be set to run consecutive or concurrent to any other sentence. Current D.C. Code § 23-1329(c) requires that any term of imprisonment for OCDR be consecutive to any other imprisonment. In contrast, the revised statute allows judges to decide whether a consecutive sentence is appropriate. This change improves the proportionality of the revised statutes.

Third, the revised pretrial release penalty enhancement expressly bars application of the enhancement to certain listed crimes or any offense when a person is also convicted of one of the listed crimes. Current D.C. Code § 23-1329 has no prohibitions on what offenses can be enhanced. In contrast, the revised statute bars use of the enhancement in relation to several offenses dealing with violation of judicial orders while on release—contempt under D.C. Code § 11-741, escape from a Correctional Facility or Officer under RCC § 22E-3401(c), tampering with a detection device under RCC § 22E-3402, or violation of a condition of release under D.C. Code § 23-1329—or any offense when a person is also convicted of one of these crimes. When a defendant commits an offense while on pretrial release, in virtually every such case a defendant is also subject to the separate but overlapping crimes of violating a condition of release[3] and the general offense of contempt of court[4] for the same conduct based on the practice of prohibiting criminal activity as a condition of release.[5] Also, the tampering with a detection device offense under RCC § 22E-3402(a)(1)(B) specifically refers to the conduct occurring during pretrial release, and escape from a correctional facility or officer under RCC § 22E-3401(c) covers persons in a half-way house pretrial. The subsection (d) limitation preserves existing charging options and does not affect in any manner liability for the contempt offense in Title 11,[6] but reduces the practical effect of the overlapping statutes.[7] This change improves the clarity and proportionality of the revised statutes.

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[3] D.C. Code § 23-1329.

[4] D.C. Code § 11-944.

[5] *See Speight v. United States*, 569 A.2d 124, 127 (D.C. 1989) (en banc).

[6] Under the Home Rule Act, the District lacks the ability to legislate changes to Title 11 provisions.

[7] The DCCA has shown great reluctance toward punishing these overlapping offenses separately. *See Speight*, 569 A.2d at 130-31 (narrow concurring opinion forming the en banc plurality relied upon underlying violation of a condition of release to uphold OCDR liability).

Beyond these three substantive changes to current District law, one other aspect of the revised criminal abuse of a minor statute may be viewed as a substantive change of law.

The revised statute, in conjunction with RCC § 22E-605, specifies that the fact that the actor was on pretrial release at the time of the offense is a circumstance element that must be proven beyond a reasonable doubt. Current D.C. Code § 23-1329 is silent as to whether OCDR requires proof beyond a reasonable doubt as to the status of being on pretrial release. The DCCA has twice recognized in recent years that the constitutional protections described in *Apprendi* may apply to OCDR but declined to resolve the question.[8] In contrast, the revised statute requires proof beyond a reasonable doubt as to the actor's pretrial release status at the time of the offense. By requiring proof beyond a reasonable doubt, the revised OCDR offense moots the question whether proof is required under *Apprendi*. This statutory clarification of the burden of proof is consistent with pre-*Apprendi* DCCA case law that previously recognized that the prosecution has the burden of proof for showing a defendant was on release at the time he committed the second offense.[9] Consistent with DCCA case law, however, at trial, a defendant may stipulate as to the fact that the actor was on pretrial release at the time of an offense in order to avoid potentially prejudicial evidence being brought to bear in a case.[10] This change clarifies and fills a possible gap in the revised statutes.

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

The revised statute clarifies that no culpable mental state is required as to the actor's status on being on pretrial release. Current D.C. Code § 23-1329 is silent as to what, in any culpable mental states are required for the offense, but subsection (b) of the current statute expressly states that: "The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to the application of this section." The revised statute eliminates this provision as unnecessary, particularly because the revised statute specifies there is no culpable mental state requirement.

[8] *Williams v. United States*, 137 A.3d 154, 164 (D.C. 2016); *Eady v. United States,* 44 A.3d 257, 265 (D.C. 2012).
[9] *Tansimore*, 355 A.2d at 804.
[10] *Williams v. United States*, 137 A.3d 154, 164 (D.C. 2016).

RCC § 22E-608. Hate Crime Penalty Enhancement.

Explanatory Note. *This section establishes the hate crime penalty enhancement for the Revised Criminal Code (RCC). This general penalty provides a penalty enhancement where the defendant committed the offense because of prejudice against certain perceived attributes of the target. The hate crime penalty enhancement provides additional punishment based on the nature of a person's criminal action, consistent with rulings of the Supreme Court and D.C. Court of Appeals.*[1] *The revised hate crime penalty enhancement replaces the bias-related crime statute definition and penalty provisions*[2] *in the current D.C. Code.*

Subsection (a) first requires a person to have committed all the elements of a predicate offense as elsewhere defined in Title 22E, including any culpable mental states required for the predicate offense. Any offense to which the general provisions in Subtitle I of Title 22E apply is subject to this penalty enhancement, whether a misdemeanor or felony, or an offense against persons, a property offense, or otherwise. The penalty enhancement also is applicable to inchoate offenses in Title 22E (including attempts and conspiracies).

Subsection (a) also requires the predicate offense to have been committed with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to another person or group of persons. The terms "pecuniary loss" and "property" are defined terms in defined at RCC § 22E-701. "Purpose," a term defined at RCC § 22E-206, here means that the actor must consciously desire to threaten, physically harm, etc. the person or group of persons. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Consequently, it is not necessary to prove that the actor succeeded in threatening, physically harming, etc. the person or group of persons, and the predicate offense may involve a complainant mistakenly harmed by the actor.[3]

Subsection (a) clarifies through use of the phrase "in whole or part" that the actor's conscious desire to threaten, physically harm, etc. need not have been the sole or primary reason for the conduct.[4] However, the conscious desire to threaten, physically harm, etc.

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[1] *Wisconsin v. Mitchell,* 508 U.S. 476 (1993); *Burrage v. United States*, 571 U.S. 204 (2014); *Lucas v. United States*, 240 A.3d 328 (D.C. 2020).

[2] D.C. Code §§ 22-3701, 22-3703.

[3] For an example of a mistake, consider a person who throws a bottle at a person with the purpose of harming the person because of their race. If the bottle misses the target person and instead strikes and causes bodily injury to a person passing by, and the actor was reckless as to the bottle hitting the person passing by, then the assault charge against the passerby is subject to the hate crime penalty enhancement even though the complainant was not the target of the prejudiced action. (In addition, an attempted assault charge against the target also would be subject to a hate crime penalty enhancement under this fact pattern.)

[4] For example, the prejudiced desire to intimidate the complainant because of their religion may have been in addition to an intent to obtain money from the complainant by robbery or because of a prior slight by the complainant. *See Lucas v. United States,* 240 A.3d 328,

must have been "because of" one of the specified types of prejudice, meaning the prejudice was a "but for"[5] cause of the actor's desire. Engaging in conduct that harms a person because of that person's sex or other characteristic does not suffice for the enhancement unless *prejudice* against the person was a but-for cause of the actor's motive. For example, a burglar who targets the homes of elderly persons not out of prejudice against the elderly, but because of a belief that these homes were most likely to have expensive medications that could be stolen, would not be subject to a hate crime penalty enhancement.

Subsection (a) further requires the prejudice against another that is a cause of the actor's conduct be against the perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression of a targeted person or group of persons. Mistakes as to the actual existence of the race, color, religion, or other protected attribute do not limit liability as it is the actor's perception of the protected attribute that matters. In addition, the complainant harmed by actor's conduct may be chosen despite the actor's awareness that the complainant does not themselves possess one of the protected attributes.[6] The complainant who experiences the offense, the target of the harm, and the person or group of persons against whom the actor is prejudiced also need not be a particular identifiable person for the hate crime penalty enhancement to apply.[7] All that is required regarding the person or group of persons is that the actor's conduct is committed because of prejudice against the perceived race, color, etc. of a person or group of persons.

Subsection (a), through the requirement that the offense be "with the purpose", excludes liability based on unconscious[8] bias and other circumstances where the actor does

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342 (D.C. 2020) ("Bias need not be the sole cause, or even the primary cause. And it may interact with several other causes in causing the end result.").

[5] For further details of the meaning of "but for" causation, see RCC § 22E-204(b) and associated commentary. *See also Lucas v. United States,* 240 A.3d 328 (D.C. 2020); *United States v. Miller*, 767 F.3d 585, 592 (6th Cir. 2014) (stating that any lesser causation standard "treads uncomfortably close to the line separating constitutional regulation of conduct and unconstitutional regulation of beliefs").

[6] For example, a hate crime penalty enhancement is applicable to an actor who destroys the office of a lawyer representing a political party when the actor's purpose was to engage in criminal damage to the property in part because of prejudice against the perceived political affiliation of the lawyer's client.

[7] For example, if other requirements are proven regarding the purpose to cause harm because of prejudice against others, it would suffice for liability that the actor painted graffiti on a church, mosque, or synagogue without understanding or desiring that the conduct would affect any particular person who is a member of that church, mosque, or synagogue.

[8] For example, while it may be relevant to the question whether a person acted with the purpose to harm another because of their prejudice against those of the opposite gender, it may not be sufficient to prove through testing (see e.g., https://implicit.harvard.edu/implicit/) that the actor is implicitly biased against another gender.

not consciously desire to cause a harm because of their prejudice against another.[9] The revised statute also requires that the actor to have a "prejudice against" a target, precluding liability for action because of positive biases.

Subsection (b) establishes that the effect of the penalty enhancement is an increase of one class to the predicate offense's otherwise applicable penalty classification except, for Class 1 offense, the authorized term of imprisonment and fine for an offense increases by 6 years and $50,000.

Subsection (c) specifies that application of an enhancement under this section is in addition to, and does not bar, application of any other penalty enhancements specified in Chapter 6 or elsewhere in the Title 22E.

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

Relation to Current District Law. *The RCC hate crimes penalty enhancement statute changes current District law for bias-related crimes in four main ways.*

First, the revised statute bases liability for the hate crime penalty enhancement on the subjective intent and personal prejudice of the actor when committing a crime. Under current D.C. Code § 22-3701(1), there is only an objective standard of whether there is a "designated act [crime] that demonstrates an accused's prejudice," with no express culpable mental state requirement for any aspect of the enhancement. Case law has not addressed whether the current statute has any subjective requirement that the actor be aware of their reasons for committing the crime. In contrast, the revised statute requires the actor to consciously desire—at least to some degree—that the crime harm the target person or persons because of prejudice. The revised statute does this by requiring proof that a crime was committed "with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to another person or group of persons because of prejudice…". "Purposely" is a defined term in the RCC[10] meaning the actor must consciously desire that the harm occur because of their prejudice. Applying at least a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[11] and insofar as the statute addresses a motive for criminal conduct it is the actor's desire (not knowledge as to their internal state) that is relevant. The approach of the revised statute avoids challenges to the statute's constitutionality that may arise under the current statute's purely objective requirement that a designated act merely "demonstrate"

[9] For example, consider a straight person who knows that he has a prejudice against gay people and is aware another person is gay. If the straight person then assaults the gay person because the latter is an Astros fan, the straight person is not subject to liability under the revised statute unless the factfinder determines that, at least in part, the assaultive conduct was committed with the conscious desire to harm the complainant because of their sexual orientation.

[10] RCC § 22E-206.

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

prejudice.[12] This change improves the clarity, completeness, and constitutionality of the revised statutes.

Second, the revised statute extends liability for the penalty enhancement in some situations to harms to a complainant who is not themselves perceived to have (or does not actually have) one of the protected characteristics. Under current D.C. Code § 22-3701, the penalty enhancement applies to a crime that "demonstrates the accused's prejudice based on the actual or perceived race…of a victim of the subject [crime]". While there is no case law on point, the plain language of the current statutory text appears to require the prejudice be based on a characteristic of the complainant. In contrast, the revised statute permits application of the penalty enhancement when the complainant of the predicate offense is not the person possessing the attribute that is the subject of the actor's prejudice—so long as the actor's criminal conduct results from the actor's desire to threaten, physically harm, etc. because of a specified type of prejudice against anyone (e.g., a third party). This change allows the hate crime penalty enhancement to apply to crimes which are motivated by one of the specified types of prejudice but the person who experiences the harm is a third party.[13] This change fills a possible gap in liability in the revised statute.

Third, the revised statute eliminates liability for relevant conduct in connection with prejudice based on marital status, personal appearance, family responsibility, and matriculation. Under current D.C. Code § 22-3701, the penalty enhancement applies to prejudice based on these four characteristics, as well as more traditional protected characteristics such as race, color, religion, national origin, and gender. The list of protected characteristics in the current bias-related crime statute tracks the list of characteristics protected under District civil law in the areas of employment, housing, etc.[14] In contrast, the revised statute applies to prejudice concerning a more limited list of characteristics, omitting marital status, personal appearance, family responsibility, and matriculation. While any prejudice based on the omitted characteristics is condemnable, in practice, criminal action in connection with these four matters may be more rare[15] and be difficult to distinguish from individual dislikes and hatred (as compared to a categorical prejudice against an identifiable class). The omission of these characteristics as separate, independent bases of liability for the hate crimes penalty enhancement does not preclude

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[12] *See State v. Pomianek*, 110 A.3d 841, 843 (2015) ("We hold that N.J.S.A. 2C:16–1(a)(3) [N.J. bias enhancement], due to its vagueness, violates the Due Process Clause of the Fourteenth Amendment. In focusing on the victim's perception and not the defendant's intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law. That is so because a defendant may be convicted of a bias crime even though a jury may conclude that the defendant had no intent to commit such a crime.").

[13] For example, a hate crime penalty enhancement is applicable to an actor who destroys the office of a politically unaffiliated lawyer representing a political party when the actor's purpose was to engage in criminal damage to the property in part because of prejudice against the perceived political affiliation of the lawyer's client.

[14] *See, e.g.,* D.C. Code § 2-1401.11 (employment prohibitions).

[15] In recent years, MPD has no record of crimes based on these types of prejudice, in contrast to other types. *See* https://mpdc.dc.gov/hatecrimes.

their evidentiary value in proving another characteristic that is recognized in the revised statute.[16] This change improves the clarity and proportionality of the revised statutes.

Fourth, the effect of the revised hate crime penalty enhancement is to raise by one class the penalty classification of the predicate offense to which the actor is otherwise subject, except, for Class 1 offense, the authorized term of imprisonment and fine for an offense increases by 6 years and $50,000. Under current D.C. Code § 22-3701 the effect of the enhancement is to raise the fine and imprisonment penalties by one and one-half times. In contrast, the revised statute generally utilizes the standardized set of penalty classifications in RCC §§ 22E-603 and 22E-604 to provide more severe, proportionate enhancement penalties. As there is no higher class than Class 1, this provides a penalty increase equal to that of the RCC repeat offender and offenses committed during release enhancements. This change improves the consistency and proportionality of the revised statutes.

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

First, the revised statute clarifies the existence and nature of the link between the predicate crime and the actor's prejudice as one of but-for causation. Under current D.C. Code § 22-3701 it is unclear whether there is any required connection between the crime and the actor's prejudice, or to what degree there must be a connection, because the current statute only requires that the crime "demonstrates an accused's prejudice." However, in *Lucas v. United States*[17] the DCCA rejected primarily on constitutional grounds that the bias enhancement in D.C. Code § 22-3701 required something less than "but-for" causation.[18] The *Lucas* court went on to describe but-for causation using the ordinary language "because of" as used in many other states' statutes.[19] In line with the *Lucas*

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[16] For example, personal appearance in the form of hairstyle or dress may be relevant to assessing whether a person was perceived to be of a particular race, religion, or gender identity or expression.

[17] *Lucas v. United States*, 240 A.3d 328, 342 (D.C. 2020).

[18] *Lucas v. United States*, 240 A.3d 328, 342 (D.C. 2020) ("In sum, we hold that § 22-3701(1) requires that a defendant's bias against a victim due to the victim's protected characteristic must be a but-for cause of the defendant's underlying criminal act. Bias need not be the sole cause, or even the primary cause. And it may interact with several other causes in causing the end result. For purposes of the Bias-Related Crime Act, however, bias against the victim's protected characteristic must be a but-for cause for a factfinder to find that the accused committed the underlying crime.").

[19] *Lucas v. United States*, 240 A.3d 328, 340–41 (D.C. 2020) ("In adopting a but-for causation standard, we do not restrict a description of such causation to the words 'but for,' but instead recognize that such language reflects a causation standard similar in meaning to language such as "based on," "because of," and "results from." (citation omitted)); *Id. at 344* ("As the Supreme Court has noted, the phrase 'because of' imparts the requisite but-for causal standard. See *Burrage*, 571 U.S. at 213-14, 134 S.Ct. 881. In describing terms such as 'based on' and 'by reason of,' the Court recognized that such language 'in common talk ... indicates a but-for relationship' and that the 'but-for requirement is a part of the common understanding of cause.' Id. at 211, 213, 134 S.Ct. 881. In *Fleming*, this court

holding, the revised statute clearly requires a but-for causal nexus between the actor's criminal act and his or her prejudice—the crime must be committed with the purpose, in whole or part, of threatening, physically harming, etc. a person or group of persons *because of* the actor's prejudiced perception of another person or group of persons. The reference to "in whole or part" clarifies that there may be other purposes involved in the criminal act, but that for the enhancement to apply the actor must have engaged in the crime consciously desiring to threaten, physically harm, etc. a person because of the prejudice. RCC § 22E-204, as applied to RCC § 22E-607, further clarifies the role of prejudice compared to other motives—the prejudice must have been the "but for" cause of the commission of the predicate offense. This change improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised statute clarifies what the DCCA has called the "puzzling wording"[20] of existing D.C. Code § 22-3701, which refers to a "designated act" as the predicate for the penalty enhancement. Consistent with current District law and the DCCA holding in *Aboye,* the revised statute clarifies that any criminal offense is subject to the hate crime penalty enhancement.

Third, the revised statute is renamed a "hate crime" penalty enhancement instead of the "bias-related crime" title currently used in D.C. Code § 22-3701. The term "hate crime" is popularly used to denote criminal acts of this nature.[21]

Fourth, the revised statute combines the multiple statutory sections currently in D.C. Code §§ 22-3701, 22-3703 into one section. The revised statute also makes conforming changes to the civil provisions to match the changes made regarding the penalty enhancement.

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endorsed a jury instruction that used 'as a result of' to describe but-for causation. 224 A.3d at 229. Recognizing this common-sense understanding, we believe it is accurate to understand 'because of' as articulating but-for causation.").

[20] *Aboye v. United States*, 121 A.3d 1245, 1249 (D.C. 2015)

[21] *See, e.g.,* 18 U.S.C. § 249 ("Hate crime acts"); MPD statistics and description available online at: https://mpdc.dc.gov/hatecrimes.

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

Explanatory Note. *This section establishes civil provisions for the hate crime penalty enhancement for the Revised Criminal Code (RCC). The civil provisions concern data collection and civil legal actions related to the hate crime penalty enhancement. These civil provisions replace the civil provisions of the bias-related crime statute[1] in the current D.C. Code.*

Subsection (a) provides for data collection and publication concerning the incidence of crimes subject to a hate crime penalty enhancement. Paragraph (a)(1) specifies that MPD shall afford a victim the opportunity to submit a written statement in support of a claim that the conduct that occurred was a crime subject to a hate crime penalty enhancement. Paragraph (a)(2) requires the Mayor to collect and compile data on the incidence of crime subject to a hate crime penalty enhancement provided that the information gathered does not reveal a complainant's identity. Paragraph (a)(3) requires the Mayor to publish an annual summary of the data it collects and submit the summary and recommendations to the Council.

Subsection (b) provides civil liability for conduct that constitutes a hate crime penalty enhancement. Paragraph (b)(1) specifies that a civil action may be brought by any person who alleges that they have been subjected to conduct that constitutes a criminal offense committed with the purpose, in whole or part, of threatening, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against the person's or group's perceived race, color, religion, national origin, sex, age, sexual orientation, homelessness, physical disability, political affiliation, or gender identity or expression as defined in D.C. Code § 2-1401.02(12A).

Paragraph (b)(2) specifies a non-exhaustive list of remedies that shall be available in a civil action under subsection (a).

Paragraph (b)(3) specifies that an actor's parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the actor is responsible for the payment of any damages required in a civil action against an actor who is under 18 years of age, if the parent or person acting in the place of a parent under civil law contributed to the actor's conduct. The term "person acting in the place of a parent under civil law" is a defined term in RCC § 22E-701 and includes both persons who have put themselves in the situation of a lawful parent in practice, and those formally appointed by a court. Parents who are not legally responsible for the health, welfare, or supervision of the actor are not liable under paragraph (b)(3).

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

Relation to Current District Law. *The RCC hate crimes penalty enhancement civil provisions statute changes current District law for bias-related crimes in one main way.*

The revised hate crimes penalty enhancement statute civil provisions describe the conduct that is the subject of data collection and a civil action in accordance with the revised elements in the hate crimes penalty enhancement, RCC § 22E-608. The current civil provisions in D.C. Code §§ 22-3702 and 22-3704 restate the elements of the current

[1] D.C. Code §§ 22-3702, 22-3704.

bias enhancement in D.C. Code § 22-3701, including reference to an "act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, homelessness, physical disability, matriculation, or political affiliation." In contrast, the revised civil provisions track the articulation of elements provided in the revised hate crimes penalty enhancement statute, RCC § 22E-608, which makes multiple changes to current District law. This change clarifies the revised statutes.

Beyond this one change to current District law, two other aspects of the revised hate crime penalty enhancement civil provisions statute may constitute substantive changes of law.

First, the revised statute makes a "parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the actor," responsible for any civil damages assessed against an actor under 18 years of age. The current D.C. Code § 22-3704(c) states that the "parent of a minor shall be liable for any damages that a minor is required to pay under subsection (a) of this section, if any action or omission of the parent or legal guardian contributed to the actions of the minor." It is unclear whether the reference to a "legal guardian" in the second half of this sentence (regarding acts and omissions) means that legal guardians also have financial liability along with parents per the first half of this sentence. The terms "legal guardian" and "minor" are also undefined and there is no DCCA case law on point. It is also unclear whether any biological parent, regardless whether the parent has custody, is liable. To resolve these ambiguities, the revised statute consistently refers to "parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the actor," who is under 18 years of age. The term "person acting in the place of a parent under civil law" is defined in RCC § 22E-701 and consistently applied to multiple statutes. The language excludes parents who are not at the time legally responsible for the welfare of their child. This change clarifies the revised statutes.

Second, the revised statute does not include an evidentiary standard for the civil proceeding. The current D.C. Code § 22-3704(b) states that whether a person has been subjected to conduct under the bias-related crime statute "shall be determined by reliable, probative, and substantial evidence." The statute does not define the meaning of these terms and there is no case law on point as to whether codification of this standard—particularly the use of the term "substantial"—is intended to limit the otherwise applicable rules of evidence in a civil proceeding. To resolve this ambiguity, the revised statute eliminates reference to "reliable, probative, and substantial evidence." This change clarifies the revised statute.

RCC § 22E-610. Abuse of Government Power Penalty Enhancement.

Explanatory Note. *This section establishes the abuse of government power penalty enhancement for the Revised Criminal Code (RCC). This general penalty provides a penalty enhancement where the defendant commits an offense against persons or property offense under color or pretense of official right. The RCC abuse of government power penalty enhancement is the first codification of such an enhancement in the District.*

Paragraph (a)(1) requires a person to have committed all the elements of an offense in Subtitle II or Subtitle III of the RCC, including any culpable mental states required for the predicate offense. The term "in fact" specifies that the person is strictly liable as to whether the predicate offense appears in Subtitle II or III. For example, the enhancement is applicable if a police officer is charged with the murder during a pursuit,[1] assault during (or after) an arrest,[2] criminally restraining someone without cause,[3] engaging in nonconsensual sexual conduct during a traffic stop,[4] or criminally damaging property during execution of a search warrant.[5]

Paragraph (a)(2) specifies that the person must be a public official at the time of the offense. The term "public official"[6] is defined in RCC § 22E-701. "Knowing" is defined in RCC § 22E-701 and applied here means the person must be practically certain that they are one of the specified types of government actors.

Paragraph (a)(3) requires state action, specifying that the person must be acting under color or pretense of official right. The phrase "under color or pretense of official right" has the same meaning as "under color of law" in 42 U.S.C. § 1983, 18 U.S.C. § 242, and elsewhere in the United States Code.[7] Misuse of power, possessed by virtue of state law and made possible only because the actor is clothed with authority of state law, is action taken under color or pretense of official right.[8] It includes not only acts done within an official's lawful authority, but also acts done beyond the bounds of lawful authority while the official is purporting or pretending to act in the performance of their official

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[1] RCC § 22E-1101. *See, e.g.,* Keith L. Alexander, *Motorcyclist Terrence Sterling shot twice by police, in neck and back, lawsuit says*, WASHINGTON POST (December 15, 2016).
[2] RCC § 22E-1201. *See, e.g.,* Eddie Kim, *Force Questioned in Video of Metro Police Arrest*, DCIST (May 22, 2011).
[3] RCC § 22E-1402. *See, e.g.,* Max Kutner, *'Jump-Outs': D.C.'s Scarier Version of 'Stop-and-Frisk,'* NEWSWEEK (January 16, 2015).
[4] RCC § 22E-1307. *See, e.g.,* Zuri Davis, *D.C.'s Police Department Is Being Sued (Again) for Sexually Violating Someone During a Search*, REASON (January 14, 2020).
[5] RCC § 22E-2503. *See, e.g.,* John Sullivan, Derek Hawkins, Pietro Lombardi, *Probable cause: Pursuing drugs and guns on scant evidence, D.C. police sometimes raid wrong homes — terrifying the innocent*, WASHINGTON POST (March 5, 2016).
[6] "Public official" means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47).
[7] Unlike 42 U.S.C. § 1983 and 18 U.S.C. § 242, however, the enhancement does not apply to private persons acting under color of law, per paragraph (a)(2).
[8] *See United States v. Classic*, 313 U.S. 299, 326 (1941); *Williams v. United States*, 341 U.S. 97, 99 (1951).

duties.[9] For example, the enhancement may apply to a public official who violates their department's policy[10] or who is off-duty at the time of the offense.[11] The government is not required to prove that the government entity itself was a moving force behind the conduct.[12]

Subsection (b) establishes that the effect of the penalty enhancement is an increase of one class to the predicate offense's otherwise applicable penalty classification, except, for Class 1 offense, the authorized term of imprisonment and fine for an offense increases by 6 years and $50,000.

Subsection (c) specifies that application of an enhancement under this section is in addition to, and does not bar, application of any other penalty enhancements specified in Chapter 6 or elsewhere in the Title 22E.

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

Relation to Current District Law. *Abuse of government power is a new general enhancement and, in that sense, all aspects of the revised statute are substantive changes to District law.*

Both current District law and the RCC authorize additional punishment where the victim of a crime is especially vulnerable. For example, the revised homicide,[13] robbery,[14] assault,[15] and criminal threats[16] statutes provide a penalty enhancement when a victim is targeted because they are a minor, elderly person, vulnerable adult, law enforcement officer, public safety employee, transportation worker, or District official.[17] The RCC also authorizes a hate crime penalty enhancement that punishes the targeting of a victim based on race, color, religion, national origin, sex, age, sexual orientation, gender identity or

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[9] *See West v. Atkins*, 487 U.S. 42, 49–50 (1988) ("It is firmly established that a defendant…acts under color of state law when he abuses the position given to him by the State.").

[10] For example, reportedly, Officer Brian Trainer was found to have violated department policy when he pursued motorcyclist Terrence Sterling before fatally shooting him in the neck and back. *See* Delia Goncalves, *Officer 'broke policy' in fatal shooting of Terrence Sterling*, WUSA 9 (December 5, 2017).

[11] For example, reportedly, Officer James Haskel was off duty and looking for his stolen minibike, when he fatally shot 14-year-old Deonte Rawlings, suspected of stealing the bike, in the back of the head. *See Timeline: The Deonte Rawlings Shooting*, WASHINGTON POST; *see also McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (holding a state employee who accesses confidential information through a government-owned computer acts under state law, even when the motives are entirely personal).

[12] *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (explaining that to establish *personal* liability, it is enough to show that the official, acting under color of law, caused the deprivation of a right, but more is required in an official-capacity action).

[13] RCC §§ 22E-1101 and 22E-1102.

[14] RCC § 22E-1201.

[15] RCC § 22E-1202.

[16] RCC § 22E-1204.

[17] *See* definition of "protected person" in RCC § 22E-701.

expression, homelessness, physical disability, or political affiliation.[18] As the D.C. Council recently recognized,[19] a person who is the victim of a crime committed *by* a law enforcement officer or other public official is in an especially an especially vulnerable position.[20] The revised statute punishes abuse of power more severely than civilian misconduct. This change eliminates a possible gap in liability and improves the proportionality of the revised statutes.

[18] RCC § 22E-608.

[19] The D.C. Council recently acknowledged the seriousness of an abuse of power in the policing context, by unanimously approving a 10-year penalty for unlawful use of neck restraints by law enforcement officers, as compared to a 180-day penalty for a simple assault for civilians. *Compare* Bill 23-0775, the Comprehensive Policing and Justice Reform Amendment Temporary Act of 2020 *with* D.C. Code § 22-404.

[20] For example, on May 25, 2020, Minneapolis police officer Derek Chauvin knelt on the neck of George Floyd for eight minutes and 46 seconds, while he hopelessly pleaded for his life and died. Three armed police officers stood by watching the murder, rendering concerned onlookers unable to intervene and save him. *See* Brittany Shammas, Timothy Bella, Katie Mettler and Dalton Bennett, *Four Minneapolis officers are fired after video shows one kneeling on neck of black man who later died*, WASHINGTON POST (May 26, 2020).

RCC § 22E-701. Generally Applicable Definitions.

This section establishes definitions that apply to all provisions of Title 22E, unless otherwise specified. Each definition is discussed separately, below.

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

Explanatory Note. The definition of "act" is addressed in the Commentary accompanying RCC § 22E-202. The revised definition of "act" appears in six revised definitions,[1] six revised offenses,[2] and six revised provisions.[3]

[1] "Commercial sex act" (RCC § 22E-701); "consent" (RCC § 22E-701); "deceive" (RCC § 22E-701); "personal identifying information" (RCC § 22E-701); "sadomashochistic abuse" (RCC § 22E-701); "undue influence" (RCC § 22E-701).

[2] Criminal conspiracy (RCC § 22E-303); Murder (RCC § 22E-1101); Manslaughter (RCC § 22E-1102); Blackmail (22E-1403); Forgery (RCC § 22E-2204); Parental kidnapping criminal offense (RCC § 16-1022).

[3] Proof of offense elements beyond a reasonable doubt (RCC § 22E-201); Voluntariness requirement (RCC § 22E-203); Merger of related offenses (RCC § 22E-214); Hate crime penalty enhancement civil provisions (RCC § 22E-609); Civil action (RCC § 22E-1611); Merger of related weapon offenses (RCC § 22E-4119).

"Actor" means person accused of a criminal offense.

Explanatory Note. The term "actor" is generally used in RCC offenses to avoid both the confusion that may arise from multiple references to a "person" and the potential bias that may arise from other references to the alleged perpetrator in a criminal case. Use of the term "actor" is a drafting convention that is not intended to substantively affect any provision in the RCC.

The RCC definition of "actor" replaces the current definition of "actor" in D.C. Code § 22-3001(1),[1] applicable to provisions in Chapter 30, Sexual Abuse (although the term is not used consistently).[2] The RCC definition of "actor" is used in numerous RCC provisions.

Relation to Current District Law. The RCC definition of "actor" is substantively identical to the statutory definition under current law.[3]

[1] D.C. Code § 22-3001(1) ("'Actor' means a person accused of any offense proscribed under this chapter.").

[2] Only three of the current sex offense statutes use the term "actor." First degree and second degree sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016) and the aggravating circumstances statute (D.C. Code § 22-3020). Instead of "actor," the other current sex offense statutes use terms like "a person," "the defendant," or by the specific position that the defendant has, e.g., "teacher."

[3] D.C. Code § 22-3001(1).

"Ammunition" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "ammunition" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "ammunition" is used in the revised definitions of "class A contraband"[1] and "large capacity ammunition feeding device,"[2] the revised offenses of possession of an unregistered firearm, destructive device, or ammunition[3] and carrying a pistol in an unlawful manner,[4] and the provisions for lawful transportation of a firearm or ammunition[5] and the exclusion from liability for weapon offenses.[6]

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

[1] RCC § 22E-701.
[2] RCC § 22E-701.
[3] RCC § 7-2502.01A.
[4] RCC § 7-2509.06A.
[5] RCC § 22E-4109.
[6] RCC § 22E-4118.

"Amount of damage" means:

(A) When property is completely destroyed, the property's fair market value at the time it was destroyed; or

(B) When the property is partially damaged, either:

(i) The reasonable cost of necessary repairs if there are repairs; or

(ii) If there are no repairs, the change in the fair market value of the property due to the damage.

(C) Notwithstanding subparagraph (B) of this paragraph, if the reasonable cost of necessary repairs is greater than the fair market value of the property at the time it was partially damaged, that fair market value is the amount of damage.

Explanatory Note. The term "amount of damage" provides a standard for the valuation of damage or destruction to property in the RCC criminal damage to property offense (RCC § 22E-2503). The valuation method used generally depends on whether property is "completely destroyed" or "partially damaged." The characterizations of "complete[]" destruction and "partial" damage may be redundant, but they are used to draw clear distinctions between the different types of valuation in the RCC definition.

Subparagraph (A) provides that when the property is completely destroyed, the "amount of damage" is the property's "fair market value" at the time it was destroyed. "Fair market value" is a defined term in RCC § 22E-701 that generally means the price which a purchaser who is willing, but not obligated to buy would pay an owner who is willing, but not obligated to sell. "Owner" is a defined term in RCC § 22E-701.

If the property is only partially damaged, however, the valuation methods in subparagraph (B) are used. Under sub-subparagraph (B)(i), if there are repairs, the amount of damage is the reasonable cost of necessary repairs. Under sub-subparagraph (B)(ii), if there are no repairs, the change in the fair market value of the property due to the partial damage is used. Fair market value" is a defined term in RCC § 22E-701 that generally means the price which a purchaser who is willing, but not obligated, to buy would pay an owner who is willing, but not obligated to sell. "Owner" is a defined term in RCC § 22E-701.

Under subparagraph (C), notwithstanding the valuation methods of subparagraph (B), if the reasonable cost of necessary repairs is greater than the "fair market value" of the property at the time it was partially damaged, that fair market value is the amount of damage. For example, if an item of property has a fair market value of $100 at the time of the partial damage and there is a reasonable cost of $500 for necessary repairs, the amount of damage is $100, not $500. Fair market value" is a defined term in RCC § 22E-701 that generally means the price which a purchaser who is willing, but not obligated, to buy would pay an owner who is willing, but not obligated to sell. "Owner" is a defined term in RCC § 22E-701.

The RCC definition of "amount of damage" is new, the term is not currently defined in Title 22 of the D.C. Code. The current malicious destruction of property statute in D.C. Code § 22-303 refers to the "value" of the property, but there is no statutory definition of this term.[1] The RCC definition of "value" replaces the reference to "value" in the current

[1] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real

malicious destruction of property statute. "Amount of damage" is used in the revised aggregation to determine property offense grades provision,[2] as well as in the revised offense of criminal damage to property.[3]

Relation to Current District Law. *The RCC definition of "amount of damage" is generally consistent with the District case law interpreting the "value" of damaged or destroyed property in the current malicious destruction of property (MDP) offense.*

Subparagraph (A) codifies DCCA case law for the current MDP statute that states that the "value" of property that is completely destroyed is the fair market value of the property.[4]

Sub-subparagraph (B)(i) codifies DCCA case law that states where "repairable damage or destruction is caused to a portion or portions of a greater whole, the value of the property damaged or destroyed is to be measured by tye [sic] reasonable cost of the repairs necessitated by the malicious conduct.[3] However, not every instance of property damage that could be repaired will actually be repaired. There is no DCCA case law that establishes how to value partially damaged property when repairs could be done, but are not. Sub-subparagraph (B)(ii) establishes that in such a case, where there are no repairs, the amount of damage is the change in fair market value of the damaged property.

Subparagraph (C) establishes a final method of valuation. Notwithstanding the methods of valuation in subparagraph (B) for partial damage, "if the reasonable cost of necessary repairs is greater than the fair market value of the property at the time it was partially damaged, that fair market value is the amount of damage." Subparagraph (C) codifies DCCA case law that states it "would be unjust" to use the cost of repairs to determine the value of the property in the current MDP statute when the cost of repairs is greater than the value of the property.[5]

The RCC definition of "amount of damage" improves the clarity, consistency, and proportionality of the revised criminal damage to property offense.

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or personal, not his or her own, of the value of $1,000 or more, shall be fined not more than the amount set forth in § 22-3571.01 or shall be imprisoned for not more than 10 years, or both, and if the property has some value shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[2] RCC § 22E-2001.

[3] RCC § 22E-2503.

[4] *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975) ("Where an item of property has been entirely destroyed, there is little difficulty in applying the normal definition of 'fair market value', i. e., the price which a purchaser who is willing but not obliged to buy would pay an owner who is willing but not obliged to sell, considering all the uses to which the property is adapted and might reasonably be applied.") (internal citations omitted).

[5] *Nichols v. United States*, 343 A.2d at 342 n.3:

> We perceive one type of case in which it would be unjust to measure the value of the damaged portion by the cost of restoration. Such a situation would occur where the total value of the entire item of property involved is less than $200 [the previous felony threshold in the MPD statute], but the cost of repair would be $200 or more. For example, an old car might have a value of only $150, while the cost of repairing a damaged portion of it could exceed $200. In such a case, the maximum value chargeable should be determined by the overall value of the entire item of property before the damage occurred.

"Assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "assault weapon" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "assault weapon" is used in the revised offenses of possession of a prohibited weapon or accessory[1] and unlawful transfer of a firearm,[2] as well as the civil provisions for licenses of firearms dealers.[3]

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

[1] RCC § 22E-4101.
[2] RCC § 22E-4112.
[3] RCC § 22E-4114.

"Audiovisual recording" means a material object upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now existing or later developed, together with any accompanying sounds.

Explanatory Note. The RCC definition of "audiovisual works" is new, the term is not currently defined in Title 22 of the D.C. Code (although similar language is used to define "audiovisual works" in D.C. Code § 22-3214.01, the deceptive labeling statute).[1] The RCC definition of "audiovisual recording" replaces the current definition of "audiovisual works" in D.C. Code § 22-3214.01, applicable to the deceptive labeling statute. The RCC definition of "audiovisual recording" is used in the revised definition of "sound recording"[2] and in the revised offenses of unlawful creation or possession of a recording[3] and unlawful labeling of a recording.[4]

Relation to Current District Law. The RCC definition of "audiovisual recording" is substantively identical to the statutory definition of "audiovisual works" in current law.[5]

[1] D.C. Code § 22-3214.01(a)(1) ("'Audiovisual works' means material objects upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.").
[2] RCC § 22E-701.
[3] RCC § 22E-2105.
[4] RCC § 22E-2207.
[5] D.C. Code § 22-3214.01(a)(1).

"Block" and other parts of speech, including "blocks" and "blocking," mean to render safe passage through a space difficult or impossible.

Explanatory Note. The RCC definition of 'blocks' is new; the term is not currently defined in Title 22 of the D.C. Code (although a similar word, 'obstruct,' is used in the current crowding, obstructing, or incommoding statute).[1] The RCC definition of "block" is used in the revised offense of blocking a public way.[2]

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

As applied in the revised offense of blocking a public way, RCC § 22E-4203, the term "block" does not substantively change District law. The current crowding, obstructing, or incommoding statute[3] uses the terms "crowd," "obstruct," or "incommode" without statutorily defining the terms, and there is no case law on point. The revised blocking a public way statute uses the word "blocks" to avoid confusion with other offenses referring to broader "obstruction" conduct (e.g. with respect to a law enforcement investigation). The revised blocking a public way statute uses the term "blocks" to include all conduct that would[4] substantially interfere with motor traffic or foot traffic on public grounds. This does not include minor incommoding that poses no risk to passers-by, such as standing or sitting on part of a sidewalk, causing pedestrians to step around. However, blocking does include conduct that would render the public way impassable, but for the intervention of a law enforcement officer. Whether a hazard is reasonable or unreasonable is a question for the factfinder. Use of the term "blocks" applies consistent, clearly articulated definitions and improves the clarity of the revised offense.

[1] D.C. Code § 22-1307.
[2] RCC § 22E-4203.
[3] D.C. Code § 22-1307.
[4] The offense does not require that anyone actually attempt to make use of the public way and be unable to do so.

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

Explanatory Note. The term "bodily injury" is the lowest of the three levels of bodily injury defined in the RCC. No minimum threshold of pain is specified for "physical pain." Examples of a "physical injury" may include a scratch, a laceration, a bruise, an abrasion, or a contusion. "Illness" may include a viral, bacterial, or other physical sickness or physical disease.[1] "Impairment of physical condition" is intended to be construed broadly.[2] The definition does not specify a minimum threshold of impairment. Subject to causation requirements, the definition of "bodily injury" may include indirect causes of pain, illness, or impairment, such as exposing another individual to inclement weather or administration of a drug or narcotic that has a negative effect on physical condition.

The RCC definition of "bodily injury" replaces the current statutory definition of "bodily injury" in D.C. Code § 22-3001(2),[3] applicable to provisions in Chapter 30, Sexual Abuse, and undefined references to "bodily injury" in the current child cruelty,[4] obstruction of a police report,[5] and animal cruelty statutes.[6] Similar terms are used in other Title 22

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[1] For example, "bodily injury" would include sexually transmitted diseases.

[2] *Compare State v. Jarvis*, 665 N.W.2d 518, 521-22 (Minn. 2003) (concluding that "any impairment of physical condition" in the definition of "bodily harm" means "any injury that weakens or damages an individual's physical condition" and finding the evidence sufficient for bodily harm when the complaining witness involuntarily ingested drugs), *and Hanic v. State*, 406 N.E.2d 335, 337-38 (Ind. Ct. App. 1980) (finding that red marks and bruises on a woman's arms and "minor scratches" on her breast area were sufficient evidence for "bodily injury."), *with Harris v. State*, 965 A.2d 691, 694 (Del. 2009) (holding that a red mark on complainant's skin from being elbowed to the forehead and scratches on the complainant's knee did not constitute impairment of physical condition as required by the definition of "physical injury" because they "did not reduce the [complainant's] ability to use the affected parts of his body."), *and State v. Higgins*, 165 Or.App. 442 (2000) (holding that "scratches and scrapes that go unnoticed by the victim, that are not accompanied by pain and that do not result in the reduction of one's ability to use the body or a bodily organ for any period of time, do not constitute an impairment of physical condition" as required by the definition of "physical injury.").

[3] D.C. Code § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[4] D.C. Code § 22-1101 ("creates a grave risk of bodily injury to a child, and thereby causes bodily injury").

[5] D.C. Code § 22-1931 ("It shall be unlawful for a person to knowingly … block access to any telephone…with a purpose to obstruct, prevent, or interfere with…[t]he report of any bodily injury.")

[6] D.C. Code § 22-1001(c) ("'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ.").

statutes,[7] and there is a definition[8] and several uses[9] of "serious bodily injury" in the current D.C. Code. The RCC definition of "bodily injury" is used in the revised defenses for defense of self or another person[10] and duress,[11] in the revised provision for admission of evidence in sexual assault and related cases,[12] in the RCC definitions of "serious bodily injury"[13] and "significant bodily injury,"[14] and in sixteen revised offenses.[15]

Relation to Current District Law. *The RCC definition of "bodily injury" makes two clear changes to the statutory definition of "bodily injury" in D.C. Code § 22-3001(2).*[16] First, the RCC definition of "bodily injury" does not require "significant" pain. Eliminating the current limitation of "significant" pain may help avoid difficult and subjective assessments[17] as to the appropriate degree of pain and improves the clarity of the revised definition. Second, the RCC definition of "bodily injury" no longer specifically includes loss or impairment of a "mental faculty," although such an injury may be included to the extent that it otherwise satisfies the definition of "bodily injury." It is unclear whether "mental faculty" refers to the physical condition of the brain or more generally to

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[7] *See, e.g.,* D.C. Code §§ 22-407 ("Whoever is convicted in the District of threats to do bodily harm…."); 22-933(1) (criminal abuse of a vulnerable adult or elderly person statute prohibiting, in part, "inflict[ing] or threat[ening[to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means.").

[8] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[9] *See, e.g.,* D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person….").

[10] RCC § 22E-403.

[11] RCC § 22E-501.

[12] RCC § 22E-1310.

[13] RCC § 22E-701.

[14] RCC § 22E-701.

[15] Robbery (RCC § 22E-1201); Assault (RCC § 22E-1202); Criminal threats (RCC § 22E-1204); Sexual assault (RCC § 22E-1301); Kidnapping (RCC § 22E-1401); Criminal restraint (RCC § 22E-1402); Criminal neglect of a minor (RCC § 22E-1502); Criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504); Forced commercial sex (RCC § 22E-1602); Trafficking in forced commercial sex (RCC § 22E-1604); Possession of a firearm by an unauthorized person (RCC § 22E-4105); Endangerment with a firearm (RCC § 22E-4120); Disorderly conduct (RCC § 22E-4201); Rioting (RCC § 22E-4301); Failure to disperse RCC § 22E-4302); Unlawful storage of a firearm (RCC § 7-2507.02A).

[16] D.C. Code § 22-3001(2).

[17] The difficulty in assessing pain thresholds at the low end of the spectrum is similar to such assessments at the high end, which the DCCA has criticized in the context of interpreting "extreme physical pain" in the definition of "serious bodily injury." *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006) ("The term [extreme physical pain] is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain.").

psychological distress, and deleting it improves the consistency of the revised definition. The remaining changes to the current sex offense definition of "bodily injury" are clarificatory.[18] Despite the substantive revisions to the definition of "bodily injury," it is unclear whether the RCC definition actually changes current District law for the current sexual abuse offenses due to the broad definition of "force" for these offenses. The commentary to the RCC sexual assault offense (RCC § 22E-1301) discusses further the effect of the revised definition of "bodily injury" on current District law.

The RCC definition of "bodily injury" is generally consistent with the limited District case law interpreting the term "bodily injury" in non-sexual offenses, where there is no statutory definition of the term.[19] This limited case law does not generally discuss the meaning of the term. However, the RCC definition of "bodily injury" results in changes to current District law as applied to particular offenses. For example, the RCC assault statute (RCC § 22E-1202) is graded, in part, based in part on whether "bodily injury" was inflicted. Physical contacts that do not cause physical pain or otherwise satisfy the RCC definition of "bodily injury" may be criminalized by the RCC offensive physical contact offense (RCC § 22E-1205), whereas current District law would criminalize these physical contacts as assault.[20] However, there may be a question in a particular case as to whether the pain, illness, injury, or impairment of condition that is inflicted is so minor that the judicial dismissal for minimal or unforeseen hams provision (RCC § 22E-215) may apply. The commentaries to relevant RCC offenses against persons discuss further the effect of the RCC definition of "bodily injury" on current District law. The revised definition of "bodily injury" improves the consistency and proportionality of revised offenses.

The commentaries to relevant RCC offenses against persons discuss further the effect of the RCC definition of "bodily injury" on current District law.

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[18] The RCC definition of "bodily injury" makes several non-substantive clarifications to the current definition of "bodily injury" in D.C. Code § 22-3001(2). The references to impairment of a "bodily member" or "organ," and "physical disfigurement" in the current definition are deleted as superfluous to the more inclusive term of "impairment of physical condition" in the RCC definition. Similarly, the current definition's references to "disease, sickness" are covered by the RCC definition's reference to "illness." Finally, the RCC definition specifies that "physical injury" is included.

[19] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[20] Under current District law, mere offensive physical contact is sufficient for assault liability. *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990)). However, this case law, and the scope assault, is in active litigation in the DCCA. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

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

Explanatory Note. The RCC definition of "building" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "building" are in several current property offenses[1]). The RCC definition of "building" is used in the revised definitions of "correctional facility," "dwelling," "halfway house," and "secure juvenile detention facility," as well as the revised offenses of arson,[2] reckless burning,[3] trespass,[4] burglary,[5] blocking a public way,[6] possession of a stun gun,[7] and carrying an air or spring gun,[8] and the civil provisions for licenses of firearms dealers.[9]

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

[1] *E.g.*, trespass (D.C. Code § 22-3302), burglary (D.C. Code § 22-801).
[2] RCC § 22E-2501.
[3] RCC § 22E-2502.
[4] RCC § 22E-2601.
[5] RCC § 22E-2701.
[6] RCC § 22E-4203.
[7] RCC § 7-2502.15.
[8] RCC § 7-2502.17.
[9] RCC § 22E-4114.

"Bump stock" means any object that, when installed in or attached to a firearm, increases the rate of fire by using energy from the recoil of the firearm to generate a reciprocating action that facilitates repeated activation of the trigger.

Explanatory Note. The RCC definition of "bump stock" replaces the current definition of "bump stock" in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of "bump stock" is used in the revised offense of possession of a prohibited weapon or accessory,[1] as well as the revised civil provisions for taking and destruction of dangerous articles.[2]

Relation to Current District Law. The RCC definition of "bump stock" is identical to the statutory definition under current law.[3]

[1] RCC § 22E-4101.
[2] RCC § 22E-4117.
[3] D.C. Code § 22-4501.

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

Explanatory Note. The RCC definition of "business yard" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current burglary statute[1]). The RCC definition of "business yard" is used in the revised offense of burglary.[2]

Relation to Current District Law. The RCC definition of "business yard" is new and does not substantively change District law.

As applied in the revised burglary statute, the term "business yard" may substantively change District law. The current burglary statute uses the phrase "any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade."[3] Case law has clarified that the phrase is limited to sites that store items for the purpose of a future commercial transaction.[4] The revised code uses the words "goods" and "merchandise," which are more common in modern English usage and broadly encompass lumber, coal, and chattels for trade. The revised code specifies that the yard must be walled or fenced, so as to distinguish a yard from open land. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

[1] D.C. Code § 22-801.
[2] RCC § 22E-2701.
[3] D.C. Code § 22-801.
[4] *Sydnor v. United States*, 129 A.3d 909, 913 (D.C. 2016) (finding a construction site could not be burglarized).

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

Explanatory Note. The RCC definition of "check" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "check" are in several current offenses[1]). The RCC definition of "check" is used in the revised definition of "value,"[2] as well as the revised offense of check fraud.[3]

Relation to Current District Law. The RCC definition of "check" is new and does not substantively change District law. There is no case law defining "check" where the term is used in current property offenses.

[1] Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; "credit" defined, D.C. Code § 22-1510; Definition of "value" for Chapter 32, D.C. Code §22-3201; Forgery D.C. Code §§ 22-3241; 22-3242;
[2] RCC § 22E-701.
[3] RCC § 22E-2203.

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

Explanatory Note. The definition of "circumstance element" is addressed in the Commentary accompanying RCC § 22E-201. The RCC definition of "circumstance element" is used in the revised provisions for the culpable mental state requirement,[1] definitions and hierarchy of culpable mental states,[2] rules of interpretation applicable to culpable mental states,[3] principles of liability governing accident, mistake, and ignorance,[4] principles of liability governing intoxication,[5] accomplice liability,[6] criminal solicitation,[7] and criminal conspiracy.[8]

[1] RCC § 22E-205.
[2] RCC § 22E-206.
[3] RCC § 22E-207.
[4] RCC § 22E-208.
[5] RCC § 22E-209.
[6] RCC § 22E-210.
[7] RCC § 22E-302.
[8] RCC § 22E-303.

"Class A contraband" means:

(A) A dangerous weapon or an imitation dangerous weapon;
(B) Ammunition or an ammunition clip;
(C) A flammable liquid or explosive powder;
(D) A knife, screwdriver, ice pick, box cutter, needle, or any other tool capable of cutting, slicing, stabbing, or puncturing a person;
(E) A shank or a homemade knife;
(F) Tear gas, pepper spray, or any other substance that is designed or specifically adapted for causing temporary blindness or incapacitation;
(G) A tool that is designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door;
(H) Handcuffs, security restraints, handcuff keys, or any other object that is designed or specifically adapted for locking, unlocking, or releasing handcuffs or security restraints;
(I) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool that is designed or specifically adapted for cutting through metal, concrete, or plastic;
(J) Rope; or
(K) A law enforcement officer's uniform, medical staff clothing, or any other uniform.

Explanatory Note. The RCC definition of "Class A contraband" replaces the current definition of "Class A contraband" in D.C. Code § 22-2603.01(2)(A),[1] applicable to the unlawful possession of contraband offense and related provisions. The terms "dangerous weapon," "imitation dangerous weapon," and "law enforcement officer" that are used in the definition of "Class A contraband" are defined elsewhere in RCC § 22E-701. The RCC definition of "Class A contraband" is used in the revised offense of correctional facility contraband.[2]

[1] D.C. Code § 22-2603.01(2)(A) ("'Class A Contraband' means: (i) Any item, the mere possession of which is unlawful under District of Columbia or federal law; (ii) Any controlled substance listed or described in Unit A of Chapter 9 of Title 48, or any controlled substance scheduled by the Mayor pursuant to § 48-902.01; (iii) Any dangerous weapon or object which is capable of such use as may endanger the safety or security of a penal institution or secure juvenile residential facility or any person therein, including,: (I) A firearm or imitation firearm, or any component of a firearm; (II) Ammunition or ammunition clip; (III) A stun gun, as defined in § 7-2501.01(17A); (IV) Flammable liquid or explosive powder; (V) A knife, screwdriver, ice pick, box cutter, needle, or any other object or tool that can be used for cutting, slicing, stabbing, or puncturing a person; (VI) A shank or homemade knife; or (VII) Tear gas, pepper spray, or other substance that can be used to cause temporary blindness or incapacitation; (iv) Any object designed or intended to facilitate an escape; (v) Handcuffs, security restraints, handcuff keys, or any other object designed or intended to lock, unlock, or release handcuffs or security restraints; (vi) A hacksaw, hacksaw blade, wire cutter, file, or any other object or tool that can be used to cut through metal, concrete, or plastic; (vii) Rope; or (viii) When possessed by, given to, or intended to be given to an inmate or securely detained juvenile, a correctional officer's uniform, law enforcement officer's uniform, medical staff clothing, any other uniform, or civilian clothing. (B) The term "Class A contraband" does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.").

[2] RCC § 22E-3403.

The RCC defines "Class A contraband" to include contraband that may be used to cause an injury or facilitate an escape more readily than other prohibited items.

Relation to Current District Law. *The RCC definition of "Class A contraband" makes several substantive changes to the current definition of "Class A contraband" in D.C. Code § 22-2603.01(2).*

First, the revised definition does not classify controlled substances as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "[a]ny controlled substance listed or described in Unit A of Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01."[3] In contrast, the revised code classifies contraband according to the danger presented into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. This change improves the proportionality of the revised definition.

Second, the revised definition does not classify clothing, other than uniforms, as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "civilian clothing."[4] In contrast, the revised definition includes a law enforcement officer's uniform, medical staff clothing, or any other uniform. The term "law enforcement officer" is defined in RCC § 22E-701 to include Department of Corrections employees, probation officers, and others. If disallowed by a facility, possession of civil clothing may still subject an incarcerated person to administrative sanctions. This change improves the proportionality of the revised definition.

Third, the revised definition does not classify unlawful items other than weapons as Class A contraband. The current D.C. Code definition of "Class A contraband" includes "[a]ny item, the mere possession of which is unlawful under District of Columbia or federal law."[5] There is no case law on point. However, the language would seem to include items that pose no apparent threat to the safety or order of a correctional facility.[6] In contrast, the revised definition of Class A contraband is limited to items that pose a clear security or escape risk. This change improves the clarity and proportionality of the revised definition.

Fourth, the current statute also classifies as Class A contraband, "Any object designed or intended to facilitate an escape."[7] There is no case law on point. In contrast, the revised code refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door." The revised language creates a more objective basis for identifying contraband—rather than making the subjective intent to facilitate escape the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense.[8] This change improves the clarity, consistency, and proportionality of the revised definition.

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[3] D.C. Code § 22-2603.01(2)(A)(ii).
[4] D.C. Code § 22-2603.01(2)(A)(viii).
[5] D.C. Code § 22-2603.01(2)(A)(i).
[6] *See, e.g.*, 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).
[7] D.C. Code § 22-2603.01(2)(A)(iv).
[8] *See* RCC § 22E-2702.

"Class B contraband" means:

(A) Any controlled substance or marijuana;

(B) Any alcoholic liquor or beverage;

(C) A hypodermic needle or syringe or other item that is designed or specifically adapted for administering an unlawful controlled substance; or

(D) **A portable electronic communication device or an accessory to a portable electronic communication device.**

Explanatory Note. The RCC definition of "Class B contraband" replaces the current definition of "Class B contraband" in D.C. Code § 22-2603.01(3)(A),[1] applicable to the unlawful possession of contraband offense and related provisions. The term "controlled substance" used in the definition of "Class B contraband" is defined elsewhere in RCC § 22E-701. The RCC definition of "Class B contraband" is used in the revised offense of correctional facility contraband.[2]

The RCC defines "Class B contraband" to include contraband that may impede a facility's ability to provide an orderly, safe, and humane environment more readily than other items prohibited under administrative regulations. The phrase "item that is designed or specifically adapted for administering an unlawful controlled substance" means an object that could be used to assist a user to introduce the drug into the body.[3] "Accessory" refers to device or devices that "enable or facilitate the use of a mobile telephone or other portable communication device. It is difficult to be exhaustive in light of changing technology, but accessories include chargers and batteries."[4]

Relation to Current District Law. The RCC definition of "Class B contraband" makes one substantive change to the current definition of "Class B contraband" in D.C. Code § 22-2603.01(3)(A): it reclassifies controlled substances, including marijuana,[5] which are classified as Class A contraband under current law[6] as Class B contraband. The current statute roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs; (B) alcohol, drug paraphernalia, and cellular phones; and (C) any item prohibited by rule (only administrative sanctions are authorized for Class C contraband). In contrast, the revised code classifies contraband according to the danger

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[1] D.C. Code § 22-2603.01(3)(A) ("'Class B Contraband' means: (i) Any alcoholic liquor or beverage; (ii) A hypodermic needle or syringe or other item that can be used for the administration of unlawful controlled substances; or (iii) A cellular telephone or other portable communication device and accessories thereto. (B) The term "Class B contraband" does not include any object or substance which a person is authorized to possess in the penal institution or secure juvenile residential facility by the director of the penal institution or secure juvenile residential facility and that is in the form or quantity for which it was authorized.").

[2] RCC § 22E-3403.

[3] For example, a pipe may be included, whereas aluminum foil is not.

[4] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-151, "Omnibus Public Safety and Justice Amendment Act of 2009," (June 26, 2009) at page 16.

[5] [Definitions of marijuana, cannabis, and cannabinoids will be reviewed and revised when the Commission issues recommendations for drug offenses.]

[6] D.C. Code § 22-2603.01(2)(A)(ii) classifies as Class A contraband "[a]ny controlled substance listed or described in Unit A of Chapter 9 of Title 48 [§ 48-901.01 et seq.] or any controlled substance scheduled by the Mayor pursuant to § 48-902.01."

presented into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. This change improves the proportionality of the revised definition.

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

Explanatory Note. The RCC definition of "close relative" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "close relative" is used in the revised kidnapping[1] and criminal restraint[2] offenses.

Relation to Current District Law. The RCC definition of "close relative" is new and does not substantively change District law.

As applied in the revised kidnapping statute, the term "close relative" substantively changes current District law in one main way. The current kidnapping statute contains an exception to liability "in the case of a minor, by a parent thereof," but otherwise does not address kidnapping by close relatives.[3] In contrast, the revised statute codifies a defense to kidnapping if the accused is a "close relative" of the complainant, acted with intent to assume custody of the complainant and did not cause bodily injury or threaten to cause bodily injury. This change improves the proportionality of the revised offense.

[1] RCC § 22E-1401.
[2] RCC § 22E-1402.
[3] D.C. Code § 22-2001.

"Coercive threat" means a communication that, unless the complainant complies, any person will do any of the following:

(A) Engage in conduct that, in fact, constitutes:

(i) An offense against persons under Subtitle II of this title; or

(ii) A property offense under Subtitle III of this title;

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

(C) Accuse a person of a crime;

(D) Expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate:

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

(ii) Significant injury to credit or business reputation;

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

(F) Restrict a person's access to either a controlled substance that the person owns or a prescription medication that the person owns; or

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

Explanatory Note. The RCC defines "coercive threat" as consisting of seven forms of threatened behavior—six *per se* types of "coercive threat" and one flexible standard of what constitutes a "coercive threat." A person making a coercive threat may communicate that the person will carry out the coercive conduct himself or herself, but that need not be the case.[1] A coercive threat requires some form of communiation. Communication requires not only that the actor take action to convey a message, but also that the message is received and understood by another person.[2] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[3] The verb "communicates" is intended to be broadly construed, encompassing all speech[4] and other

[1] For example, a person may compel another person to perform labor by threatening that a third party will injure the laborer if he or she refuses to perform.

[2] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute recognizes, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

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

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

messages,[5] which includes gestures or other conduct,[6] that are received and understood by another person.

Subparagraph (A) specifies that coercive threats include communicating that any person will engage in conduct that constitutes a criminal offense against persons as defined in Subtitle II of Title 22E, or a property offense as defined in Subtitle III of Title 22E. This form of coercive threat does not include threats to commit any other types of criminal offenses.[7] The use of "in fact" indicates that no culpable mental state is required as to whether the threatened conduct constitutes an offense against persons or a property offense, or a criminal offense. However, all the elements of the predicate offense against persons or property offense, including their culpable mental states, must be proven.

Subparagraph (B) specifies that coercive threats include communicating that any person will take or withhold action as a public official, or to cause a public official to take or withhold action. This form of coercive threat includes threats to cite someone for violation of a regulation, make an arrest, or deny the award of a government contract or permit. The term "public official" is defined in RCC § 22E-701, and means "a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47).

Subparagraph (C) specifies that coercive threats include communicating that any person will accuse another person of a crime. Under this form of coercive threat it is immaterial whether the accusation is accurate.

Subparagraph (D) specifies that coercive threats include communicating that any person will expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate hatred, contempt, ridicule, or other significant injury to personal reputation, or a significant injury to credit or business reputation. This subparagraph does not require that the asserted secret or fact be true or false. This form of "coercive threat" is intended only to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[8] There is one possible exception, in that this form of coercive threat also includes threats to expose secrets, assert facts, etc., that

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

[6] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

[7] For example, threatening to commit a controlled substance offense would not constitute coercion.

[8] D.C. Code § 22-3252.

would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of coercive threat.[9]

Subparagraph (E) specifies that coercive threats include communicating that any person will notify a federal, state, or local government agency or official of, or to publicize, another person's immigration or citizenship status. The definition of "coercive threat" includes these threats because of the unique, often life-changing consequences stemming from a person's immigration or citizenship status becoming publicized.

Subparagraph (F) specifies that coercive threats include communicating that any person will restrict a person's access to a controlled substance that the person owns, or to prescription medication that the person owns. As this form of coercive threat requires that the other person already owns the controlled substance or prescription medication, a threat to refuse to sell or provide a controlled substance or prescription medication does not constitute a coercive threat under this subparagraph.[10]

Subparagraph (G) specifies that coercive threats include communicating that any person will cause any harm that is sufficiently serious under all the circumstances to compel a reasonable person of the same background and in the same circumstances as the complainant to comply. This is a catch-all provision intended to capture potential harms that are not *per se* included in the RCC's coercive threats definition. In determining whether the harm was sufficiently serious, fact finders should consider the nature of the harm, the complainant's particular circumstances and background, and the conduct demanded by the defendant. A threat may be coercive to a particular complainant, but not another.[11] In addition, harms that may constitute a coercive threat when used to compel certain conduct may not necessarily constitute a coercive threat when used to compel different conduct.[12]

The RCC definition of "coercive threat" is new, the term is not currently defined in Title 22 of the D.C. Code (although the close-related term "coercion" is currently defined for the human trafficking statutes[13] and other statutes[14] use the undefined term "coercion"). The RCC definition of "coercive threats" replaces the current definition of "coercion" in

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[9] For example, even if it is well known that a person has engaged in numerous acts of infidelity, a threat to reveal an additional act of infidelity may still constitute a coercive threat under this paragraph. Although there is no clear DCCA case law on point, it is possible threats to reveal this type of information may not have constituted blackmail at common law.

[10] However, in some cases refusal to sell or provide a controlled substance of prescription medication may constitute a coercive threat under the catch-all provision set forth in subparagraph (G).

[11] For example, threatening to leave a small child alone in an unknown part of a city may constitute coercion, but would not if the same threat were made to an adult.

[12] For example, some harms that would compel a reasonable person to perform basic tasks may not necessarily be sufficient to compel a reasonable person to engage in sexual activity.

[13] D.C. Code § 22-1831(3).

[14] Criminal street gangs (D.C. Code § 22-951); definition of "Act of terrorism" (D.C. Code § 22-3152).

D.C. Code § 22-1831(3),[15] applicable to provisions in Chapter 18A, Human Trafficking. The RCC definition of "coercive threat" is used in the revised definition of "effective consent"[16] and in the revised offenses of sexual assault,[17] kidnapping,[18] criminal restraint,[19] forced labor,[20] forced commercial sex,[21] trafficking in labor,[22] trafficking in forced commercial sex,[23] commercial sex with a trafficked person,[24] and extortion.[25]

Relation to Current District Law. The RCC definition of "coercive threats" makes several substantive, possibly substantive, and clarificatory changes to the current definition of "coercion" in D.C. Code § 22-1831(3). As applied to the revised sexual assault offense in RCC § 22E-1301, the RCC definition of "coercive threats" may change current law.

The revised coercive threat definition makes two changes that constitute substantive changes to current District law in D.C. Code § 22-1831(3).

First, the revised "coercive threat" definition excludes fraud, deception, or causing a person to believe he or she is property of another. The current D.C. Code coercion definition for human trafficking offenses includes as one form "fraud or deception."[26] Similarly, the current D.C. Code states that coercion includes "knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstance to believe that he or she is the property of a person or business."[27] There is no DCCA case law interpreting the meaning of these provisions. In contrast, the RCC definition of coercive threat does not specifically address frauds or deceptions. Leading someone to

[15] D.C. Code § 22-1831(3) ("'Coercion' means any one of, or a combination of, the following: (A) Force, threats of force, physical restraint, or threats of physical restraint; (B) Serious harm or threats of serious harm; (C) The abuse or threatened abuse of law or legal process; (D) Fraud or deception; (E) Any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint; (F) Facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication; or (G) Knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business.").
[16] RCC § 22E-701.
[17] RCC § 22E-1301.
[18] RCC § 22E-1401.
[19] RCC § 22E-1402.
[20] RCC § 22E-1601.
[21] RCC § 22E-1602.
[22] RCC § 22E-1603.
[23] RCC § 22E-1604.
[24] RCC § 22E-1608.
[25] RCC § 22E-2301.
[26] D.C. Code § 22-1831(3)(D).
[27] D.C. Code § 22-1831(3)(G).

believe that they are property of another appears to be a particular form of deception.[28] Although deceiving another person for personal gain is wrongful and may be subject to criminal liability,[29] it is not equivalent to the coercive behavior listed in this definition when it is the sole form of wrongdoing.[30] This change improves the clarity and proportionality of the revised statute.

Second, the revised "coercive threat" definition includes communicating that any person will "restrict a person's access either to a controlled substance that the person owns or a prescription medication that the person owns." The current D.C. Code definition of "coercion" for human trafficking offenses refers to "*facilitating or controlling*" a person's access to "an addictive or controlled substance" or "restricting a person's access to prescription medication." There is no DCCA case law interpreting the meaning of these terms. In contrast, the revised definition of coercive threats is narrower in three respects. First, this form of coercive threat requires that the defendant *restricts* another person's access to a controlled substance or prescription medication. This form of coercive threat does not include facilitating or controlling a person's access to controlled substances.[31] Second, this form of coercive threat requires that the accused threaten to restrict a person's access to a controlled substance *that the person owns*, or to a prescription medication *that the person owns*. This form of coercive threat excludes a refusal to sell or provide a controlled substance or prescription medication that the other person does not already own. Third, this form of coercive threat does not include limiting a person's access to addictive but legal substances like alcohol and tobacco. Including threats to restrict access to any addictive substance as a form of coercive threat creates the possibility of criminalizing conduct that is comparatively less harmful than other forms of coercive threats included in the revised definition.[32] These changes improve the clarity and proportionality of the revised statute.

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[28] As a matter of practice, in most cases in which a reasonable person would believe that he or she was the property of another, that person may also be subject to threats of physical injury or other form of abuse that would satisfy other forms of coercive threat included in the revised definition.

[29] E.g., using deception to cause another person to provide labor is punishable under the RCC's revised fraud statute. RCC § 22E-2201.

[30] Deception may be a critical part of a human trafficking scheme involving other types of coercive threats that would trigger liability. For example, a person may deceive a person with the false promise of high wages to entice a person to begin providing labor, and then use threats of bodily harm to compel the person to continue providing labor.

[31] However, a person can satisfy this subparagraph by facilitating or controlling a person's access a controlled substance, when doing so constitutes an implicit threat that future access will be limited. For example, a person may behave coercively by giving heroin to a heroin addict if by doing so he or she implicitly threatens that access to heroin will be limited in the future.

[32] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably may constitute forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and is relatively easier to obtain. Restricting a person's access to alcohol is not as inherently coercive as restricting a

In addition, the revised coercive threat definition makes six changes that may constitute substantive changes to current District law in D.C. Code § 22-1831(3).

First, the revised "coercive threat" definition includes communicating that any person will engage in "any criminal offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E" or any "harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." The current D.C. Code definition of "coercion" for human trafficking offenses includes "force, threats of force, physical restraint, or threats of physical restraint,"[33] conduct that generally would constitute the criminal offenses of assault or kidnapping. The current D.C. Code also references any scheme intended to cause a person to believe that someone would suffer "serious harm or physical restraint."[34] The current definition of "coercion" also includes "serious harm or threats of serious harm,"[35] and "serious harm" is defined, in relevant part, as "harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[36] It is unclear under the current D.C. Code whether threatening to commit other offenses against persons or property offenses would constitute "serious harm." There is no DCCA case law interpreting the meaning of these terms. However, the revised definition clarifies that threats to commit a criminal offense against persons or a property offense suffices to establish a coercive threat, while at the same time preserving an explicit catch-all provision for other sufficiently serious harms. These changes improve the clarity and consistency[37] of the revised statutes.

Second, the revised coercive threat definition does not specifically include "force," "physical restraint," or "serious harm." The revised coercive threat definition includes communicating that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22E[.]" Although the use of force, physical restraint, and serious harm may constitute offenses against persons[38], the revised definition requires that the accused *communicates* that another person will commit a criminal offense against persons or to inflict serious harm. Committing an offense against persons without an implicit or explicit threat of further criminal activity would not constitute a coercive threat under the revised definition. However, in almost any case in which a person coerces a person by using force or physical restraint, there is at least an implicit threat to commit an additional crime against persons. This change clarifies and improves the consistency of the revised statute.

Third, the revised coercive threat definition specifically includes communicating that an person will notify a federal, state, or local government agency or official of, or

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person's access to a controlled substance, as it is relatively easy for a person to obtain alcohol by other means.

[33] D.C. Code § 22-1831(3)(A).

[34] D.C. Code § 22-1831(3)(E).

[35] D.C. Code § 22-1831(3)(B).

[36] D.C. Code § 22-1831(7).

[37] *See*, sex offenses RCC §§ 22E-1301 through 22E-1309; and extortion § 22E-2301.

[38] Force and physical restraint could constitute assault, kidnapping, or criminal restraint.

publicize, another person's immigration or citizenship status. The current D.C. Code coercion definition does not explicitly refer to threats to reveal a person's immigration or citizenship status. However, such conduct or threats may constitute "serious harm" as that term is used in the current human trafficking offenses,[39] or may constitute "[t]he abuse or threatened abuse of law or legal process" which is included in the current coercion definition.[40] There is no relevant case law interpreting what constitutes "serious harm." The revised definition clarifies that any threat to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status constitutes a coercive threat. This change clarifies and improves the consistency of the revised statute.

Fourth, the revised definition includes communicating that any person will "expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate: Hatred, contempt, ridicule, or other significant injury to personal reputation; or significant injury to credit or business reputation." The current D.C. Code "coercion" definition does not explicitly refer threats to cause significant reputational harms. However, such threats may constitute "serious harm" as that term is used in the current human trafficking offenses.[41] There is no relevant case law interpreting what constitutes "serious harm." The revised definition clarifies that such severe reputational harms constitutes a coercive threat. This change clarifies and improves the consistency of the revised statute.

Fifth, the revised coercive threat definition does not specifically include "the abuse or threatened abuse of law or legal process." The current D.C. Code definition of "coercion" for human trafficking offenses includes "the abuse or threatened abuse of law or legal process."[42] There is no relevant case law, or legislative history that provides examples of what would constitute abuse of law or legal process. The RCC definition of coercive threat omits specific reference to the abuse of law or legal process, although such conduct may still constitute a coercive threat if it involves threats to accuse a person of a crime, threats to reveal a person's immigration or citizenship status, or other harm sufficiently serious to compel a reasonable person to comply.[43] This change improves the clarity of the revised offense.

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[39] D.C. Code § 22-1831(3)(B); D.C. Code § 22-1831(7).

[40] D.C. Code § 22-1831(3)(C).

[41] D.C. Code § 22-1831(3)(B); D.C. Code § 22-1831(7). Note that the current D.C. Code definition of "serious harm specifically includes certain sufficiently serious "reputational harm." D.C. Code § 22-1831(7).

[42] D.C. Code § 22-1831(3)(C).

[43] Whether threats to abuse law or legal process would satisfy the requirements of the catch-all provision would be determined on a case by case basis. It is possible that only certain abuses of law or legal process would be sufficiently harmful given the surrounding circumstances to constitute coercion. For example, a threat to file a suit in small claims court for very minor damages against a wealthy complainant may not necessarily be sufficiently harmful to satisfy the catch-all provision. Similarly, it is unclear whether threatening to file a civil noise complaint would be sufficiently coercive to satisfy the revised definition's catch-all provision.

Sixth, the revised coercive threat definition does not explicitly include making a "wrongful threat of economic injury." The current extortion statute[47] includes the phrase "wrongful threat of economic injury," but the phrase is not defined in the statute, and there is no relevant DCCA case law. The legislative history notes that this language was "not intended to cover the threat of labor strikes or other labor activities," or "consumer boycotts,"[44] but is intended to cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[49] However, the RCC's definition of "coercive threats" does not specifically include a "wrongful threat of economic injury." While the revised coercive threat definition is not intended to include threats of labor strikes or consumer boycotts, certain types of threats of economic injury may still satisfy the catch-all provision. However, because it is not clear exactly what constitutes a "wrongful threat of economic injury under current law," it is unclear whether the catch-all provision would necessarily cover all such threats. This change clarifies and improves the consistency of the revised statute.

The remaining changes to the revised coercive threat definition are clarificatory and are not intended to change current District law in D.C. Code § 22-1831(3).

First, the revised coercive threat definition does not specifically include "threats of force" or "threats of physical restraint." This change is not intended to change current law. The revised coercive threat definition includes communicating that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22E[.]" Threats of force and threats of physical restraint involve threatening to engage in a criminal offense against persons.[45]

Second, the revised coercive threat definition does not specifically include "threats of serious harm." Omitting this language is not intended to change current District law. The revised coercive threat definition includes "any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." The language in this catch-all provision in the revised coercive threat definition is intended to include threats of all harms that constitute threats of "serious harm" under current law.[46]

Third, the revised coercive threat definition does not specifically include "any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or

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[44] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 69 (hereinafter, "Judiciary Committee Report").

[45] Force, threats of force, physical restraint, or threats of physical restraint could constitute assault, criminal threats, kidnapping, or criminal restraint.

[46] The DCCA has never issued an opinion interpreting the definition of "serious harm" under current law. However, federal courts interpreting analogous provisions in federal human trafficking statutes have approved jury instructions defining "serious harm" as "any consequences, whether physical or non-physical, that are sufficient under all of the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labor or services." *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) *cert. granted, judgment vacated on other grounds*, 545 U.S. 1101, 125 S. Ct. 2543, 162 L. Ed. 2d 271 (2005).

physical restraint[.]" Omitting this language is not intended to change current District law. The revised coercive threat definition includes communicating that any person will commit a criminal offense against persons, or cause any harm sufficiently serious to compel a reasonable person to comply. An explicit or implicit communication may be established by a single act, or a scheme, plan, or pattern of behavior.[47]

As applied to the revised sexual assault offense in RCC § 22E-1301, the RCC definition of "coercive threats" may change current law. The current D.C. Code sexual abuse statutes do not use the term "coercion," but second degree and fourth degree sexual abuse broadly prohibit causing a complainant to engage in sexual activity "by threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[48] However, as discussed further in the commentary to the revised sexual assault statute (RCC § 22E-1301), second degree and fourth degree of the revised sexual assault statute prohibit causing a complainant to engage in sexual activity by a "coercive threat." The use of "coercive threat" in the revised sexual assault statute's second and fourth degrees is not limited to threats "other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping," and thereby is a lesser included offense of those specific kinds of threats which remain a basis of liability in first and third degree sexual assault. Otherwise, the RCC definition of "coercive threat" captures the breadth of the plain language of the current second degree and fourth degree sexual abuse statutes as well as limited DCCA case law interpreting these statutes.

[47] For example, if a person routinely beats laborers, causing other laborers to fear that they will face similar beatings if they refuse to work, that person would satisfy the requirements of a coercive threat even without an explicit threatening language.

[48] D.C. Code §§ 22-3003(1), 22-3005(1).

"Commercial sex act" means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.

Explanatory Note. The RCC definition of "commercial sex act" replaces the definition of "commercial sex act" in D.C. Code § 22-1831. The RCC definition of "commercial sex act" is copied verbatim from the definition in D.C. Code § 22-1831, except that it does not include violations of various Chapter 27 offenses.[1] The terms "sexual act" and "sexual contact" are defined in RCC § 22E-701. The RCC definition of "commercial sex act" is used in the revised definition of "debt bondage"[2] and the revised offenses of forced commercial sex,[3] trafficking in forced commercial sex,[4] sex trafficking of minors or adult incapable of consenting,[5] misuse of documents in furtherance of human trafficking,[6] commercial sex with a trafficked person,[7] and trafficking in commercial sex.[8]

Relation to Current District Law. The revised definition of "commercial sex act" changes current District law in two main ways.

First, violations of offenses under Chapter 27 do not constitute commercial sex acts, unless they involve a sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.[9]

Second, the RCC definition of "commercial sex" act uses the terms "sexual act" and "sexual contact," which are also defined in RCC § 22E-701. The current definition of "commercial sex act" also uses the terms as they are defined in D.C. Code § 22-3001. To the extent that the RCC definitions of "sexual act" and "sexual contact" change current District law, the RCC definition of "commercial sex act" also changes current District law.

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[1] "The term "commercial sex act" includes a violation of § 22-2701, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722." D.C. Code § 22-1831 (4).
[2] RCC § 22E-701.
[3] RCC § 22E-1602.
[4] RCC § 22E-1604
[5] RCC § 22E-1605.
[6] RCC § 22E-1607.
[7] RCC § 22E-1608.
[8] RCC § 22E-4403.
[9] For example, D.C. Code 22-2713 states that "[w]hoever shall erect, establish, continue, maintain, use, own, occupy, or release any building . . . for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance[.]" This conduct does not constitute a "commercial sex act" as defined in the RCC.

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

Explanatory Note. This definition which offenses in other jurisdictions are deemed "comparable offenses" as to any given offense under the RCC. The words "current District offense" refers to an offense under the RCC at the time the comparable offense was committed. The RCC definition of "comparable offense" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "comparable offense" is used in the revised repeat offender penalty enhancement,[1] as well as in the revised offenses of stalking,[2] electronic stalking,[3] possession of a firearm by an authorized person,[4] and contributing to the delinquency of a minor.[5]

Relation to Current District Law. The RCC definition of "comparable offense" is new and does not substantively change District law.

As applied in the revised stalking and electronic stalking offenses, the term "comparable offense" may substantively change District law. The current stalking statute defines a "course of conduct" and provides an extensive list of activities that already are separately criminalized in the D.C. Code, such as efforts to "threaten," "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," and "[u]se another individual's personal identifying information."[6] Case law on the stalking statute has not addressed whether the listed conduct differs from their corresponding separate criminal offenses in the District or elsewhere. The revised statute refers to the term "comparable offense" to clarify that these separate crimes serve as a predicate for stalking, even if committed outside the District of Columbia. This change improves the clarity, consistency, and completeness of the revised offense.

[1] RCC § 22E-606.
[2] RCC § 22E-1801.
[3] RCC § 22E-1802.
[4] RCC § 22E-4105.
[5] RCC § 22E-4601.
[6] D.C. Code § 22-3132(8).

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

Explanatory Note. The term "complainant" is generally used in RCC offenses to avoid both the confusion that may arise from multiple references to a "person" and the potential bias that may arise from other references to the alleged victim in a criminal case. Use of the term "complainant" is a drafting convention that is not intended to substantively affect any provision in the RCC.

The RCC definition of "complainant" is new, the term is not currently defined in Title 22 of the D.C. Code (although similar language is inconsistently[1] used in the provisions in Chapter 30, Sexual Abuse, through the definition of "victim" in D.C. Code § 22-3001(11)).[2] The RCC definition of "complainant" replaces the current definition of "victim" in D.C. Code § 22-3001(11) and is used in numerous RCC provisions.

Relation to Current District Law. The RCC definition of "complainant" is substantively identical to the definition of "victim"[3] provided in the current sex offense statutes under current law.

[1] Only three of the current sex offense statutes use the term "victim." The consent defense for first degree through fourth degree and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020). Instead of "victim," the other current sex offense statutes use terms like "another person" or "child," "ward," etc.

[2] D.C. Code § 22-3001(11) ("'Victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.").

[3] D.C. Code § 22-3001(11).

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

Explanatory Note. The definition of "conduct element" is addressed in the Commentary accompanying RCC § 22E-201. The revised definition of "conduct element" is used in the revised voluntariness requirement.[1]

[1] RCC § 22E-203.

"Consent" means a word or act that:

(A) Indicates, explicitly or implicitly, agreement to particular conduct or a particular result; and

(B) Is not given by a person who:

(i) Is legally unable to authorize the conduct charged to constitute the offense or to the result thereof; or

(ii) Because of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof; and

(C) Has not been withdrawn, explicitly or implicitly, by a subsequent word or act.

Explanatory Note. The RCC defines "consent" to mean that a person has expressed (by word or act) agreement to particular conduct or to a particular result and the person is generally competent and able to make a reasoned judgment to give such agreement. "Consent" generally means to agree to some act or to choose some act. The RCC relies on civil law principles of agency to determine when an individual is authorized to give "consent" on behalf of another person.[1]

Per subparagraph (A) a word or words such as saying, "Yes, I agree," or writing the same in an email, or an act or acts such as nodding or gesturing positively, typically will constitute consent. However, the word or act is not limited to a literal "yes," and includes other, indirect types of agreement, such as the use of well-recognized customs.[2] Inaction at a certain point in time may indicate agreement if there was a prior word or act that indicated ongoing agreement.[3] However, in the absence of any communication or prior communication establishing ongoing agreement, inaction necessarily means that no

[1] Thus, an employee may sell her employer's merchandise by giving "consent" on behalf of the employer to a transaction. See RCC commentary for particular offenses regarding whether and under what circumstances a person may consent, on behalf of another person, to conduct constituting an offense against person. Generally, it would be improper for one person to give consent to conduct on behalf of another where that conduct harms the person. However, there may be categorical exceptions to this general rule for offenses against persons. For example, it may be that a parent or guardian may consent to an elective medical procedure, ear piercing, or participation in a karate lesson on behalf of their child or ward.

[2] For example, raising one's fists or assuming a fighting stance may be commonly understood to indicate that the person has agreed to mutual combat, and handing a merchant currency or a method of payment is commonly understood to indicate that the person has agreed to the transaction.

[3] Determining whether inaction at a given is consenual based on a prior word or act is a context-sensitive factual inquiry that may require examination of the parties' relationship and prior experiences with one another, as well as the nature of the conduct that is the object of the alleged consent. For example, absent a prior act or word indicating ongoing consent, the inaction of a coworker to say or do anything would not constitute consent if, when taking one of several inexpensive pens from the worker's desk the coworker says "you don't mind if I borrow your pen?" However, if a coworker at one time asks if she can borrow a person's expensive pen and returns it, then five minutes later takes the pen again while the owner is absent or passively watches, the relevant question is whether the earlier consent to borrowing constituted an ongoing grant of permission.

consent, as here defined, was given.[4] The word or act also must be to some particular conduct or to a particular result.[5] Typically, in the RCC's offenses against persons, the particular conduct is defined by the use of consent within an offense definition or within an affirmative defense.

Notably, "consent" in subparagraph (A) can be conditioned or unconditioned.[6] This means that "consent" can be the product of completely free decision making (unconditioned),[7] or it can be the product of decision making driven by external pressures

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[4] For example, imagine a case of assault where a person is walking down a street late at night, and the defendant sees the person and strikes him from behind. There would be no evidence in this case that the victim consented to mutual combat, because the victim gave no words or actions that indicated consent to the defendant's strikes. Or, imagine a case of theft where a person leaves his laptop out on a table at a café while he goes to use the restroom. A thief sees the person step away from the laptop, and promptly takes it. The taking would be completely without consent, because the owner gave no words or actions that indicated consent to the taking.

[5] For example, a person may agree to particular conduct (e.g. playing football) or a particular result (getting pushed to the ground). The distinction may be important in some cases where there is consent to one aspect but not the other. For instance, a complainant may give consent to sexual intercourse but not to anal penetration.

[6] This characteristic of consent is important: often, the term "consent" used both casually and in the law can mean one of two things. It can mean "agreeing to something," and it can also mean, "agreeing to something with sufficient freedom and knowledge." Imagine, for example, a person who is tricked by a fraudster into giving over her life savings. It would be correct in one sense to say that she consented to giving the money, because she voluntarily handed over her fortune. On the other hand, it could also be correct to say that she did not consent to the transaction, because her consent was vitiated by the fraudster's deception.

Both descriptions are arguably correct: if one takes "consent" to mean "agreement," then the victim has consented because she has agreed. But if one takes "consent" to mean "agreement given pursuant to certain normative conditions, such as having sufficient knowledge about the nature of the transaction," then the victim has not given consent, because she did not have sufficient knowledge about the actual nature of the transaction. She had no idea, after all, that her money was getting put in a fraudulent scheme. Both descriptions of the hypothetical are equally valid depending on what the definition of "consent" in use.

Unfortunately, having dual, competing, and equally valid meanings for a single term is a recipe for confusion. How can one know which sense of "consent" is being used at a given time? It is impossible to say. Therefore, rather than persist in confusing these two distinct but useful concepts by employing a single word to describe them, the Revised Criminal Code distinguishes them. "Consent" is employed to refer to mere agreement, while "effective consent" is employed to refer to consent given under sufficient conditions of knowledge and freedom (i.e., consent free from problematic coercion and deception).

[7] E.g., if a person went to a store and said, "I am going to buy the largest television in this store, no matter the cost!" This is an expression of an unconditional preference - the person has stated that he or she will purchase the property no matter what.

placed on the person giving consent (conditioned).[8] Conditioned "consent" may be present even when there is an extreme or normatively disturbing condition that induces a person's agreement, which makes the "consent" not freely given.[9] In the RCC, the degree to which "consent" may be subject to conditions is specified by the elements of particular offenses or by the requirement of "effective consent."[10]

Per subparagraph (B), consent is ineffective in a varity of circumstances.[11] First, consent cannot be given by a person who is legally unable to authorize the conduct charged to constitute the offense or to the result thereof.[12] Consent also cannot be given by a person who because of youth, mental disability, or intoxication, is unable to make a reasonable

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[8] E.g., if a person went to a store and said, "I would like to buy the largest television in this store - but because the largest television is too expensive, I'll settle for this smaller one." The person here has an unconditional preference for the largest television, just as the person in the previous footnote does; but here, the person's budget is an external condition that has pressured the person to choose something other than his or her unconditional preference.

[9] E.g., a defendant walks into the victim's store and says, "You better pay me some protection money, or you might find you suffer an unfortunate accident!" The victim's preference in this situation may well be to pay the protection money, rather than risk being murdered or assaulted -- therefore, the victim hands the cash over to the extortionist. In this case, the victim has given consent to the transaction. Admittedly, the victim's unconditioned preference is likely that he have to provide the money at all. But faced with either giving the money or suffering a physical harm, the person may well consent to giving the money. This is not to say that the extortionist in this hypothetical will avoid liability, of course: under the RCC, the extortionist would have obtained the victim's consent by means of coercion.

[10] The RCC defines "effective consent" in RCC § 22E-701 as agreements that are obtained by means other than the use of a coercive threat, or deception. Thus, an agreement that is not freely or voluntarily given may constitute "consent," but it would not constitute "effective consent." The commentary to the RCC definition "effective consent" further discusses the definition and its role in the RCC.

[11] *See* Model Penal Code § 2.11(a) commentary ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense[.]"); § 6.5(a)Consent, 1 Subst. Crim. L. § 6.5(a) (3d ed.) (citing to reform jurisdictions that have adopted Model Penal Code § 2.11(a) and (b) in their codes).

[12] The RCC language deviates slightly from the language in Model Penal Code § 2.11 and following jurisdictions by referring to a person who is legally "unable" to authorize the conduct rather than legally "incompetent." While a person may be unable to authorize conduct because of a severe cognitive disability or other mental disability, the RCC reference to legally "unable" refers more broadly to a person who is legally barred from giving authorization. For example, a person may be legally unable to provide consent as to use of property because of a court ruling or their lack of necessary property rights under civil law, such as where, as the Model Penal Code § 2.11 notes, "where a stranger 'consents' to the removal of another's property." The RCC reference to legally "unable" thus seeks to follow the broad intent of Model Penal Code § 2.11 while avoiding the narrow connotation of the term "competent."

judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof.[13] What precise age, mental disability, intoxication, etc. is sufficient to undermine consent is a highly fact-dependent inquiry, and may vary significantly according to the nature of the conduct at issue.[14]

Per subparagraph (C), consent does not persist after it has been withdrawn by a subsequent word or act. It exists only until nullified or revoked by the person giving the consent.

There is no culpable mental state specified in the definition of consent,[15] rather the use of the term in particular RCC offenses determines what culpable mental state applies.

"Consent" is statutorily defined in current D.C. Code § 22-3001(4)[16] for sexual abuse offenses and related provisions in Chapter 30, Sexual Abuse, although the undefined term is used in other Title 22 statutes.[17] The RCC definition of "consent" replaces in

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[13] Again, the RCC language closely follows Model Penal Code § 2.11, although it refers to "mental disability" instead of "mental disease or defect" to be consistent with the phrase in RCC § 22E-504, Mental disability defense, which broadly refers to both short-term and long-term mental conditions affecting cognition and behavioral controls.

[14] For example, with respect to an agreement to play a game of touch football, a thirteen year old may be both legally able and/or apparently able to make a reasoned judgment as to participation, while a three year old would be neither legally able nor apparently able to make a reasoned judgment about such conduct.

[15] The RCC differs somewhat from the Model Penal Code in this respect, the former potentially allowing for a lower culpable mental state (e.g. recklessness) than the latter's specification that the lack of reasonable judgment be "manifest" or "known." *See* Model Penal Code § 2.11 ("Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if… (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or *known* by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense[.]"). The RCC approach of not specifying a culpable mental state in the definition of "consent also avoids also avoids changing the culpable mental state applicable to following offense elements after the term. *See* Rules of Interpretation Applicable to Culpable Mental State Requirement in RCC § 22E-207.

[16] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[17] *See, e.g.,* Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . ."); Exception to abuse and neglect of vulnerable adults provisions, D.C. Code § 22-935 ("'A person shall not be considered to commit an offense of abuse or neglect under this chapter for the sole reason that he provides or permits to be provided treatment by spiritual means through prayer alone in accordance

relevant part[18] the definition of "consent" in in D.C. Code § 22-3001(4), applicable to provisions in Chapter 30, Sexual Abuse, and undefined references in other statutes revised in the RCC. The RCC definition of "consent" is used in the RCC definitions of "effective consent,"[19] "owner,"[20] and "property of another,"[21] as well as in five revised provisions[22] and thirteen revised offenses.[23]

Relation to Current District Law. The RCC breaks the current definition of "consent" in D.C. Code § 22-3001(4) and the general concept of consent into two terms. The RCC definition of "consent" refers to the bare fact of an agreement by a competent and reasonable person obtained by any means, while the RCC definition of "effective consent" (see commentary entry below) refers to agreements that are obtained by means other than the use of physical force, a coercive threat, or deception.[24] While the RCC

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with a religious method of healing, in lieu of medical treatment, to the vulnerable adult or elderly person to whom he has a duty of care with the express consent or in accordance with the practice of the vulnerable adult or elderly person.").

[18] Subparagraph (A) of the RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[19] RCC § 22E-701.

[20] RCC § 22E-701.

[21] RCC § 22E-701.

[22] Special responsibility for care, discipline, or safety defense (RCC § 22E-408); Authorized dispositions (RCC § 22E-602); Financial exploitation of a vulnerable adult or elderly person civil provisions (RCC § 22E-2209); Admission of evidence in sexual assault and related cases (RCC § 22E-1310); Civil provisions for taking and destruction of dangerous articles (RCC § 22E-4117).

[23] Sexual assault (RCC § 22E-1301); Arranging for sexual conduct with a minor or person incapable of consenting (RCC § 22E-1306); Incest (RCC § 22E-1308); Blackmail (RCC § 22E-1403); Sex trafficking of a minor or adult incapable of consenting (RCC § 22E-1605); Commercial sex with a trafficked person (RCC § 22E-1608); Theft (RCC § 22E-2101); Fraud (RCC § 22E-2201); Financial exploitation of a vulnerable adult or elderly person (RCC § 22E-2208); Trademark counterfeiting (RCC § 22E-2210); Extortion (RCC § 22E-2301); Patronizing prostitution (RCC § 22E-4402); Trafficking in commercial sex (RCC § 22E-4403).

[24] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical

definition of "effective consent" may change current District law with respect to multiple aspects of "consent" per D.C. Code § 22-3001(4) and other current statutory provisions, the revised definition of "consent" substantively changes current District law in one way.

The RCC definition of "consent" makes one substantive change and several clarificatory changes to the current definition of "consent" in D.C. Code § 22-3001(4), which applies only to sex offense provisions.

The substantive change to the definition of "consent" is that the RCC restrictions in subparagraph (B) provide a flexible standard for determining a minimum age of consent rather than a fixed age. District sex offense case law, relying on various indications of legislative intent, has held that persons under 16 years of age categorically cannot consent to sexual activity with an adult that is at least four years older.[25] However, the DCCA recently reaffirmed that a person that is at least 16 years of age can consent to a simple assault that consists of non-violent sexual touching by an adult.[26] In contrast, no specific age is specified under the revised definition of consent, which allows for evaluation of the specific facts of the case (e.g. the conduct involved, the ages of other participants, and the relationship between the participants). This definitional change is more compatible with norms recognizing that, for example, a fifteen year old can consent to sexual conduct with another fifteen year old. However, despite this definitional change to "consent," the RCC

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resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[25] The DCCA has held that the current D.C. Code fourth degree sexual abuse statute, which prohibits a sexual contact with a complainant that is "incapable of appraising the nature of the sexual contact," categorically merges into the current D.C. Code second degree child sexual abuse statute, which prohibits a sexual contact with a complainant that is under the age of 16 years when the actor is at least four years older. *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017); D.C. Code §§ 22-3005; 22-3009; 22-3001(2A) (defining a "child" as a "person who has not yet attained the age of 16 years."). The court stated that "once the government proves in a sexual assault case that the defendant was four or more years older than the [complainant under the age of 16 years], there is a conclusive presumption that the defendant knew or should have known that the [complainant under the age of 16 years] was incapable of appraising the nature of the sexual conduct." *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017).

In addition, the DCCA has held that in a prosecution under the current D.C. Code general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3). "Adult" is not statutorily defined in the current sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

[26] The District's current assault statute prohibits, in relevant part, an "assault." D.C. Code § 22-404(a)(1). District case law establishes that an assault includes non-violent sexual touching that causes no pain or impairment to the complainant's body. *See, e.g., Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020) at 8. In general, the elements established by the case law are a "voluntary touching of another in a sexually sensitive or private area without consent." *Id.* at 8. In *Augustin v. United States*, the DCCA stated that the District's current sexual abuse statutes, and their age-based requirements for liaiblitly and limitations on defenses for offenses involving minors, "does not mean that the Council raised the age of consent in a simple assault prosecution for a non-violent sexual touching of a minor." *Id.* at 9. The DCCA stated that "sixteen years is the age of consent for the non-violent sexual toucing prosecuted as simple in this case." *Id.* at 10.

§ 22E-1302 sexual abuse of a minor statute continues to criminalize sexual conduct between persons of specified ages and does not have a consent defense, which eliminates any need to rely on a fixed age limit in the definition of "consent." The commentary below discusses how the RCC definition of "effective consent" addresses consent induced by physical force, coercive threats, or deception.

Remaining changes to the current definition of "consent" in D.C. Code § 22-3001(4) are clarificatory. First, the revised definition omits the word "overt" in the current definition as redundant. The plain meaning of the current and RCC definitions of "consent" is that there must be something that "indicates" that there is an "agreement," precluding any reliance on covert words or actions. Second, the RCC defines "consent" as a "word" or "act" instead of "words" or "actions." This revision clarifies that a single word or act may suffice for "consent." Third, the RCC specifies that the word or act may express agreement either expressly or implicitly. This revision clarifies that the word or act is not limited to a "yes" or a nod in response, and includes any other words or acts that indirectly indicate agreement. Fourth, the RCC defines consent to include consent to a "particular result" in addition to "particular conduct," whereas the current definition of "consent" for the sex offense statutes requires consent to "the sexual act or sexual contact in question," and it is unclear whether this includes the result, conduct, or both.

The RCC definition of "consent" also clarifies uses of the term in various offenses against persons in current Title 22 of the D.C. Code. Current District law does not codify a definition of "consent" for offenses against persons outside of Chapter 30 Sex Offenses, however the term has been used in case law concerning some offenses against persons. For example, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's simple assault statute and is not a defense to the District's felony assault statute,[27] but the rulings do not define the precise meaning of "consent." Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[28] without discussing the difference between these terms.[29] The RCC definition of "consent" is consistent with and further clarifies existing the meaning of the term for offenses against persons.

The RCC definition of "consent" also clarifies references to the term in connection with various property offenses in current Title 22 of the D.C. Code. Current District law has not codified a definition of "consent" for property offenses, nor does case law discuss

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[27] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault."); see also *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).

[28] *Guarro*, 237 F.2d at 581.

[29] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.

the term or concept at length in property offenses. However, there are similar terms and phrases in current property statutes and case law. On a few occasions, the DCCA has recognized the relevance of consent in proving many property offenses.[30] Consent is also an explicit element in several of the District's current property offenses, such as the current extortion offense[31] and unauthorized use of a motor vehicle offense.[32] Further, the current definition of "appropriate" in Chapter 30 of the D.C. Code makes use of "without authority or right," which is roughly in line with the RCC's definition of consent.[33] Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property,[34] and some current offense definitions explicitly include agents.[35] The RCC definition of "consent" is consistent with and further clarifies existing the meaning of the term for property offenses.

The commentaries to relevant RCC provisions further discuss the effect of the RCC definition of "consent" on current District law.

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[30] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[31] D.C. Code § 22-3251(a) ("A person commits the offense of extortion if: (1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or (2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.").

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

[33] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included 'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id*. Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[34] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

[35] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id*.

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

Explanatory Note. This definition specifies that under the RCC, the term "controlled substance" has the same meaning as defined under D.C. Code § 48–901.02. The term "controlled substance" also incorporates limitations to the definition relating to marijuana included in D.C. Code § 48-904.01.[1] Note that a conforming amendment may be needed to incorporate the marijuana limitations that are currently included in the offense statutes. The term "controlled substance" is used in the revised definitions of "class B contraband"[2] and "coercive threat,"[3] and in the revised offenses of blackmail,[4] criminal neglect of a minor,[5] criminal neglect of a vulnerable adult or elderly person,[6] forgery,[7] correctional facility contraband,[8] possession of a controlled substance,[9] trafficking of a controlled substance,[10] trafficking of a counterfeit substance,[11] possession of drug manufacturing paraphernalia,[12] and trafficking of drug paraphernalia.[13]

Relation to Current District Law. The RCC's definition of "controlled substance" is identical to the definition under current law and is not intended to substantively change District law.

[1] Under the current District Code, the term "controlled substance" is defined under D.C. Code § 48-901.02. However, D.C. Code § 48-904.01, which defines the possession and distribution of controlled substance offenses, includes limitations to the definition pertaining to marijuana. D.C. Code § 48-904.01 states that the term

[2] RCC § 22E-701.

[3] RCC § 22E-701.

[4] RCC § 22E-1403.

[5] RCC § 22E-1502.

[6] RCC § 22E-1504.

[7] RCC § 22E-2204.

[8] RCC § 22E-3403.

[9] RCC § 48-904.01a.

[10] RCC § 48-904.01b.

[11] RCC § 48-904.01c.

[12] RCC § 48-904.10.

[13] RCC § 48-904.11.

"Correctional facility" means any building or building grounds located in the District of Columbia, operated by the Department of Corrections, for the secure confinement of persons charged with or convicted of a criminal offense.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. The word "secure" makes clear that a placement in an unsecured inpatient drug treatment program or independent living program is excluded. The definition does not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. The definition does not include buildings used by private businesses to detain suspected criminals, such as a booking room in a retail store.

The RCC definition of "correctional facility" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer[1] and unlawful possession of contraband[2] offenses). The term "building" that is used in the definition of "correctional facility" is defined elsewhere in RCC § 22E-701. The RCC definition of "correctional facility" is used in the revised offenses of sexual abuse by exploitation,[3] escape from a correctional facility or officer,[4] and correctional facility contraband.[5]

Relation to Current District Law. The RCC definition of "correctional facility" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "correctional facility" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. Case law has held that the phrase includes the District's halfway houses.[6] In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the revised correctional facility contraband offense, the term "correctional facility" may substantively change District law. D.C. Code § 22-2603.01 defines "penal institution" to mean "any penitentiary, prison, jail, or secure facility owned, operated, or under the control of the Department of Corrections, whether located within the District of Columbia or elsewhere." It defines "grounds" to mean "the area of land occupied by the penal institution or secure juvesnile residential facility and its yard and outbuildings, with a clearly identified perimeter." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. Each definition includes buildings (also defined in RCC § 22E-701) and building grounds. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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[1] D.C. Code § 22-2601.
[2] D.C. Code D.C. Code § 22-2603.01, et seq.
[3] RCC § 22E-1303.
[4] RCC § 22E-3401.
[5] RCC § 22E-3403.
[6] *See Demus v. United States,* 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States,* 498 A.2d 1172, 1174 (D.C.1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

"Counterfeit mark" means any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia, that is used without the permission of the owner of the trademark, service mark, trade name, label, term, picture, seal, word, or advertisement.

Explanatory Note. The term "counterfeit mark" defines specific types of marks, when used without the permission of the owner of the mark. Invalid marks, or marks used with the permission of the mark's owner are not included in the definition of "counterfeit mark." The revised definition of "counterfeit mark" is used in the revised definition of "retail value"[1] and in the revised offense of trademark counterfeiting.[2]

Relation to Current District Law. The definition of "counterfeit mark" does not substantively change current District law. The term "counterfeit mark" replaces the current terms "counterfeit mark" and "intellectual property." The current definition of "counterfeit mark" includes "any *unauthorized* reproduction or copy of intellectual property" or "intellectual property affixed to any item knowingly sold, offered for sale, manufactured, or distributed, or identifying services offered or rendered *without the authority* of the owner of the intellectual property[.]"[3] In turn, "intellectual property" is defined as "any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia."[4] The revised definition of "counterfeit mark" incorporates the current definition of "intellectual property," and requires that the mark be used "without the permission of the owner[.]" The term "without the permission" is intended to have the same meaning as "without authority" or "unauthorized." The revised definition of "counterfeit mark" is not intended to substantively change current District law.

[1] RCC § 22E-701.
[2] RCC § 22E-2210.
[3] D.C. Code § 22-901 (emphasis added).
[4] D.C. Code § 22-901.

"Crime of violence" means:

(A) Murder under RCC § 22E-1101;
(B) Manslaughter under RCC § 22E-1102;
(C) Robbery under RCC § 22E-1201;
(D) First degree, second degree, and third degree assault under RCC § 22E-1202(a)-(c);
(E) Enhanced first degree criminal threats under RCC § 22E-1204(a), (d)(4)(B);
(F) First degree, second degree, and third degree sexual assault under RCC § 22E-1301(a)-(c);
(G) First, second, fourth, and fifth degree sexual abuse of a minor under RCC § 22E-1302(a)-(b), (d)-(e);
(H) Kidnapping under RCC § 22E-1401;
(I) Enhanced criminal restraint under RCC § 22E-1402(a), (d)(2);
(J) First and second degree criminal abuse of a minor under RCC § 22E-1501(a)-(b);
(K) First and second degree criminal abuse of a vulnerable adult or elderly person under RCC § 22E-1503(a)-(b);
(L) Forced labor under RCC § 22E-1601;
(M) Forced commercial sex under RCC § 22E-1602;
(N) Trafficking in labor under RCC § 22E-1603;
(O) Trafficking in forced commercial sex under RCC § 22E-1604;
(P) Sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605;
(Q) [Reserved. Acts of terrorism under RCC § 22E-1701;]
(R) [Reserved. Manufacture or possession of a weapon of mass destruction under RCC § 22E-1702;]
(S) [Reserved. Use, dissemination, or detonation of a weapon of mass destruction under RCC § 22E-1703;]
(T) Enhanced first degree and enhanced second degree burglary under RCC § 22E-2701(a)-(b), (d)(4); or
(U) For any of the offenses described in subparagraphs (A)-(T) of this paragraph, a criminal attempt under RCC § 22E-301, a criminal solicitation under RCC § 22E-302, or a criminal conspiracy under RCC § 22E-303.

Explanatory Note. The RCC defines "crime of violence" to include enumerated RCC offenses that are serious (felony) offenses against persons that require or likely involve actual use of violence, as well as armed burglary. Enhanced versions of the ennumerated offenses are also included within the definition.

The RCC definition of "crime of violence" replaces the current definition of "crime of violence" as used in D.C. Code § 22-4503, Unlawful possession of firearm, which defines the term by reference to the definition in D.C. Code § 23–1331(4). The RCC definition of "crime of violence" is used in the revised offense of possession of a firearm by an unauthorized person.[1]

[1] RCC § 22E-4105.

Relation to Current District Law. While the RCC definition of "crime of violence" is broadly consistent with the scope of the current District definition, the revised definition substantively changes District law in multiple ways. First, the revised definition includes several additional offenses concerning human trafficking[2] and criminal abuse of vulnerable adults and elderly persons.[3] Second, unlike the current D.C. Code § 23–1331(4) definition, the revised definition does not include "arson" as the revised statute does not require endangerment of human life, does not include "gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation,"[4] or "extortion or blackmail accompanied by threats of violence." The exclusion of these and other RCC crimes from the definition of crime of violence does not reflect that such crimes involving threatening or risk-creating conduct are not serious, but rather focuses the definition on crimes that require or typically include actual violence. Third, the revised definition of "crime of violence," by reference to RCC offenses, gradations, and enhancements with different elements than their counterparts in the current D.C. Code, differs in the precise extent of coverage. For example, the robbery under RCC § 22E-1201does not include conduct such as pickpocketing, in contrast to the current robbery statute in D.C. Code § 22–2801.

This change improves the clarity and proportionality of the revised statutes.

[2] Current D.C. Code § 23–1331(4) does not include any human trafficking crimes. In contrast, the revised statute includes: Forced labor under RCC § 22E-1601; Forced commercial sex under RCC § 22E-1602; Trafficking in labor under RCC § 22E-1603; Trafficking in forced commercial sex under RCC § 22E-1604; and Sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605.

[3] Current D.C. Code § 23–1331(4) does not include D.C. Code § 22–933, Criminal abuse of a vulnerable adult or elderly person. In contrast, the revised statute includes: First and second degree criminal abuse of a vulnerable adult or elderly person under RCC § 22E-1503(a)-(b).

[4] [To date, the RCC has not addressed revision of D.C. Code § 22–951, Criminal street gangs. Inclusion of this statute may be recommended at a later date.]

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

Explanatory Note. The definition of "culpability required" is addressed in the Commentary accompanying RCC § 22E-201. The revised definition of "culpability required" is used in the revised provisions for accomplice liability,[1] criminal liability for conduct by an innocent or irresponsible person,[2] criminal attempt,[3] criminal solicitation,[4] and criminal conspiracy.[5]

[1] RCC § 22E-210.
[2] RCC § 22E-211.
[3] RCC § 22E-301.
[4] RCC § 22E-302.
[5] RCC § 22E-303.

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

Explanatory Note. The definition of "culpable mental state" is addressed in the Commentary accompanying RCC § 22E-205. The revised definition of "culpable mental state" is used in the revised defenses for lesser harm[1] and duress,[2] and the revised provisions for the rules of interpretation applicable to culpable mental states,[3] principles of liability governing accident, mistake, and ignorance,[4] principles of liability governing intoxication,[5] liability for causing crime by an innocent or irresponsible person,[6] merger of related offenses,[7] judicial dismissal for minimal or unforeseen harms,[8] and charging and proof of penalty enhancements.[9]

[1] RCC § 22E-401.
[2] RCC § 22E-501.
[3] RCC § 22E-207.
[4] RCC § 22E-208.
[5] RCC § 22E-209.
[6] RCC § 22E-211.
[7] RCC § 22E-214.
[8] RCC § 22E-215.
[9] RCC § 22E-605.

"Dangerous weapon" means:

(A) A firearm;

(B) A restricted explosive;

(C) A knife with a blade longer than 3 inches, sword, razor, stiletto, dagger, or dirk; or

(D) A blackjack, billy club, slungshot, sand club, sandbag, or false knuckles;

(E) A stun gun; or

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

Explanatory Note. The RCC defines "dangerous weapon" to include enumerated weapons and any object that in the manner of its actual, attempted, or threatened use is likely[1] to cause death or serious bodily injury. The enumeration of items in the definition of "dangerous weapon" does not mean that the simple possession of these items is criminal. In fact, possession of some enumerated items is constitutionally protected in certain circumstances. Besides firearms, stun guns are arms protected for use in self-defense under the Second Amendment to the United States Constitution[2] and knives may also be afforded protection.[3]

The phrase "[a]ny object" is to be interpreted broadly, including, for example, not only solid objects[4] but fluids and gases. Stationary fixtures such as floors, curbs, and sinks are not dangerous weapons, regardless of how they are used.[5] Body parts such as teeth, nails, hands, and feet are not dangerous weapons, regardless of how they are used. However, objects used by a person's hands or feet (e.g., steel-toed boots) or expelled from the body (e.g., bodily fluids) potentially may be dangerous weapons. Whether an object or substance "in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury" is a question of fact, not a question of law.

The RCC definition of "dangerous weapon" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "dangerous weapon" are in the possession of dangerous weapons offense[6] and the unlawful possession of

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[1] *See Johnson v. United States*, 17-CM-1117, 2019 WL 2041278, at *4 (D.C. May 9, 2019) (explaining that while the *actual* injury inflicted by the object in question is an important factor in establishing its dangerousness (and in some cases the determining factor), the absence of such injury does not necessarily indicate that the object was not dangerous because legal standard is whether such injury is *likely* to occur) (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005)).

[2] *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016).

[3] *See Wooden v. United States*, 6 A.3d 833, 839–40 (D.C. 2010).

[4] E.g., candlestick, lead pipe, wrench, rope.

[5] *Edwards v. United States*, 583 A.2d 661 (D.C. 1990).

[6] D.C. Code § 22-4514 makes it unlawful to possess with intent to use unlawfully against another "an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon." However, the phrase "other dangerous weapon" is not defined.

contraband offense,[7] and an apparently non-exhaustive list of "dangerous or deadly" weapons is in the penalty enhancement provision for committing crime while armed[8]). The terms "false knuckles," "firearm," "restricted explosive," "serious bodily injury," and "stun gun" that are used in the definition of "dangerous weapon" are defined elsewhere in RCC § 22E-701. The RCC definition of "dangerous weapon" is used in the revised defense for defense of self or another person,[9] in the revised definitions of "Class A contraband"[10] and "imitation dangerous weapon,"[11] in the revised provision for merger of related weapon offenses,[12] and in fourteen revised offenses.[13]

Relation to Current District Law. The RCC definition of "dangerous weapon" is new and does not substantively change an existing statute.

As applied in the revised offenses of robbery, assault, menacing, sexual assault, kidnapping, criminal restraint, possession of a prohibited weapon or accessory, carrying a dangerous weapon, possession of a dangerous weapon with intent to commit crime, and possession of a dangerous weapon during a crime, the term "dangerous weapon" is generally consistent with, but in several ways changes or may change, current District law.

First, subparagraphs (A) - (E) of the revised definition specify a complete list of items which constitute inherently "dangerous weapons." Together, subparagraphs (A) - (E) include nearly all the objects specifically listed in the District's current possession of a prohibited weapon offense[14] and while armed penalty enhancement.[15] However, there are various differences between the items listed in these current statutes and the RCC statute. For the RCC offenses against persons subtitle, an "imitation dangerous weapon" is a separately defined term in RCC § 22E-701 that is incorporated into various specific

[7] D.C. Code § 22-2603.01(2)(A)(iii).
[8] D.C. Code § 22-4502 provides a heightened penalty where a person commits a crime of violence or dangerous crime while armed with (or having readily available) "any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)." However, the statute does not specify that the list provided is exhaustive.
[9] RCC § 22E-403.
[10] RCC § 22E-701.
[11] RCC § 22E-701.
[12] RCC § 22E-4119.
[13] Robbery (RCC § 22E-1201); Assault (RCC § 22E-1202); Criminal threats (RCC § 22E-1204); Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Kidnapping (RCC § 22E-1401); Criminal restraint (RCC § 22E-1402); Burglary (RCC § 22E-2701); Carrying a dangerous weapon (RCC § 22E-4102); Possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); Possession of a dangerous weapon during a crime (RCC § 22E-4104); Endangerment with a firearm (RCC § 22E-4120); Trafficking of a controlled substance (RCC § 48-904.01b); Trafficking of a counterfeit substance (RCC § 48-904.01c)
[14] D.C. Code § 22-4514.
[15] D.C. Code § 22-4502(a).

offenses,[16] but is not a *per se* dangerous weapon.[17] District case law has recognized that many of the objects listed in the possession of a prohibited weapon offense and while armed penalty enhancement are inherently dangerous.[18] However, District case law has been unclear as to what other weapons may be *per se* dangerous weapons besides those listed in the statutes, and at times has appeared to say that inherently dangerous weapons, even those included in the statutes, are actually dangerous only in certain circumstances and ordinarily the matter of weather a weapon is dangerous is a question of fact.[19] Under the RCC "dangerous weapon" definition, only the items listed in subparagraphs (A) - (E) are considered inherently or *per se* dangerous weapons, based on their design rather than the manner of their use.[20] Providing a single, complete list of items that are inherently dangerous clarifies District law.

Second, the RCC definition in subparagraph (F) provides a functional definition of ways any item may be deemed a dangerous weapon. Any "object or substance, other than

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[16] *See, e.g.*, RCC §§ 22E-1201 (robbery); 22E-1203 (menacing); 22E-1301 (sexual assault); 22E-1401 (kidnapping).

[17] The commentaries for relevant RCC offenses against persons discuss further, below, how excluding imitation firearms affects current District law. Besides the current while-armed penalty enhancement statute, DCCA case law currently establishes that an imitation pistol may be sufficient for ADW liability. *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975).

[18] *See Dade v. United States*, 663 A.2d 547, 553 (D.C. 1995) ("The only grammatical way to construe this statute [D.C. Code § 22-4502(a)] is to read it, first, as including all pistols and other firearms (or imitations thereof) within the category of dangerous or deadly weapons, and second, as identifying a dozen other objects as dangerous or deadly weapons, in addition to pistols and other firearms. Thus any pistol or other firearm is, by statutory definition, a dangerous or deadly weapon, and the jury need not find specifically that a particular pistol is a dangerous or deadly weapon in order to find the defendant guilty of an armed offense."); *Jones v. United States*, 67 A.3d 547, 550–51 (D.C. 2013) ("We have acknowledged that § 22–4515(b) includes a "non-exhaustive list of weapons readily classifiable as dangerous *per se*." (citing *In re D.T.*, 977 A.2d 346, 349, 353 (D.C.2009)).

[19] *See Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) ("Some weapons, under appropriate circumstances, are so clearly dangerous that it is prudent for the court to declare them to be such, as a matter of law. Included in this class are rifles, pistols, swords, and daggers, when used in the manner that they were designed to be used and within striking distance of the victim. Whether an object or material which is not specifically designed as a dangerous weapon is a "dangerous weapon" under an aggravated assault statute, however, is ordinarily a question of fact to be determined by all the circumstances surrounding the assault. See generally 2 C. Torcia, Wharton's Criminal Law § 200 (14th ed. 1979). The trier of fact must consider whether the object or material is known to be "likely to produce death or great bodily injury" in the manner it is used, intended to be used, or threatened to be used. The jurors' knowledge of the dangerous character of the weapon used generally can be based on "familiar and common experience." [citation omitted].)"

[20] The design of an object may be an important fact in determining whether the object is a "dangerous weapon" per subparagraph (I), but it is not determinative.

a body part" can be a "dangerous weapon" if "the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury." The DCCA has said that, to determine whether an item is a dangerous weapon, "the manner [in which an item] is used, intended to be used, or threatened to be used"[21] should be considered. However, there is also District case law which suggests that "intended use" may be the same as "attempted use."[22] Subparagraph (F) of the RCC definition of "dangerous weapon" codifies actual use, threatened use, and "attempted use" (instead of "intended use"). Under the RCC definition, a mere "intended use" of an item as a dangerous weapon (separate from an actual, threatened, or attempted use) still may be sufficient to make that item a dangerous weapon, but only if such an intended use of the weapon is sufficient to satisfy the requirements of a criminal attempt.[23] Notably, current District practice with respect to charges of assault with a dangerous weapon does not appear to distinctly recognize as dangerous weapons either objects that are "intended to be used" or are involved in an "attempted" use to cause serious bodily injury or death.[24] Creating a functional test as to whether an item is a dangerous weapon based on its actual, attempted, or threatened use clarifies District law with respect to attempts, and may provide a more objective basis for determining liability as compared to a general inquiry, per current law, as to the defendant's intent for the item.

Third, under the RCC definition of "dangerous weapon" in subparagraph (F) the object or substance must be "likely" to cause death or serious bodily injury. The DCCA has discussed whether an object or substance is a "dangerous weapon" both in terms of whether it is "capable" of producing death or serious bodily injury, as well as "likely" to

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[21] *See, e.g.*, *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (emphasis in original omitted) (internal quotations omitted). Although *Williamson* is an ADW case, several cases use the same standard to determine whether an object is a "dangerous weapon" under the "while armed" enhancement in D.C. Code § 22-4502. its standard for determining whether an object is a "dangerous weapon" is used in "while armed" enhancement cases under D.C. Code § 22-4502. *See, e.g.*, *Arthur v. United States*, 602 A.2d 174, 177-78 (D.C. 1992) (discussing *Williamson v. United States*, 445 A.2d 975 (D.C. 1982) and other District precedent for determining whether an object is a "dangerous weapon" in an assault with intent to kill while armed case charged under the "while armed" enhancement in D.C. Code § 22-4502).

[22] *McGill v. United States*, 270 F.2d 329, 331 (D.C. Cir. 1959) ("A pistol [used as a club] is undoubtedly a dangerous weapon; and the fact that the attempt to pistol-whip the complaining witness did not result in physical injury does not make the action any less an assault with a dangerous weapon.").

[23] *See* RCC § 22E-301. For example, if a person carries an iron spike in their pocket with intent to use that object as a weapon to cause serious bodily injury to an enemy, that person may be guilty of an attempted assault with a dangerous weapon if the person satisfies the requirements for attempt liability, including the requisite intent as to the result (i.e. causing serious bodily injury by means of the spike) and being "dangerously close" to completing the offense.

[24] *See,* D.C. Crim. Jur. Instr. § 4-101. ("An object is a dangerous weapon if it designed to be used, actually used, or threatened to be used, in a manner likely to produce death or serious bodily injury.").

produce death or serious bodily injury, without discussion.[25] The RCC definition adopts a "likely" standard as is consistent with current District practice[26] and long-established case law.[27] This change clarifies District law.

Fourth, the RCC definition of dangerous weapon in subparagraph (F) refers to the revised definition for "serious bodily injury." Current DCCA case law has discussed whether an object or substance is a "dangerous weapon" both in terms of causing death or "great bodily injury,"[28] and death or "serious bodily injury."[29] The DCCA has explicitly stated that in this context the terms "great" and "serious" are interchangeable.[30] Using "serious bodily injury" does not appear to constitute a change in District law, except to the extent the RCC definition of "serious bodily injury" differs from the current definition.[31] Referencing "serious bodily injury" in the RCC definition of "dangerous weapon" improves the consistency of language and definitions across offenses.

Fifth, the RCC definition of a dangerous weapon does not include items that a complaining witness incorrectly perceives as a dangerous weapon, changing current District law.[32] Imitation dangerous weapons are now separately defined in RCC § 22E-701 and do not constitute *per se* dangerous weapons. Liability for use of such apparently dangerous objects is provided in specified RCC offenses, such as the revised criminal threats offense.[33] Excluding these objects from the scope of "dangerous weapon" does not change District case law holding that circumstantial evidence may be sufficient to establish an object or substance is a dangerous weapon.[34] These changes clarify and improve the

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[25] *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) ("A deadly or dangerous weapon is an object 'which is *likely* to produce death or great bodily injury by the use made of it.' Thus, an instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others.") (internal citations omitted)).

[26] D.C. Crim. Jur. Instr. §§ 4.101 (jury instruction for ADW); 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502).

[27] *See, e.g.*, *Tatum v. United States*, 110 F.2d 555, 556 (D.C. Cir. 1940) ("A dangerous weapon is one likely to produce death or great bodily injury.")

[28] *See, e.g.*, *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982).

[29] *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) ("Similarly, "an instrument capable of producing death or serious bodily injury *by its manner of use* qualifies as a dangerous weapon, whether it is used to effect an attack or is handled with reckless disregard for the safety of others.").

[30] *In re D.T.*, 977 A.2d 346, 356 (D.C. 2009) ("This court has interpreted the term "great bodily injury" to be equivalent to the term "serious bodily injury…") (citing *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004).

[31] *See* Commentary to "serious bodily injury."

[32] D.C. Code § 22-4502(a) ("Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof)…"). *See, also Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."); *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("[P]resent ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required.").

[33] RCC § 22E-1204.

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

proportionality of the definition of a dangerous weapon, basing the definition on objective criteria and increasing penalties based on the actual increased risk of harm.

Sixth, the RCC definition of a "dangerous weapon" in subparagraph (F) precludes a body part from being deemed a dangerous weapon. A panel of the DCCA has specifically upheld a conviction for assault of a police officer using a deadly or dangerous weapon based on the defendant's use of his teeth to bite an officer's leg.[35] Dicta in the case indicated that any other body part could similarly be a deadly or dangerous weapon depending on its usage,[36] although there does not appear to be an appellate ruling to date in the District on whether other body parts may be considered dangerous weapons. The DCCA ruling that some uses of a person's body parts—without an external item—may constitute use of a dangerous weapon creates uncertainty as to what types of physical contacts should and should not be subject to enhanced liability. The RCC definition, by contrast, clarifies that a person's body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon.[37] This change clarifies the law by providing a bright-line distinction as to what may be a dangerous weapon, penalizing more severely a defendant's use of external objects to inflict damage.

The revised definition of a "dangerous weapon" does not change other DCCA case law as to whether certain objects—be they cars,[38] flip flops[39] or stationary bathroom fixtures[40]—constitute dangerous weapons under the facts in those cases. Inoperable and unloaded firearms also remain dangerous weapons under subparagraph (A) of the RCC definition.

Seventh, the revised definition of dangerous weapon includes any object that is actually likely to cause death likely to cause death or serious bodily injury. The DCCA

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[35] *In re D.T.*, 977 A.2d 346 (D.C. 2009).

[36] *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009) ("We no more implied that bare feet were not dangerous weapons in our shod foot cases by highlighting the presence of the shoe, than we intimated that a cold clothes iron could not be a dangerous weapon when we held that a "hot" one was.").

[37] However, as noted above, bodily fluids are not considered a body part and may constitute a "dangerous weapon" under the RCC definition. For example, a defendant who recklessly exposes another person to infectious bodily fluids that results in harm to that person may be liable for assault by means of a dangerous weapon—his or her own bodily fluid.

[38] *See, e.g.*, *Frye v. United States*, 926 A.2d 1085, 1097 (D.C. 2005) ("The complainant's testimony concerning the manner in which appellant used his vehicle, trying to run her off the road and force her into oncoming traffic, over a substantial stretch of roadway was sufficient to permit the jury to find reasonably that appellant used his vehicle as a dangerous weapon in committing an assault against [the complaining witness]."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (finding the evidence sufficient for ADW and the "while armed" enhancement because the "evidence adduced at trial permitted the jury to conclude beyond a reasonable doubt that the Cadillac, driven at the speeds and in the manner that appellant employed, was likely to produce death or serious bodily injury because of the wanton and reckless manner of its use in disregard of the lives and safety of others.").

[39] *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) ("Even viewing the evidence in a light most favorable to the government, we hold as a matter of law that the flip flop was not a prohibited weapon under § 22-4514(b) [possession of a dangerous weapon]."

[40] *Edwards v. United States*, 583 A.2d 661, 662 (D.C. 1990) ("We hold that the evidence was insufficient to support the jury's finding that Edwards inflicted his wife's injuries while armed, within the meaning of Section 22-3202, when his alleged weapon consisted of one or more fixed or stationary plumbing fixtures against which he hurled his hapless wife.").

has explained that when an object is not dangerous *per se,* the trier of fact must consider whether that object is "known" to be likely to produce death or "great" bodily injury in the manner it is used or threatened to be used. *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005) (quoting *Arthur v. United States,* 602 A.2d 174, 177 (D.C.1992) (citing *Williamson v. United States,* 445 A.2d 975, 979 (D.C.1982); *Harper v. United States,* 811 A.2d 808, 810 (D.C. 2002))). In contrast, the revised definition uses an objective analysis of likelihood and a standardized definition of the term "serious bodily injury" used across the RCC. This change improves the clarity and consistency of the revised code.

"Deadly force" means any physical force that is likely to cause serious bodily injury or death.

Explanatory Note. The term "deadly force" includes any force, with or without the use of a weapon, that is more likely than not to cause death or serious bodily injury. The likelihood could arise from the degree of force, the duration of the force, the location of the force on the human body, the complainant's health, or other factors. A person may use deadly force even if the person does not intend to cause a serious injury[1] and even if death or serious injury does not occur.[2] The term "deadly force" is not currently defined in Title 22 of the D.C. Code, however a definition of the term recently was codified for the first in the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020).[3] The term "serious bodily injury" that is used in the definition of "deadly force" is defined elsewhere in RCC § 22E-701. The RCC definition of "deadly force" is used in the revised defenses for execution of public duty,[4] defense of self or another person,[5] and defense of property,[6] as well as in the revised offense of murder.[7]

Relation to Current District Law. The RCC definition of "deadly force" may constitute a substantive change to District law in two ways.

First, the revised definition does not specifically include a reference to force "intended" to cause serious bodily injury or death. The current D.C. Code definition of deadly force, codified only with respect to law enforcement officer use of force, refers to "any force that is likely or intended to cause serious bodily injury or death." The definition's term "intended" is not defined in the D.C. Code (nor are cognate words "intent," etc.), and there is no case law or legislative history as to the meaning of "intended" in the definition. However, prior DCCA case law defined the term as "force likely to cause serious bodily injury or death."[8] Resolving this ambiguity, the revised definition omits from the codified definition a reference to "intent." In the RCC, "intent" is a defined

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[1] For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

[2] For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

[3] Act 23-336 ("'Deadly force' means any force that is likely or intended to cause serious bodily injury or death.").

[4] RCC § 22E-402.

[5] RCC § 22E-403.

[6] RCC § 22E-404.

[7] RCC § 22E-1101.

[8] *See, e.g.*, *Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016); *McPhaul v. United States*, 452 A.2d 371, n. 1 (D.C. 1982); *Etheredge v. Dist. of Columbia*, 635 A.2d 908, n. 9 (D.C. 1993); *Edwards v. United States*, 721 A.2d 938, 942 (D.C. 1998); *Fersner v. United States*, 482 A.2d 387, 393 (D.C. 1984); *Alcindore v. United States*, 818 A.2d 152, 159 (D.C. 2003).

culpable mental state with a meaning and RCC definitions generally do not contain culpable mental states to avoid confusion as to the scope of their operation. The RCC codification of defense of self or others, moreover, refers in relevant part to an actor who "uses or attempts to use deadly force" which may practically have the same meaning as "intended" within the current D.C. Code definition of "deadly force."[9] This change improves the clarity and consistency of the revised statutes.

Second, the revised definition primarily relies on a different, revised definition of "serious bodily injury." The current D.C. Code definition of deadly force, codified only with respect to law enforcement officer use of force, uses a definition "serious bodily injury" that refers, in relevant part, to "extreme physical pain, illness, or impairment of physical condition." These terms in the definition are not defined in the D.C. Code, and there is no case law or legislative history as to their meaning. This D.C. Code definition of "serious bodily injury" with respect to a law enforcement officer use of force differs from the D.C. Code definition of "serious bodily injury" for sexual abuse offenses,[10] case law defining "serious bodily injury" for other offenses,[11] and case law defining "deadly force" by a person other than a law enforcement (in defense of property).[12] Resolving this ambiguity, the revised definition of "deadly force" uses the standard RCC definition of "serious bodily injury" which does not specifically refer to "extreme physical pain, illness, or impairment of physical condition." The revised definition of "serious bodily injury may narrow in some respects, and expand in other respects, the scope of conduct constituting "deadly force."[13] This change improves the clarity and consistency of the revised statutes.

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[9] See Commentary to RCC § 22E-403, Defense of Self or Another Person.

[10] D.C. Code §22-3001 ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[11] In the absence of a codified definition of "serious bodily injury" for other offenses, District case law has adopted the definition of D.C. Code § 22-3001 when interpreting the term's use in other offenses. *See, e.g Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) (aggravated assault); *Fadero v. United States*, 59 A.3d 1239, 1250 (D.C.2013) (felony assault on a police officer).

[12] *Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016) (defining "serious bodily harm" to have the same meaning as "serious bodily injury" with respect to the meaning of "deadly force").

[13] See Commentary to RCC § 22E-701, "Serious bodily injury."

"Debt bondage" means the status or condition of a person who provides services or commercial sex acts, for a real or alleged debt, where:

(A) The value of the services or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;

(B) The length and nature of the services or commercial sex acts are not respectively limited and defined; or

(C) **The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.**

Explanatory Note. The term "debt bondage" is defined as the status or condition of a person who provides labor, services, or commercial sex acts for real or alleged debt under one of three specified circumstances where such a transaction is unfair.

"Debt bondage" is currently defined in D.C. Code § 22-1831(5) for human trafficking statutes. The RCC definition of "debt bondage" replaces the current definition of "debt bondage" in D.C. Code § 22-1831 and is used the revised offenses of forced labor,[1] forced commercial sex,[2] trafficking in labor,[3] trafficking in forced commercial sex,[4] and commercial sex with a trafficked person.[5]

Relation to Current District Law. The RCC's definition of "debt bondage" is identical to the definition under current law and is not intended to substantively change District law.

[1] RCC § 22E-1601.
[2] RCC § 22E-1602.
[3] RCC § 22E-1603.
[4] RCC § 22E-1604.
[5] RCC § 22E-1608.

"Deceive" and other parts of speech, including "deception," mean:

(A) To create or reinforce a false impression as to a material fact, including a false impression as to an intention to perform future actions;

(B) Preventing another person from acquiring material information;

(C) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which influences another to whom they stand in a fiduciary or confidential relationship; or

(D) For offenses under Subtitle III of this title, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of property which they transfer or encumber in consideration for property, whether or not it is a matter of official record; provided that under subparagraphs (A)-(D) of this paragraph:

(i) The term does not include puffing statements that are unlikely to deceive ordinary persons; and

(ii) Deception as to a person's intention to perform a future act shall not be inferred from the fact alone that they did not subsequently perform the act.

Explanatory Note. This definition enumerates means by which a person can deceive another. Although other conduct may be deemed deceptive in the ordinary use of the word, for purposes of the RCC, "deceive" and "deception" only include the means listed in this definition.

Subparagraph (A) defines "deception" to include creating or reinforcing a false impression. It is not necessary that the defendant create the false impression. Even if another person has a pre-conceived false impression, a person can deceive by merely reinforcing that false impression. "Deception" requires a false impression, but not necessarily false statements. A person can "deceive" by making statements that are factually true to create or reinforce a false impression. Creating or reinforcing a false impression does not require any oral or written communications. Acts and gestures that create or reinforce false impressions can also constitute deception under this definition.

Subparagraph (A) also requires that the creation or reinforcement of a false impression be about a material fact, a fact that a reasonable person would deem relevant under the circumstances. A material fact can include a false impression as to law[1] or the value of the property.

Subparagraph (A) also defines "deception" to include creating or reinforcing false impressions as to an intention to perform future actions. However, mere failure to perform the promised future action does not constitute deception. The person must have had the requisite mental state as to whether he would not perform at the time he or she made the promise.[2]

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[1] For example, a person can deceive another by creating a false impression that a car for sale is street-legal, when in fact it is not.

[2] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]").

Subparagraph (B) defines "deception" to include preventing a person from acquiring material information.[3]

Subparagraph (C) includes two exceptions to the general rule that there is no duty to correct a false impression. Ordinarily, a person has no duty to correct another's pre-existing false impression, and is free to take advantage of that false impression.[4] However, if a person had previously created or reinforced a false impression, even if innocently, that person can "deceive" by later failing to correct that false impression. Subparagraph (C) also states that a person can "deceive" if he or she has a fiduciary or other confidential relationship with another person, and fails to correct a false impression held by that person.

Subparagraph (D) defines "deception," when used in offenses under Subtitle III, to include failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not the impediment is a matter of official record. This is a specialized form of deception that only arises in the context of real estate transactions.

Sub-subparagraph (D)(i) provides one limitation to the definition of "deception," and excludes puffery that is unlikely to deceive ordinary persons. Such statements that exaggerate or heighten the attractiveness of a product or service do not go so far as to constitute deception. When representations go beyond mere exaggeration to actually create or reinforce an explicit false impression, however, then an actor may cross the line into criminal deception. In many cases, this exception is unnecessary as puffery ordinarily does not, and is not intended to, actually create or reinforce a false impression. However, advertising may include puffing statements that will create a false impression in at least some listeners. In this context, there is no "deception" if the puffery is unlikely to deceive ordinary persons. With non-puffing statements however, there is no requirement that the deception be likely to fool an ordinary person.

Sub-subparagraph (D)(ii) provides an evidentiary rule regarding false intentions to perform a future act. Under this sub-subparagraph, failure to perform a promised act, without any additional evidence, is insufficient to prove that the a person intended to deceive another.

Notably, the "deception" definition does not itself require any culpable mental state. If a person creates a false impression, it is not required that he or she knew that the impression was false. However, specific statutes in the RCC that use the "deception" definition may specify a mental state for that particular offense. For example, if an offense requires a culpable mental state of "knowingly", and the deception is premised on creating or reinforcing a false impression, then the defendant must have been practically certain that the impression was false. If another offense requires a culpable mental state of "recklessly," and the deception is premised on creating or reinforcing a false impression,

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[3] For example, if a person selling a car that had been seriously damaged in an accident hides or destroys records of the accident to prevent a buyer from learning that information, he may have deceived the other person, even if he did not actually create or reinforce the false impression that the car had never been in an accident.

[4] For example, if a person is selling a ring that he believes is made of fool's gold, but a buyer realizes that the ring is made of real gold, the buyer has no obligation to correct the seller's false impression.

then the defendant must only have been consciously aware of a substantial and unjustifiable risk that the impression was actually false.

The RCC definition of "deceive" and "deception" is new; the terms are not statutorily defined in Title 22 of the D.C. Code (although the undefined terms are used in other statutes[5] in Title 22. The RCC definitions of "deceive" and "deception" are used in the revised definition of "effective consent,"[6] as well as the revised offenses of nonconsensual sexual conduct,[7] kidnapping,[8] criminal restraint,[9] fraud,[10] forgery,[11] identity theft,[12] impersonation of an official,[13] and misrepresentation as a District of Columbia entity.[14]

Relation to Current District Law. The RCC "deception" definition is new and does not itself change current District law, but may result in changes of law as applied to particular offenses (including through the definition of "effective consent").

As applied to the current D.C. Code fraud and theft offenses which specifically criminalize taking property of another by means of creating a false impression,[15] there is no substantive change to District law. The D.C. Court of Appeals (DCCA) has not explicitly held whether fraud or theft include obtaining property by reinforcing a false impression, preventing another from obtaining information, failing to correct a false impression that the defendant first created or when a person has a fiduciary or confidential relationship with another[16], or failing to disclose a lien or other adverse claim to property. However, the "deception" definition appears consistent with current theft and fraud law in several respects. First, the DCCA has held that both fraud and theft criminalize taking property of another by means of "false representation."[17] Second, the current fraud statute

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[5] E.g., Financial exploitation of a vulnerable adult or elderly person (D.C. Code § 22-933.01); Definitions for Chapter 18A (D.C. Code § 22-1831).

[6] RCC § 22E-701.

[7] RCC § 22E-1307.

[8] RCC § 22E-1401.

[9] RCC § 22E-1402.

[10] RCC § 22E-2201.

[11] RCC § 22E-2204.

[12] RCC § 22E-2205.

[13] RCC § 22E-3201.

[14] RCC § 22E-3202.

[15] The current theft statute states that the offense "includes conduct previously known as . . . larceny by trick, larceny by trust . . . and false pretenses." D.C. Code § 22-3211. The current fraud statute criminalizes "engag[ing] in a scheme ort systematic course of conduct with intent to defraud or to obtain property of another by means of false or fraudulent pretense, representation, or promise[.]" D.C. Code 22-3221.

[16] Some federal courts however, have held that "[mail fraud statutes] are violated by affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000).

[17] *United States v. Blackledge*, 447 A.2d 46 (D.C. 1982) ("To convict a defendant for the crime of false pretenses, the government must prove that the defendant made a false representation"); *see also Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011) ("To convict for fraud, the jury had to conclude that the appellant engaged in 'a scheme or systematic course of conduct' composed of at least two acts calculated to

explicitly includes using a false promise to obtain property of another.[18] Third, the U.S. Supreme Court has held that the federal mail fraud statute, which served as a model for the District's current fraud statute,[19] "require[es] a misrepresentation or concealment of *material* fact."[20] Although the DCCA has never squarely held that fraud or theft requires a false impression as to a material fact, the Redbook Jury Instructions for fraud state that a "false representation or promise is any statement that concerns a material or important fact or a material or important aspect of the matter in question."[21]

deceive, cheat, or falsely obtain property."); *See also* D.C. Crim. Jur. Instr. § 5-300 (stating that "deception" is any act or communication made by [the defendant] she s/he knows to be false[.]").

[18] D.C. Code § 22-3221.

[19] Commentary to the District of Columbia Theft and White Collar Crime Act of 1982 at 40 ("The language 'obtain property of another by means of false or fraudulent pretense, representation, or promise' is basically derived from the federal mail fraud statute.").

[20] *Neder v. United States*, 527 U.S. 1, 22 (1999) (emphasis original). See also, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998); LAFAVE, WAYNE. 3 SUBST. CRIM. L. § 19.7.

[21] D.C. Crim. Jur. Instr. § 5-200.

"Demonstration" means an act of marching, congregating, standing, sitting, lying down, parading, or patrolling by one or more persons, with or without signs, with the desire to persuade one or more individuals, or the public, or to protest some action, attitude, or belief.

Explanatory Note. The RCC definition of "demonstration" is substantively identical[1] to the definition of "demonstration" in D.C. Code § 22-1307(b)(2). The RCC definition of "demonstration" is used in the revised offenses of unlawful demonstration[2] and contributing to the delinquency of a minor.[3]

Relation to Current District Law. The RCC definition of "demonstration" is nearly identical to the definition of "demonstration" in D.C. Code § 22-1307(b)(2) and does not substantively change current District law. The phrase "for the purpose of" is changed to "with the desire to," so as to avoid confusion with the defined term "purpose" in RCC § 22E-206.

[1] The sole difference between the RCC definition and the current definition of "demonstration" in D.C. Code § 22-1307(b)(2) is that the former deletes the circular reference to "demonstrating" in the latter. Currently, D.C. Code § 22-1307(b)(2) states: "Demonstration" means marching, congregating, standing, sitting, lying down, parading, *demonstrating*, or patrolling by one or more persons, with or without signs, for the purpose of persuading one or more individuals, or the public, or to protest some action, attitude, or belief." (emphasis added).

[2] RCC § 22E-4204.

[3] RCC § 22E-4601.

"Deprive" means:

(A) Withhold property or cause it to be withheld from an owner permanently, or for so extended a period or under such circumstances that a substantial portion of its value or its benefit is lost to the owner; or

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

Explanatory Note. The RCC definition includes "owner," itself a defined term in RCC § 22E-701 that means a person holding an interest in property that the actor is not privileged to interfere with.

The RCC definition of "deprive" replaces the current statutory definition of "deprive" in D.C. Code § 22-3201(2),[1] applicable to provisions in Chapter 32 of title 22.[2] The RCC definition of "deprive" is used in the revised offenses of robbery,[3] theft,[4] fraud,[5] financial exploitation of a vulnerable adult or elderly person,[6] extortion,[7] and possession of stolen property.[8]

Relation to Current District Law. The revised definition of "deprive" makes one clear change to the statutory definition of "deprive" in in D.C. Code § 22-3201(2), applicable to certain property offenses.[9] Subparagraph (A) of the current definition of "deprive" requires, in part, that the property be withheld "for so extended a period or under such circumstances as to acquire a substantial portion of its value." It is unclear whether this language includes a situation where the actor does not actually gain any value or benefit from the property, but causes an owner to lose value or benefit. In contrast, subparagraph (A) of the revised definition of "deprive" replaces "as to acquire a substantial portion of its value" in the current definition with "that a substantial portion of its value or its benefit is lost to the owner." The revised definition clearly includes situations where the actor does not actually gain any value or benefit, but causes an owner to lose it. In the rare situation where an actor gains a substantial portion of the value or benefit of the property without causing an owner to lose it a substantial portion of its value or benefit,[10] the revised

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[1] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.").

[2] *See* D.C. Code Title 22, Chapter 32. Theft; Fraud; Stolen Property; Forgery; and Extortion.

[3] RCC § 22E-1201.

[4] RCC § 22E-2101.

[5] RCC § 22E-2201.

[6] RCC § 22E-2208.

[7] RCC § 22E-2301.

[8] RCC § 22E-2401.

[9] *See* D.C. Code Title 22, Chapter 32. Theft; Fraud; Stolen Property; Forgery; and Extortion.

[10] For example, in theft of intellectual property there may be situations that do not result in a substantial loss to the owner. Such unlawful uses of another's property would remain criminalized under unauthorized use of property in 22E-2102.

definition of "deprive" is not satisfied and the conduct would be covered by unauthorized use of property in RCC § 22E-2102.

The remaining changes to the statutory definition of "deprive" in in D.C. Code § 22-3201(2)[11] are clarificatory and not intended to change District law. The revised definition of "deprive" replaces two references to "a person" with "an owner," a defined term in 22E-701 meaning a person holding an interest in property with which the accused is not privileged to interfere without consent. Subparagraph (b) of the current definition of "deprive" uses the term "owner,"[12] but it is not a statutorily defined term in the current D.C. Code. Replacing the two references to "a person" with "an owner" clarifies the revised definition.

[11] D.C. Code 22-3201(2) ("'Deprive' means: (A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or (B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.").

[12] D.C. Code 22-3201(2).

"Detection device" means any wearable equipment with location tracking capability, including global positioning system and radio frequency identification technologies.

Explanatory Note. The RCC defines "detection device" to mean any wearable equipment with location tracking capability, such as global positioning system ("GPS"), or radio frequency identification ("RFID") technology. A detection device is any technology installed on a person's body or clothing that is capable of monitoring the person's whereabouts. It includes mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the GPS that is currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the RFID technology that is currently used by the Department of Corrections.[1] It is also intended to capture other wearable equipment that may be developed in the future.

The word "wearable" modifies "electronic monitoring," "global positioning system," and "radio frequency identification technology." Accordingly, the definition does not include surveillance devices that are not worn, such as video cameras, infrared cameras, and international mobile subscriber identity-catchers (which intercept cellular phone traffic). The term refers to the physical device itself and does not include the records or reports that it generates.

The RCC definition of "detection device" replaces the current definition of "device" in D.C. Code § 22-1211(a)(2),[2] applicable to the offense tampering with a detection device. The RCC definition of "detection device" is used in the revised offense of tampering with a detection device.[3]

Relation to Current District Law. The RCC definition of "detection device" may change the current definition of "device" in D.C. Code § 22-1211(a)(2) in one main way. Current law defines the term "device" to "includes a bracelet, anklet, or other equipment with electronic monitoring capability or global positioning system or radio frequency identification technology." Case law has not addressed the term's meaning. The revised code completely defines the meaning of the term instead of providing a partial definition as to what is included, and specifies that a detection device means any "wearable" monitoring equipment. This change improves the clarity of the revised offense.

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[1] *See* Report on Bill 18-963, the "Criminal Code Amendment Act of 2010," Committee on Public Safety and the Judiciary (December 6, 2010) at Page 3.

[2] D.C. Code § 22-1211(a)(2) ("For the purposes of this subsection, the term "device" includes a bracelet, anklet, or other equipment with electronic monitoring capability or global positioning system or radio frequency identification technology.").

[3] RCC § 22E-3402.

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

Explanatory Note. The RCC definition of "District official" is new, the term is not currently defined in Title 22 of the D.C. Code (although the current protection of District public officials statute defines "official or employee" in D.C. Code § 22-851[1]). The RCC definition of "District official" replaces the current definition of "official or employee" in D.C. Code § 22-851, applicable to the current protection of District public officials statute. The RCC definition of "District official" is used in the RCC definition of a "protected person,"[2] and in the revised offenses of murder,[3] manslaughter,[4] assault,[5] criminal threats,[6] offensive physical contact,[7] kidnapping,[8] criminal restraint,[9] stalking,[10] and impersonation of an official.[11]

Relation to Current District Law. The RCC definition of "District official" makes one clear change to the statutory definition of "official or employee" in D.C. Code § 22-851.[12] The current definition of "employee or official" is "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions."[13] In contrast, the revised definition, by incorporating the definition of "public official" in D.C. Code § 1-1161.01(47)(A) – (H)[14] is limited to District officials and employees that have special

[1] D.C. Code § 22-851(a)(2) ("'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").
[2] RCC § 22E-701.
[3] RCC § 22E-1101.
[4] RCC § 22E-1102.
[5] RCC § 22E-1202.
[6] RCC § 22E-1204.
[7] RCC § 22E-1205.
[8] RCC § 22E-1401.
[9] RCC § 22E-1403.
[10] RCC § 22E-1801.
[11] RCC § 22E-3201.
[12] D.C. Code § 22-851(a)(2).
[13] D.C. Code § 22-851(a)(2).
[14] D.C. Code § 1-1161.01(47) (47)(A) – (H) ("'Public official' means: (A) A candidate; (B) The Mayor, Chairman, and each member of the Council of the District of Columbia holding office under Chapter 2 of this title; (C) The Attorney General; (D) A Representative or Senator elected pursuant to § 1-123; (E) An Advisory Neighborhood Commissioner; (F) A member of the State Board of Education; (G) A person serving as a subordinate agency head in a position designated as within the Executive Service; (G-i) Members of the Washington Metropolitan Area Transit Authority Board of Directors appointed appointed by the Council pursuant to § 9-1107.01(5)(a); (G-ii) A Member or Alternate Member of the Washington Metrorail Safety Commission appointed by the District of Columbia pursuant to Article III.B. of the Metrorail Safety Commission Interstate Compact enacted pursuant to D.C. Law 21-250; (H) A member of a board or commission listed in § 1-523.01(e).").

obligations in District government.[15] The RCC definition of "District official" improves the proportionality of the revised offenses against persons.

As applied to several RCC offenses against persons, the RCC definition of "District official" substantively changes current District law. For example, the RCC assault statute (RCC § 22E-1202) incorporates enhanced penalties for assaults committed against a "District official" while in the course of official duties (through the RCC definition of "protected person"), as well as for assaults committed "with the purpose of harming" a "District official" due to his or her status as a "District official." The District's current assault and related statutes do not have any such enhanced penalties, although such assaultive conduct is prohibited under D.C. Code § 22-851.[16] In contrast, the RCC assault statute incorporates enhanced penalties for assaults against a "District official" directly into the gradations of the offense, part of the general repeal of D.C. Code § 22-851. The revised definition of "District official," limited to District officials and employees that have special obligations in District government,[17] improves the consistency and proportionality of the revised offense.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "District official" on current District law.

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[15] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).

[16] D.C. Code § 22-851(c) ("A person who . . . injures any official or employee . . . while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law."); D.C. Code § 22-851(a)(2) ("'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").

[17] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).

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

Explanatory Note. The RCC definition of "domestic partner" replaces the current definition of "domestic partner" in D.C. Code § 22-3001(4A),[1] applicable to the the provisions in Chapter 30, Sexual Abuse. The RCC definition of "domestic partner" is used in the RCC definition of "position of trust with or authority over"[2] and the revised provision for the admission of evidence in sexual assault and related cases.[3]

Relation to Current District Law. The RCC definition of "domestic partner" is identical to the statutory definition in current law.[4]

[1] D.C. Code § 22-3001(4A) ("'Domestic partner' shall have the same meaning as provided in § 32-701(3)."). The current definition of "domestic partner" in D.C. Code § 32-701(3) is: "'Domestic partner' means a person with whom an individual maintains a committed relationship as defined in paragraph (1) of this section and who has registered under § 32-702(a) or whose relationship is recognized under § 32-702(i). Each partner shall: (A) Be at least 18 years old and competent to contract; (B) Be the sole domestic partner of the other person; and (C) Not be married."

[2] RCC § 22E-701.

[3] RCC § 22E-1310.

[4] D.C. Code § 22-3001(4A).

"Domestic partnership" has the meaning specified in D.C. Code § 32-701(4).

Explanatory Note. The RCC definition of "domestic partnership" replaces the current definition of "domestic partnership" in D.C. Code § 22-3001(4B),[1] applicable to the provisions in Chapter 30, Sexual Abuse. The RCC definition of "domestic partnership" is used in the RCC definition of "position of trust with or authority over,"[2] as well as in the revised offenses of sexual abuse of a minor,[3] sexual abuse by exploitation,[4] sexually suggestive contact with a minor,[5] enticing a minor into sexual conduct,[6] incest,[7] distribution of an obscene image to a minor,[8] creating or trafficking an obscene image of a minor,[9] possession of an obscene image of a minor,[10] arranging a live sexual performance of a minor,[11] and attending or viewing a live sexual performance of a minor.[12]

Relation to Current District Law. The RCC definition of "domestic partner" is identical to the statutory definition in current law.

[1] D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4)."). D.C. Code § 32-701(4) defines "domestic partnership" as: "the relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)."
[2] RCC § 22E-701.
[3] RCC § 22E-1302.
[4] RCC § 22E-1303.
[5] RCC § 223-1304.
[6] RCC § 22E-1305.
[7] RCC § 22E-1308.
[8] RCC § 22E-1806.
[9] RCC § 22E-1807.
[10] RCC § 22E-1808.
[11] RCC § 22E-1809.
[12] RCC § 22E-1810.

"Dwelling" means a structure that at the time of the offense is either designed or actually used for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public.

Explanatory Note. The word "structure" is notably broader than the term "building," which is also defined in RCC § 22E-701. A structure need not be affixed to land and includes vehicles and tents, if used as housing.

The RCC definition of "dwelling" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "dwelling" are in several current property offenses[1]). The RCC definition of "dwelling" is used in the revised definition of "position of trust with or authority over,"[2] as well as the revised offenses of arson,[3] reckless burning,[4] trespass,[5] burglary,[6] public nuisance,[7] breach of home privacy,[8] and indecent exposure.[9]

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

As applied in the revised burglary statute, the term "dwelling" clarifies, but does not substantively change, District law. The current burglary statute does not define the term. District case law has held that it includes the secured communal areas of multi-unit buildings.[10] The DCCA has also interpreted the phrase "dwelling, or room used as a sleeping apartment."[11] The revised code adds a definition of "dwelling" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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[1] *E.g.*, trespass (D.C. Code § 22-3302), burglary (D.C. Code § 22-801).
[2] RCC § 22E-701.
[3] RCC § 22E-2501.
[4] RCC § 22E-2502.
[5] RCC § 22E-2601.
[6] RCC § 22E-2701.
[7] RCC § 22E-4202.
[8] RCC § 22E-4205.
[9] RCC § 22E-4206.
[10] *Ruffin v. United States*, 219 A.3d 997, 1003 (D.C. 2019).
[11] *See Newman v. United States*, 705 A.2d 246, 264 (D.C. 1997) (finding a reasonable jury could have concluded that an apartment was a sleeping apartment, not merely a base for prostitution).

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

Explanatory Note. The RCC definition of "effective consent" is new, the term is not currently defined in Title 22 of the D.C. Code (although the closely-related term "consent" is currently codified in D.C. Code § 22-3001(4),[1] applicable to provisions in Chapter 30, Sexual Abuse, and the undefined term is used in numerous other Title 22 statutes[2]). The RCC definition of "effective consent" replaces, in relevant part,[3] the current definition of "consent" in D.C. Code § 22-3001(4) and is used in numerous RCC provisions.

Relation to Current District law. The RCC breaks the current D.C. Code definition of "consent" in D.C. Code § 22-3001(4), applicable to sex offense provisions, and the general concept of consent into two terms. The RCC definition of "consent" (see commentary entry above) refers to the bare fact of an agreement by a competent and reasonable person obtained by any means, while the RCC definition of "effective consent" refers to agreements that are obtained by means other than the use of physical force, an express or implied coercive threat, or deception.[4] While the RCC definition of "consent" substantively changes current District law with respect to D.C. Code § 22-3001(4) in one way and does not substantively change District law referencing the term in connection with

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[1] D.C. Code § 22-3001 ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[2] *See, e.g.,* Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . .").

[3] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[4] The RCC definition of "consent" corresponds to the first part of the first sentence of the current definition of "consent" in D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a … agreement to the sexual act or contact in question."). Meanwhile the RCC definition of "effective consent" corresponds to the later part of the first sentence and the second sentence of the current definition of "consent" in D.C. Code § 22-3001("'Consent' means … a freely given agreement…. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

other statutory provisions, the RCC definition of "effective consent" may substantively change current District law in multiple aspects.

The RCC definition of "effective consent" makes one possible substantive change to the current definition of "coercion" in D.C. Code § 22-3001(4), applicable to sex offense provisions. The current definition of "consent" in D.C. Code § 22-3001(4) for the sex offense statutes requires that the agreement between the actor and the complainant to engage in sexual conduct be "freely given." The meaning of "freely given" is ambiguous as to whether it includes agreements based on deception, and DCCA case law does not address the matter. The RCC definition of "effective consent" resolves this ambiguity by stating that an agreement caused by deception is *not* "effective consent." "Deception" is a defined term in RCC § 22E-701 that explicitly excludes minor "puffery."[5] To the extent that a person agrees to conduct based on a deception, it is questionable whether there is an "agreement," let alone one that is "freely given" under current District law. This change clarifies and improves the consistency of the revised statutes.

The RCC definition of "effective consent" also clarifies the current definition of "consent" in D.C. Code § 22-3001(4), which applies to sex offense provisions in Chapter 30. The current statute, besides saying that consent must be "freely given," states separately that: "Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent."[6] However, the RCC definition of "effective consent" eliminates this second sentence as unnecessary and potentially confusing. The sentence in the current statute appears to provide a specific example of when a "freely given agreement" is not reached—namely, when there is a "lack of verbal or physical resistance or submission by the victim resulting from the use of force, threats, or coercion…." The RCC definition of "effective consent" generally excludes consent obtained by physical force, an explicit or implicit coercive threat, and deception, and communicates the same point in a more general way that is applicable to all offenses in the RCC. This change clarifies the revised statute.

The RCC definition of "effective consent" also clarifies references to the term "consent" in various offenses against persons in Title 22 of the current D.C. Code. Current District law has not codified a definition of "consent" for offenses against persons outside of Chapter 30 Sex Offenses, however the term has been used in case law concerning some offenses against persons. For example, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's simple assault statute and is not a defense to the District's felony assault statute.[7] Although the rulings do not define the

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[5] In addition, the RCC nonconsensual sexual conduct offense (RCC § 22E-1307) limits liability for engaging in a sexual act or sexual contact by deception to instances where the actor used deception as to the nature of the sexual act or sexual contact. Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person's current use of birth control (e.g. use of a condom or IUD); and a person's health status (e.g. having a sexually transmitted disease). See commentary to RCC § 22E-1307 for further discussion.

[6] D.C. Code § 22-3001(4).

[7] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault."); see also *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to

precise meaning of "consent," there was a recognition in one case that forms of forced consent are clearly not intended to be a defense to assaultive conduct.[8] Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[9] without discussing the difference between these terms.[10] The RCC definition of "effective consent" is consistent with and further clarifies existing the meaning of the term "consent" for offenses against persons.

The RCC definition of "effective consent" also clarifies references to the term "consent" in current Title 22 property offenses. Current District law has not codified a definition of either "effective consent" or "consent" for property offenses, nor does case law discuss these terms or concepts at length in property offenses. However, there are similar terms and phrases in current property statutes and case law. On a few occasions, the DCCA has recognized the relevance of consent in proving many property offenses.[11] Consent is also an explicit element in several of the District's current property offenses, such as the current extortion offense[12] and unauthorized use of a motor vehicle offense.[13] Further, the current definition of "appropriate" in Chapter 30 of the D.C. Code makes use

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charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).

[8] *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2014) ("Taken to its logical conclusion, appellant's argument that consent should be a defense to assault where there is significant bodily injury would render non-prosecutable acts that are an affront to the public peace and order, such as a loan shark lending money on the condition that non-payment authorizes a beating or gang members who agree to settle old scores by a shootout.").

[9] *Guarro*, 237 F.2d at 581.

[10] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.

[11] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[12] D.C. Code § 22-3251(a) ("A person commits the offense of extortion if: (1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or (2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.").

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

of "without authority or right,"[14] which is roughly in line with the RCC's definition of consent. Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property,[15] and some current offense definitions explicitly include agents.[16] The RCC definition of "effective consent" is consistent with and further clarifies existing the meaning of the term for property offenses.

The commentaries to relevant RCC provisions further discuss the effect of the RCC definition of "effective consent" on current District law.

[14] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included 'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id*. Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[15] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

[16] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id*.

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

Explanatory Note. The RCC definition of "elderly person" replaces the current definition of "elderly person" in D.C. Code § 22-932(3),[1] applicable to provisions in Chapter 9A, Criminal Abuse and Neglect of Vulnerable Adults. The RCC definition of "elderly person" is used in the revised offenses of criminal abuse of a vulnerable adult or elderly person,[2] criminal neglect of a vulnerable adult or elderly person,[3] and financial exploitation of a vulnerable adult or elderly person,[4] as well as in the financial exploitation of a vulnerable adult or elderly person civil provisions.[5]

Relation to Current District Law. The RCC definition of "elderly person" is identical to the statutory definition under current law.[6]

[1] D.C. Code § 22-932(3) ("'Elderly person' means a person who is 65 years of age or older."). The current penalty enhancement for certain crimes committed against senior citizens does not define the term "senior citizen" or "elderly person," but also requires that the victim be "65 years of age or older." D.C. Code § 22-3601(a). The current enhancement for certain crimes committed against senior citizens does not apply to the current abuse of a vulnerable adult or elderly person statute (D.C. Code § 22-933) or neglect of a vulnerable adult or elderly person statute (D.C. Code § 22-934).

[2] RCC § 22E-1503.

[3] RCC § 22E-1504.

[4] RCC § 22E-2208.

[5] RCC § 22E-2209.

[6] D.C. Code § 22-932(3) ("'Elderly person' means a person who is 65 years of age or older."). The current penalty enhancement for certain crimes committed against senior citizens does not define the term "senior citizen" or "elderly person," but also requires that the victim be "65 years of age or older." D.C. Code § 22-3601(a). The current enhancement for certain crimes committed against senior citizens does not apply to the current abuse of a vulnerable adult or elderly person statute (D.C. Code § 22-933) or neglect of a vulnerable adult or elderly person statute (D.C. Code § 22-934).

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

Explanatory Note. The definition of "factual cause" exclusively appears in RCC § 22E-204 and is addressed in the Commentary accompanying the statute.

"Fair market value" means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied.

Explanatory Note. In the RCC, "fair market value" is defined as the price "which a purchaser who is willing, but not obligated to buy, would pay an owner who is willing, but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied."

The RCC definition of "fair market value" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "fair market value" is used in the RCC definitions of "amount of damage"[1] and "value."[2]

Relation to Current District Law. The RCC definition of "fair market value" is may substantively change current District law in one way.

The RCC definition of "fair market value" is taken from *Nichols v. United States*,[3] a malicious destruction of property case. It is also the definition that the jury instructions use for "value."[4] However, he DCCA has recognized at least two other definitions of fair market value in the context of other property offenses.[5] These definitions of "fair market value" differ from the *Nichols* definition by not specifically requiring that the buyer and seller be willing, but not obligated, or that all reasonable uses of the property be considered. There is no DCCA case law that discusses whether the variations between the definitions of fair market value are substantive. Given the ambiguity of the case law, adopting the more expansive *Nichols* definition of "fair market value" could be viewed as a substantive change in law.

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[1] RCC § 22E-701.

[2] RCC § 22E-701.

[3] 343 A.2d 336, 341 (D.C. 1975) (stating that the "normal definition" of "fair market value" is the price which a purchaser who is willing but not obliged to buy would pay an owner who is willing but not obliged to sell, considering all the uses to which the property is adapted and might reasonably be applied.").

[4] D.C. Crim. Jur. Instr. § 3.105 & cmt. at 3-12.

[5] In the context of receiving stolen property, the DCCA has stated that "property value is its market value at the time and place stolen, if there is a market for it. *Long v. United States*, 156 A.3d 698, 714 (D.C. 2017) (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (quoting Lafave, Criminal Law, § 8.4(b) (3d ed. 2000)), and has also applied the definition typically used in theft cases, *Curtis v. United States*, 611 A.2d 51, 52 and n.1. (D.C. 1992) (discussing the "fair market value" and citing to a theft case, *Williams v. United States*, 376 A.2d 442 (D.C. 1977)). The definition typically used in theft cases is the "price at which a willing seller and a willing buyer will trade." *Williams v. United States*, 376 A.2d 442, 444 (D.C. 1977); *see also Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010).

"False knuckles" means an object, whether made of metal, wood, plastic, or other similarly durable material that is constructed of one piece, the outside part of which is designed to fit over and cover the fingers on a hand and the inside part of which is designed to be gripped by the fist.

Explanatory Note. The RCC definition of "false knuckles" replaces the current definition of "knuckles" in D.C. Code § 22-4501, applicable to provisions in Chapter 45, Weapons and Possession of Weapons. The RCC definition of "false knuckles" is used in the revised definition of "dangerous weapon."[1]

Relation to Current District Law. The RCC definition of "false knuckles" is identical to the statutory definition of "knuckles" under current law.[2] The word "false" clarifies that the term does not include a body part.

[1] RCC § 22E-701.
[2] D.C. Code § 22-4501.

"Felony" means:

(A) An offense punishable by a term of imprisonment that is more than one year;

(B) In other jurisdictions, an offense punishable by death; or

(C) First or Second Degree Parental Kidnapping under RCC § 16-1022.

Explanatory Note. The RCC defines "felony" for all offenses. The definition depends on the maximum penalty or whether in another jurisdiction the penalty is punishable by death. Principally, the definition captures offenses punishable by more than one year imprisonment. In addition, the term "felony" includes first and second degree parental kidnapping,[1] which is not punishable by a term of imprisonment of more than one year.[2] The RCC definition of "felony" is used in eight revised provisions[3] and three revised offenses.[4]

Relation to Current District Law. While there is no current D.C. Code definition of "felony," the RCC definition reflects current DCCA case law.[5] Specifying the "felony" includes parental kidnapping is consistent with current District law.[6]

[1] RCC § 16-1022.

[2] RCC § 16-1022 (h)(6) specifies that first and second degree parental kidnapping are designated as felonies, notwithstanding the maximum allowable penalties.

[3] Criminal solicitation (RCC § 22E-302); Offense classifications (RCC § 22E-601); Authorized terms of imprisonment (RCC § 22E-603); Authorized fines (RCC § 22E-604); Repeat offender penalty enhancement (RCC § 22E-606); Pretrial release penalty enhancement (RCC § 22E-607); Hate crime penalty enhancement (RCC § 22E-608); Abuse of government power penalty enhancement (RCC § 22E-610).

[4] Kidnapping (RCC § 22E-1401); Failure to appear after release on citation or bench warrant bond (RCC § 23-586); Failure to appear in violation of a court order (RCC § 23-1327).

[5] *Henson v. United States*, 399 A.2d 16, 20 (D.C. 1979) ("No statute applicable to the District of Columbia provides a general definition of either "felony" or "misdemeanor." Largely for historical reasons, the courts in this jurisdiction generally define "felony" as any offense for which the maximum penalty provided for the offense is imprisonment for more than one year; generally, all other crimes are misdemeanors. Stephens v. United States, 106 U.S.App.D.C. 249, 250 n.1, 271 F.2d 832, 833 n.1 (1959).").

[6] D.C. Code § 16-1024 (b) (stating that if the child is out of the custody of the lawful custodian for more than 30 days that the defendant is guilty of a "felony.").

"Financial injury" means the reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act, including:

(A) The costs of clearing a name, debt, credit rating, credit history, criminal record, or any other official record;

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

(C) Medical bills;

(D) Relocation costs;

(E) Lost wages or compensation; and

(F) Attorneys' fees.

Explanatory Note. The RCC defines "financial injury" to include all financial losses sustained as a result of a crime. The list of examples provided in the definition is not exhaustive. The loss may be incurred by any natural person, including the victim of a crime, a person who is financially responsible for the victim, and a person other than the victim who is threatened by the criminal conduct.[1] However, the loss may not be incurred by an agency or organization.[2] The factfinder must determine that the expenditures were reasonably necessitated by the criminal conduct.[3]

The costs of clearing a record include the litigation costs necessitated by a civil or administrative proceeding. The costs of repairing or replacing property should be calculated based on the cost actually reasonably incurred and not limited by market value at the time of the loss. Medical bills include health expenses paid by a natural person but exclude expenses paid by an insurance company. Relocation costs may include penalties for breaking a lease. Lost wages or compensation includes salaries, other earnings, and benefits. Attorneys' fees must reasonably result from the criminal act and must be reasonable in amount.

The RCC definition of "financial injury" replaces the current definition of "financial injury" in D.C. Code §§ 22-3132(5) and 22-3227.01(1). The term "act" that is used in the definition of "financial injury" is defined elsewhere in RCC § 22E-701. The RCC definition of "financial injury" is used in the revised offenses of stalking,[4] electronic stalking,[5] identity theft,[6] and financial exploitation of a vulnerable adult or elderly person.[7]

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[1] Consider, for example, a criminal offense in which an actor stalks a victim by repeatedly threatening to injure the victim's sibling, causing the sibling to relocate to a hidden residence. Although the sibling is not a victim of stalking conduct *per se*, the costs of relocation may qualify as a financial injury resulting from the stalking.

[2] For example, the costs incurred by a police department or court system are excluded from the calculation of a financial injury.

[3] Consider, for example, a person who relocates to an expensive, high-security apartment to avoid a stalker. The jury will first have to decide whether it was reasonable to relocate under the circumstances. Then the jury will have to decide which expenses incurred as a result of the move were reasonably necessary, e.g., the moving truck, the rent increase, the cost of furnishing the new apartment.

[4] RCC § 22E-1801.

[5] RCC § 22E-1802.

[6] RCC § 22E-2205.

[7] RCC § 22E-2208.

Relation to Current District Law. The RCC definition of "financial injury" makes two substantive changes to the current definition of "financial injury" in D.C. Code §§ 22-3132(5) and 22-3227.01(1).

First, the revised definition includes costs incurred by any natural person. Current D.C. Code § 22-3132(5) limits the calculation of financial injury to expenses incurred by the victim, a member of the victim's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the victim. In contrast, the revised definition includes costs incurred by anyone, so long as they are reasonably related to the criminal act. This change applies consistent, clearly articulated definitions, improves the clarity of the revised offenses, and fills an unnecessary gap in liability.

Second, the revised definition explicitly requires that the costs be "reasonably incurred" as a result of the criminal act. The current statutes do not specify that the calculation of financial injury must be objectively reasonable. In contrast, the revised statute explicitly requires a rational and justifiable nexus between the criminal act and the resulting expenditures. This change applies consistent, clearly articulated definitions and improves the clarity and proportionality of the revised offenses.

"Firearm" has the meaning specified in D.C. Code § 7-2501.01, except that in Chapter 41 of this title the term "firearm":

(A) Shall not include a firearm frame or receiver;

(B) Shall not include a firearm muffler or silencer; an

(C) Shall include operable antique pistols.

Explanatory Note. The RCC definition of "firearm" replaces the current definition of "firearm" in D.C. Code § 22-4501 and the exceptions provision in D.C. Code § 22-4513. The RCC definition of "firearm" is used in the revised definitions of "bump stock,"[1] "dangerous weapon,"[2] and "imitation firearm,"[3] as well as in sixteen revised offenses[4] and four revised provisions.[5]

Relation to Current District Law. The RCC definition of "firearm" is identical to the statutory definition of "firearm" under current D.C. Code Title 22 Chapter 45,[6] except that it does not include frames, receivers, mufflers, or silencers. The RCC instead separately criminalizes silencers as a firearm accessory in the revised possession of a prohibited weapon or accessory offense.[7]

As applied in the revised possession of a dangerous weapon during a crime offense, the revised definition may change current law in one way. The revised definition categorically excludes toy and antique pistols unsuitable for use as firearms. Current D.C. Code § 22-4513 excludes toys and antiques for all sections in Chapter 45 of Title 22 except possession of a firearm during a crime of violence or dangerous crime,[8] possession of a prohibited weapon with intent to use unlawfully against another,[9] and the while armed

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[1] RCC § 22E-701.
[2] RCC § 22E-701.
[3] RCC § 22E-701.
[4] Possession of a prohibited weapon or accessory (RCC § 22E-4101); Carrying a dangerous weapon (RCC § 22E-4102); Possession of a dangerous weapon during a crime (RCC § 22E-4104); Possession of a firearm by an unauthorized person (RCC § 22E-4105); Negligent discharge of firearm (RCC § 22E-4106); Alteration of a firearm identification mark (RCC § 22E-4107); Unlawful sale of a pistol (RCC § 22E-4111); Unlawful transfer of a firearm (RCC § 22E-4112); Sale of a firearm without a license (RCC § 22E-4113); Unlawful sale of a firearm by a licensed dealer (RCC § 22E-4115); Use of false information for purchase or licensure of a firearm (RCC § 22E-4116); Endangerment with a firearm (RCC § 22E-4120); Possession of an unregistered firearm, destructive device, or ammunition (RCC § 7-2502.01A); Unlawful storage of a firearm (RCC § 7-2507.02A); Trafficking of a controlled substance (RCC § 48-904.01b); Trafficking of a counterfeit substance (RCC § 48-904.01c).
[5] Civil provisions for prohibitions of firearms on public or private property (RCC § 22E-4108); Civil provisions for lawful transportation of a firearm or ammunition (RCC § 22E-4109); Civil provisions for licenses of firearms dealers (RCC § 22E-4114); Exclusions from liability for weapon offenses (RCC § 22E-4118).
[6] D.C. Code § 22-4501.
[7] RCC § 22E-4101.
[8] D.C. Code § 22-4504(b).
[9] D.C. Code § 22-4514(b).

enhancement.[10] In contrast, the revised code combines these three provisions into two offenses titled possession of a dangerous weapon with intent to commit crime[11] and possession of a dangerous weapon during a crime.[12] The revised offenses criminalize possession of a toy or antique firearm if used as an imitation firearm or as a dangerous weapon. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[13] Dangerous weapons include "any object, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."[14]

[10] D.C. Code § 22-4502.
[11] RCC § 22E-4103.
[12] RCC § 22E-4104.
[13] RCC § 22E-701.
[14] RCC § 22E-701.

"Firearms instructor" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "firearms instructor" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "firearms instructor" is used in the revised exclusions from liability for weapons offenses provision.[1]

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

[1] RCC § 22E-4118.

"Ghost gun" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "ghost gun" cross-references to the definition of the term as currently[1] defined in D.C. Code § 7-2501.01. The RCC definition of "ghost gun" is used in the revised offense of possession of a prohibited weapon or accessory.[2]

Relation to Current District Law. The RCC definition of "ghost gun" is identical to the definition in existing District law.

[1] The term is defined in the Omnibus Public Safety and Justice Amendment Act of 2020, Act A23-0568 (projected law date of May 18, 2021).
[2] RCC § 22E-4101.

"Halfway house" means any building or building grounds located in the District of Columbia that are used for the confinement of persons participating in a work release program under D.C. Code § 24-241.01.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. A work release program is a program established under D.C. Code § 24-241.01.

The RCC definition of "halfway house" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer[3] offense). The term "building" that is used in the definition of "halfway house" is defined elsewhere in RCC § 22E-701. The RCC definition of "halfway house" is used in the revised escape from a correctional facility or officer[4] offense.

Relation to Current District Law. The RCC definition of "halfway house" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "halfway house" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. Case law has held that the phrase includes the District's halfway houses.[5] In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

[3] D.C. Code § 22-2601.

[4] RCC § 22E-3401.

[5] *See Demus v. United States,* 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States,* 498 A.2d 1172, 1174 (D.C.1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

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

Explanatory Note. The RCC definition of "health professional" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "health professional" is used in the revised defenses for special responsibility for care, discipline, or safety[1] and temporary possession,[2] the revised provision for principles of liability governing intoxication,[3] and the revised offenses of sexual abuse by exploitation[4] and trafficking of drug paraphernalia.[5]

Relation to Current District Law. The RCC definition of "health professional" may substantively change current District law as applied to the revised sexual abuse by exploitation statute. The current sexual abuse of a patient or client statutes do not specify the medical professionals that fall within the scope of the statute.[6] The revised sexual abuse by exploitation statute, by using a defined term in current District civil law for "health professional," clarifies the scope of the revised statute. The commentary to the revised sexual abuse by exploitation statute discusses this change further.

[1] RCC § 22E-408.
[2] RCC § 22E-502.
[3] RCC § 22E-209.
[4] RCC § 22E-1303.
[5] RCC § 48-904.11.
[6] D.C. Code §§ 22-3015; 22-3016.

"Healthcare provider" has the meaning specified in D.C. Code § 16-2801.

Explanatory Note. The RCC definition of "healthcare provider" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "healthcare provider" is used in the revised offense of sexual abuse by exploitation.[1]

Relation to Current District Law. The RCC definition of "healthcare provider" may substantively change current District law as applied to the revised sexual abuse by exploitation statute. The current sexual abuse of a patient or client statutes do not specify the medical professionals that fall within the scope of the statute.[2] The revised sexual exploitation of an adult statute, by using a defined term in current District civil law for "healthcare provider," clarifies the scope of the revised statute. The commentary to the revised sexual abuse by exploitation statute discusses this change further.

[1] RCC § 22E-1303.
[2] D.C. Code §§ 22-3015; 22-3016.

"Homelessness" means the status or circumstance of an individual who:

(A) Lacks a fixed, regular, and adequate nighttime residence; or

(B) Has a primary nighttime residence that is:

(i) A supervised, publicly or privately operated shelter designed to provide temporary living accommodations, including motels, hotels, congregate shelters, and transitional housing for persons with a mental illness;

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

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

Explanatory Note. The RCC definition of "homelessness" is taken almost verbatim from the current bias related crime statute in D.C. Code § 22-3701,[1] and is intended to have the same meaning as under current law. The RCC definition of a "homelessness" replaces the definition of "homelessness" in D.C. Code § 22-3701. The RCC definition of "homelessness" is used in the revised hate crime penalty enhancement,[2] and in the revised hate crime penalty enhancement civil provisions.[3]

Relation to Current District Law. The RCC definition of "homelessness" is nearly identical[4] to the definition in the current bias related crime statute,[5] and does not change current District law.

[1] The revised definition refers to a "housing facility" rather than a "shelter" as used in current D.C. Code § 22-3701. The reference to "housing facility" is less confusing and is in accord with the definition of "homeless" in D.C. Code § 4–751.01 (18).

[2] RCC § 22E-608.

[3] RCC § 22E-609.

[4] The revised definition refers to a "housing facility" rather than a "shelter" as used in current D.C. Code § 22-3701. The reference to "housing facility" is less confusing and is in accord with the definition of "homeless" in D.C. Code § 4–751.01 (18).

[5] D.C. Code § 22-3701.

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

Explanatory Note. The RCC definition of "image" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "image" are in some current Title 22 offenses[1]). The RCC definition of "image" is used in the revised definitions of "audiovisual recording,"[2] "live broadcast,"[3] "personal identifying information,"[4] and "recording device,"[5] in the revised offenses of electronic stalking,[6] voyeurism,[7] unauthorized disclosure of a sexual recording,[8] distribution of an obscene image,[9] distribution of an obscene image to a minor,[10] creating or trafficking an obscene image of a minor,[11] possession of an obscene image of a minor,[12] and unlawful labeling of a recording,[13] and in the revised identity theft civil provisions.[14]

Relation to Current District Law. *The RCC definition of "image" is new and does not itself substantively change existing District law. As applied in the revised voyeurism and unauthorized disclosure of sexual recordings statutes,*[15] *the revised definition may change current District law.* D.C. Code § 22-3531(d)(1) makes it unlawful to "capture an image" of a person's private area without permission. The term "image" is not defined in the statute and District case law has not addressed its meaning. It is unclear whether "capture an image" has the same meaning as "electronically record" in § 22-3531(c)(1). It is also unclear whether "image" includes both refers to both "visual" and "aural images."[16] It is also unclear whether the term "image" includes a "series of images"[17] or a derivative image (e.g., a photograph of a photograph, a screenshot). Resolving this ambiguity, the

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[1] D.C. Code §§ 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception)l 22-2603.01 (Introduction of Contraband Into Penal Institution); 22-3051 – 3057 (Non-consensual Pornography); 22-3214.01 (Deceptive Labeling); 22-3214.02 (Unlawful operation of a recording device in a motion picture theater); 22-3227.01 and 3227.05 (Identity Theft); and 22-3531 (Voyeurism).
[2] RCC § 22E-701.
[3] RCC § 22E-701.
[4] RCC § 22E-701.
[5] RCC § 22E-701.
[6] RCC § 22E-1802.
[7] RCC § 22E-1803.
[8] RCC § 22E-1804.
[9] RCC § 22E-1805.
[10] RCC § 22E-1806.
[11] RCC § 22E-1807.
[12] RCC § 22E-1808.
[13] RCC § 22E-2207.
[14] RCC § 22E-2206.
[15] RCC §§ 22E-1803 and 22E-1804.
[16] *See* D.C. Code § 22-3531(a)(1). The revised offense does not criminalize creating an "aural image" of a person's private areas or of a person undressing.
[17] *See* D.C. Code § 22-3531(f)(2).

revised code defines the term "image," as described herein. This definition may broaden the offense by including images that are captured without an electronic device (such as those captured using a mechanically-operated camera)[18] but may narrow the offense by excluding images that are hand-drawn or illustrated on an electronic device (such as a tablet). The definition also clarifies that a film or video constitutes a single image, not a series of images.

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

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

[19] RCC §§ 22E-1807 and 1808.

[20] D.C. Code § 22-3101(3).

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

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

image of a minor statute and the revised possession of an obscene image of a minor statute are limited to images that are not hand-rendered. However, the RCC may still criminalize the underlying sexual conduct that is depicted in the hand-rendered image.[23] This change improves the clarity, consistency, and constitutionality of the revised statutes.

As applied in the revised identity theft civil provisions RCC § 22E-2206, the revised definition of "image" clarifies current District law. The term "District of Columbia public record" is defined in D.C. Code § 22-3227.05 to include a "photographic image[.]"[24] Current law does not specify whether "photographic images" include images stored in print, electronic, magnetic, or digital formats. The term "photographic image" is not defined in the current statute, and there is no relevant DCCA case law. This corresponding RCC provision in RCC § 22E-2206 was copied verbatim from the current D.C. Code § 22-3227.05 and provides procedures to correct District of Columbia public records that contain false information as a result of identity theft. By use of the RCC definition of "image," the revised statute clarifies that photographic images includes print, electronic, magnetic, or digital formats.

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

[23] For example, if a defendant forced a minor to have sex with an adult and sketched a drawing of the encounter, there would be no liability under the creating or trafficking statute because a sketch is not an "image" as defined in the RCC. However, the defendant would be liable under the RCC sexual assault statute (RCC § 22E-1301) for the use of force.

[24] RCC § 22E-2206.

"Imitation dangerous weapon" means an object used or fashioned in a manner that would cause a reasonable person to believe that the object is a dangerous weapon.

Explanatory Note. The RCC definition of "imitation dangerous weapon" is new, the term is not currently defined in Title 22 of the D.C. Code (although the undefined term "imitation pistol" is used in two current statutes[1] and the undefined term "imitation firearm" is used in four others[2]). [The Commission has not yet issued recommendations for weapons offenses or enhancements.] The term "dangerous weapon" that is used in the definition of "imitation dangerous weapon" is defined elsewhere in RCC § 22E-701. The RCC definition of "imitation dangerous weapon" is used in the revised definition of "Class A contraband,"[3] as well as the revised offenses of robbery,[4] assault,[5] criminal threats,[6] sexual assault,[7] sexual abuse of a minor,[8] kidnapping,[9] and criminal restraint.[10]

Relation to Current District Law. The RCC definition of "imitation dangerous weapon" is new and does not substantively change District law.

As applied in the revised offenses against persons of robbery, assault, menacing, sexual assault, kidnapping, and criminal restraint, the term "imitation dangerous weapon" is generally, but not entirely, consistent with current District case law defining an imitation pistol or firearm, and current District practice.

In several cases, the DCCA has upheld jury instructions stating, with minor variations, that "[a]n imitation [pistol] is any object that resembles an actual firearm closely enough that a person observing it in the circumstances would reasonably believe it to be a

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[1] D.C. Code § 22-4510(a)(6) ("No pistol or imitation thereof or placard advertising the sale thereof shall be displayed…"); D.C. Code § 22-4514(b) ("No person shall within the District of Columbia possess, with intent to use unlawfully against another, an *imitation pistol*…").

[2] D.C. Code § 22-2603.01(2)(A) ("'Class A Contraband' means…A firearm or *imitation firearm*, or any component of a firearm;"); D.C. Code § 22-2803(b)(1) ("A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-3020 ("The defendant was armed with, or had readily available, a pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-4502(a) ("Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other *firearm (or imitation thereof*)…"); D.C. Code § 22-4504(b) ("No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or *imitation firearm* while committing a crime of violence or dangerous crime…").

[3] RCC § 22E-701.

[4] RCC § 22E-1201.

[5] RCC § 22E-1202.

[6] RCC § 22E-1204.

[7] RCC § 22E-1301.

[8] RCC § 22E-1302.

[9] RCC § 22E-1401.

[10] RCC § 22E-1402.

[pistol]."[11] District practice appears to rely on a similar definition at present.[12] The revised definition similarly provides that any object may be an imitation weapon if it is used or fashioned in a manner that would cause a reasonable person to believe that the article is a dangerous weapon. Codification of this definition clarifies District law. However, the definition of "imitation dangerous weapon" is not included in the list of per se (inherently) dangerous weapons in RCC § 22E-701. Combined with the fact that the revised assault and robbery statutes criminalize causing bodily injury by means of a dangerous weapon, the RCC imitation dangerous weapon definition often[13] will preclude penalty enhancements for assaults or robberies involving imitation dangerous weapons.[14] However, the RCC does provide enhanced liability for use of imitation dangerous weapons in the aggravated criminal menace statute, RCC § 22E-1203, and in fourth degree robbery based on displaying an imitation weapon, in RCC § 22E-1201. The RCC's manner of addressing the use of imitation dangerous weapons ensures that such weapons are penalized the same as real dangerous weapons when used with intent to frighten victims. However, imitation dangerous weapons are not treated as automatically equivalent to real dangerous weapons when grading more serious assault and robbery charges involving actual harms and actual risks of death or serious bodily injury. By confining penalty enhancements for imitation dangerous weapons to intent-to-frighten offenses, the proportionality of District offenses involving an imitation weapon is improved.[15]

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[11] *Smith v. United States*, 777 A.2d 801, 810 n. 15 (D.C.2001). *See also Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016); Bates v. United States, 619 A.2d 984, 985 (D.C.1993).

[12] D.C. Crim. Jur. Instr. § 8.101 (jury instruction for "while armed" enhancement under D.C. Code § 22-4502, referring in comment to definition of "imitation firearm" in *Bates v. U.S.*, 619 A.2d 984, 985 (D.C. 1993)).

[13] Even though imitation weapons are not per se dangerous weapons in the RCC, it is still is possible, depending on the facts of a particular case, that an imitation weapon (e.g. a starter pistol) constitutes a dangerous weapon per RCC § 22E-1001(5)(F) due to the manner in which it is used (e.g. "pistol-whipping" a victim) to inflict injury.

[14] A defendant may still be liable for assault by virtue of causing the other person harm, even if the imitation weapon does not make the person liable for an enhanced assault gradation.

[15] The RCC definition of "imitation weapon" resolves judicial concern that has been expressed over whether to distinguish an object designed as an imitation dangerous weapon (e.g., a starter gun) and an object that merely appears to the victim to be a dangerous weapon (e.g., a cell phone, metal pipe, or finger used in a manner that it reasonably appears to be a dangerous weapon) for purposes of assessing penalties. See *Washington v. United States*, 135 A.3d 325, 332 (D.C. 2016) (C.J. Washington, concurring)(Concluding from legislative history that the actual design of the object rather than a victim's perception is the critical consideration for whether an object is an imitation firearm for purposes of District's assault with a deadly weapon and possession of firearm during crime of violence statutes). Under the RCC definition of an imitation dangerous weapon, objects not fashioned or designed to look like a dangerous weapon (e.g., a finger jabbed into someone's back) may nonetheless be an "imitation dangerous weapon." However, such additional liability for the use of such "imitation dangerous weapons" is provided in the RCC only for aggravated criminal menace, second degree robbery based on an aggravated criminal menace, and [other revised offenses against persons], but not assault.

As applied in the revised correctional facility contraband statute, the term "imitation dangerous weapon" clarifies, but does not substantively change, District law. The current statute uses the phrase "imitation firearm" but does not define it.[16]

[16] D.C. Code § 22-2603.01(2)(A)(iii).

"Imitation firearm" means any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real.

Explanatory Note. It is the actual design of the object rather than a victim's perception that is the critical consideration for whether an object is an imitation firearm.[1]

The RCC definition of "imitation firearm" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined reference to "imitation firearm" and "imitation pistol" are in some current Title 22 provisions[2]). The term "firearm" used in the definition of "imitation firearm" is defined elsewhere in RCC § 22E-701. The RCC definition of "imitation firearm" is used in the revised offenses of burglary,[3] possession of a dangerous weapon with intent to commit crime,[4] possession of a dangerous weapon during a crime,[5] endangerment with a firearm,[6] trafficking of a controlled substance,[7] and trafficking of a counterfeit substance,[8] as well as in the revised civil provisions for licenses of firearms dealers.[9]

Relation to Current District Law. The RCC definition of "imitation firearm" codifies the definition articulated by the D.C. Court of Appeals in *Bates v. United States*[10] and does not substantively change current District law.

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[1] *See Washington v. United States*, 135 A.3d 325, 332 (D.C. 2016) (C.J. Washington, concurring).

[2] D.C. Code §§ 22-2603.01 (Introduction of contraband into a penal institution); 22-4504 (Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty); 22-4514 (Possession of certain dangerous weapons prohibited; exceptions); *see also* D.C. Code §§ 16-2310 (Criteria for detaining children); 23-1322 (Detention prior to trial); and 23-1325 (Release in first degree murder, second degree murder, and assault with intent to kill while armed cases or after conviction).

[3] RCC § 22E-2701.

[4] RCC § 22E-4103.

[5] RCC § 22E-4104.

[6] RCC § 22E-4120.

[7] RCC § 48-904.01b.

[8] RCC § 48-904.01c.

[9] RCC § 22E-4114.

[10] 619 A.2d 984, 985 (D.C. 1993) (finding no error in an instruction reading, "[A] firearm is any weapon that will expel a projectile by means of an explosive. An imitation firearm is any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real.").

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

Explanatory Note. The definition of "in fact" is addressed in the Commentary accompanying RCC § 22E-207. The revised definition of "in fact" appears in numerous RCC provisions.

"Incapacitated individual" has the meaning specified in D.C. Code § 21-2011.

Explanatory Note. The RCC definition of "incapacitated individual" is new, the term is not currently defined in Title 22 of the D.C. Code. The term "incapacitated individual" is defined, however, in Title 21 of the D.C. Code[1] and that definition is incorporated by cross-reference in the RCC. The RCC definition of "incapacitated individual" is used in the revised definition of "person with legal authority over the complainant,"[2] in the revised special responsibility for care, discipline, or safety defense,[3] and in the revised offenses of kidnapping[4] and criminal restraint.[5]

Relation to Current District Law. The definition of "incapacitated individual" does not change current District law.

[1] D.C. Code § 21–2011 (11) ("'Incapacitated individual' means an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.").
[2] RCC § 22E-701.
[3] RCC § 22E-408.
[4] RCC § 22E-1401.
[5] RCC § 22E-1402.

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

Explanatory Note. The definition of "innocent or irresponsible person" exclusively appears in RCC § 22E-211 and is addressed in the Commentary accompanying the statute.

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

Explanatory Note. The definition of "intentionally" is addressed in the Commentary accompanying RCC § 22E-206. The revised definition of "intentionally" and other parts of speech, including "intent," appears in numerous RCC provisions.

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

Explanatory Note. The definition of "intoxication" is addressed in the Commentary accompanying RCC § 22E-206. The RCC definition of "intoxication" is used in the revised definitions of "consent"[1] and "self-induced intoxication."[2]

[1] RCC § 22E-701.
[2] RCC § 22E-701.

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

Explanatory Note. The definition of "knowingly" is addressed in the Commentary accompanying RCC § 22E-206. The revised definition of "knowingly" and other parts of speech, including "know," "known," "knows," "knowing," and "knowledge," appears in numerous RCC provisions.

"Labor" means work that has economic or financial value.

Explanatory Note. The RCC definition of "labor" includes any work that has economic or financial value. The term is intended to include commercial sex acts.

"Labor" is currently defined in D.C. Code § 22-1831(6) for human trafficking statutes. The RCC definition of "labor" replaces the current definition of "labor" in D.C. Code § 22-1831(6) and is used in the RCC definition of "services,"[1] as well as in the revised offenses of forced labor,[2] trafficking in labor,[3] benefitting from human trafficking,[4] the misuse of documents in furtherance of human trafficking,[5] and fraud.[6]

Relation to Current District Law. *The definition of "labor" makes one change that may constitute a substantive change to current District law that improves the clarity of the revised criminal code.*

The current D.C. Code definition of "labor" makes no reference to commercial sex acts, referring generally only to acts that have "economic or financial value." Neither DCCA case law nor legislative history address whether "labor" includes commercial sex acts.[7] However, it is notable that the current human trafficking statutes sometimes appear to use the term "labor" as if it did not include commercial sex acts.[8] The RCC's "labor" definition is intended to include commercial sex acts in the definition of "labor." This change improve the clarity of the revised statute.

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[1] RCC § 22E-701.
[2] RCC § 22E-1601.
[3] RCC § 22E-1603.
[4] RCC § 22E-1606.
[5] RCC § 22E-1607.
[6] RCC § 22E-2201.
[7] However, at least one federal circuit court interpreting a similar federal provision has held that "labor" includes sexual activity. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008).
[8] E.g., D.C. Code § 22-1833, entitled "Trafficking in labor or commercial sex acts" includes as an element that, "Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act". The specification of both "labor" and "commercial sex act" in the offense suggests the former does not include the latter. In addition, the current code defines "debt bondage" as "the status or condition of a person who provides labor, services*, or commercial sex acts*, for a real or alleged debt, where: **(A)** The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; **(B)** The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or **(C)** The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred." D.C. Code § 22-1831 (emphasis added). The inclusion of the words labor and commercial sex act may suggest that labor does not include commercial sex acts.

"Large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition. The term "large capacity ammunition feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

Explanatory Note. The RCC definition of "large capacity ammunition feeding device" is new, the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "large capacity ammunition feeding device" is identical to the definition in D.C. Code § 7-2506.01 (Person permitted to possess ammunition). The term "ammunition" used in the definition of "large capacity ammunition feeding device" is defined elsewhere in RCC § 22E-701. The RCC definition of "large capacity ammunition feeding device" is used in the revised offense of possession of a prohibited weapon or accessory,[1] as well as in the revised civil provisions for taking and destruction of dangerous articles.[2]

Relation to Current District Law. The RCC definition of "large capacity ammunition feeding device" is identical to the definition in D.C. Code § 7-2506.01 and does not substantively change current District law.

[1] RCC § 22E-4101.
[2] RCC § 22E-4117.

"Law enforcement officer" means:

(A) An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;

(B) An investigative officer or agent of the United States;

(C) An on-duty, civilian employee of the Metropolitan Police Department;

(D) An on-duty, licensed special police officer;

(E) An on-duty, licensed campus police officer;

(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or

(G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.

Explanatory Note. Subparagraph (A) includes Metropolitan Police Department officers and members (such as a reserve officers). It also includes other police departments operating in the District of Columbia. This includes organizations that operate regularly throughout the city, such as Metro Transit Police, Housing Authority Police, and Department of General Service Protective Services Police. It also includes officers who are working in a designated location on assignment, such as California Highway Patrol officers working at the National Law Enforcement Memorial. It does not include off-duty out-of-state officers.

Subparagraph (B) includes federal law enforcement officers such as Deputy U.S. Marshals, United States Park Police, and Capitol Police.

Subparagraphs (C) – (G) apply only when the person is on duty.[1] The phrases "licensed special police officer" and "licensed campus police officer" refer to persons who are duly authorized by law to act as special police officers or campus police officers.[2]

The RCC definition of "law enforcement officer" replaces the current statutory definitions of "law enforcement" in D.C. Code § 22-405(a)[3] applicable to assault on a police officer (APO), and D.C. Code § 22-2106(b)(1), applicable to murder of a law

[1] *Compare Dist. of Columbia v. Coleman*, 667 A.2d 811, 818 (D.C. 1995) ("Members of the police force are 'held to be always on duty', and are required to take police action when crimes are committed in their presence") *with Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979) (explaining a special police officer will be considered a policeman or law enforcement officer only to the extent that he acts in conformance with the regulations governing special officers).

[2] *See, e.g.,* 6-A DCMR §§ 1100 and § 1200; D.C. Code §§ 5-129.02; 5-129-.03; 5-205.

[3] D.C. Code § 22-405(a) ("For the purposes of this section, the term 'law enforcement officer' means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision.").

enforcement officer.[4] The RCC definition of "law enforcement officer" is used in seven revised provisions,[5] three revised definitions,[6] and twenty-two revised offenses.[7]

Relation to Current District Law. *The RCC definition of "law enforcement officer" makes one clear change to the statutory definition of "law enforcement officer" in D.C. Code § 22-405(a,)[8] applicable to assault on a police officer (APO).*

The RCC definition of "law enforcement officer" no longer includes officers or members of a fire department operating in the District of Columbia or investigators or code inspectors employed by the government of the District of Columbia. These categories of individuals are included in the current definition of "law enforcement officer" for the APO statute, but not for the current murder of a law enforcement officer statute.[9] In contrast, in the RCC, these categories of individuals are included in the definition of "public safety employee," defined in RCC § 22E-701. This change clarifies District law by distinguishing persons who are regularly involved with criminal law enforcement from others who are

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[4] D.C. Code § 22-2106(b)(1) ("'Law enforcement officer' means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.").

[5] Defense of self or another person (RCC § 22E-403); Temporary possession (RCC § 22E-502); Entrapment (RCC § 22E-503); Civil provisions for prohibitions of firearms on public or private property (RCC § 22E-4108); Exclusions from liability for weapon offenses (RCC § 22E-4118); Jury trial; trial by court (D.C. Code § 16-705); Protective custody and return of child (RCC § 16-1023).

[6] "Class A contraband" (RCC § 22E-701); "protected person" (RCC § 22E-701); "public official" (RCC § 22E-701).

[7] Murder (RCC § 22E-1101); Manslaughter (RCC § 22E-1102); Assault (RCC § 22E-1202); Criminal threats (RCC § 22E-1204); Offensive physical contact (RCC § 22E-1205); Sexual abuse by exploitation (RCC § 22E-1303); Enticing a minor into sexual conduct (RCC § 22E-1305); Kidnapping (RCC § 22E-1401); Criminal restraint (RCC § 22E-1402); Stalking (RCC § 22E-1801); Unauthorized disclosure of a sexual recording (RCC § 22E-1804); Distribution of an obscene image (RCC § 22E-1805); Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Trademark counterfeiting (RCC § 22E-2210); Impersonation of a District official (RCC § 22E-3201); Escape from a correctional facility or officer (RCC § 22E-3401); Unlawful transfer of a firearm (RCC § 22E-4112); Disorderly conduct (RCC § 22E-4201); Blocking a public way (RCC § 22E-4203); Failure to disperse (RCC § 22E-4302); Possession of an unregistered firearm, destructive device, or ammunition (RCC § 7-2502.01A).

[8] D.C. Code § 22-405(a).

[9] D.C. Code § 22-2106(b)(1).

not, and creating one broad, consistent definition as to who constitutes a "law enforcement officer."

The revised definition of "law enforcement officer" makes one possible change to the statutory definition of "law enforcement officer" in D.C. Code § 22-405(a,)[10] applicable to assault on a police officer (APO), and one possible change to the statutory definition of "law enforcement officer"in D.C. Code § 22-2106, applicable to murder of a law enforcement officer.

First, subparagraphs (C) – (G) of the revised definition include non-police officers such as licensed special police officers and licensed campus police officers, only when they are "on-duty." The definition of "law enforcement officer" in the current D.C. Code APO statute does not specify whether such individuals must be "on-duty" or "off-duty" to fall within the scope of the statute. There is no DCCA case law on this issue for the current APO statute, but in the context of a conviction for carrying a pistol without a license, the DCCA has stated that "a special police officer" will be considered a policeman or law enforcement officer "only to the extent that he acts in conformance with the regulations governing special officers."[11] Resolving this ambiguity, the revised definition of "law enforcement" requires that the non-police officers in subparagraphs (C) – (G) be "on-duty." There is no such requirement for subparagraphs (A) or (B) of the revised definition pertaining to police officers,[12] which is consistent with DCCA case law stating that the current APO statute includes "off-duty" police officers "provided they are engaged in the performance of official duties."[13] This change improves the clarity, consisntecy, and proportionality of the revised statute.

Second, the RCC definition of "law enforcement officer" does not include a federal, state, county, or municipal officer, investigator, or agent from a police force that does not operate in the District. Nor does it include an off-duty or out-of-state parole officer, and probation officer, or pretrial service officer. D.C. Code § 22-2106 criminalizes causing the death of a law enforcement officer on account of the performance of such officer's official duties. The term "law enforcement officer" there is defined to include officers who serve in the Metropolitan Police Department, District of Columbia Protective Services, District of Columbia Department of Corrections, or any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency. In addition, the definition includes "[a]ny federal, state, county, or municipal officer performing functions comparable" to the District officers listed, "including state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers." This definition provides no specific exception for off-duty officers from other jurisdictions or federal officers who perform these duties, so they may qualify as "law enforcement officers." There is no DCCA case law on point. The revised definition of "law

[10] D.C. Code § 22-405(a).
[11] *Timus v. United Staes*, 406 A.2d 1269, 1272 (D.C. 1979)).
[12] However, the RCC definition of "protected person" requires that a law enforcement officer be "in the course of his or her official duties" in order for the "protected person" penalty enhancements to apply to a given RCC offense, which is consistent with this DCCA case law.
[13] *Mattis v. United States*, 995 A.2d 223, 227 (D.C. 2010).

enforcement officer" resolves this ambiguity and clarifies that *off-duty* non-federal officers from other jurisdictions who do not constitute "law enforcement officers" under the RCC. This change clarifies the revised statutes.

Other changes that the RCC definition of "law enforcement officer" makes to the current definition "law enforcement officer" in D.C. Code § 22-405(a),[14] applicable to assault on a police officer (APO), are clarificatory and do not substantively change District law.

First, the revised definition of "law enforcement officer" no longer specifically includes reserve MPD officers like the definition in the current APO statute. As is noted in the explanatory note, resesrve MPD officers are included in subparagraph (A) of the revised definition. This change improves the clarity of the revised statute.

Second, subparagraph (B) of the revised definition includes an investigative officer or agent of the United States. The definition of "law enforcement officer" in the current APO statute does not specifically list this type of officer or agent, but does broadly include "any officer or member of any police force operating and authorized to act in the District of Columbia."[15] This would appear to include federal investigative officers and agents. This change improves the clarity of the revised statute.

Third, subparagraph (E) of the revised definition specifically includes licensed campus police officers, in addition to licensed special police officers (subparagraph (D)). The definition of "law enforcement officer" in the current APO statute specifically includes "any licensed special police officer"[16] and licensed campus police officers perform a similar function. This change improves the clarity of the revised statute.

Third, subparagraph (F) of the revised definition does not include an express reference to any "officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District," as in the definition of "law enforcement officer" in the current APO statute.[17] The revised definition includes these employees as "on-duty employees of the Department of Youth Rehabilitation Services." This change improves the clarity of the revised statute.

The remaining changes to the definition of "law enforcement officer" in the current APO statute are non-substantive and clarificatory.[18]

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[14] D.C. Code § 22-405(a).

[15] D.C. Code § 22-405(a).

[16] D.C. Code § 22-405(a).

[17] D.C. Code § 22-405(a).

[18] The remaining changes to the definition of "law enforcement officer" are intended to be non-substantive, clarificatory wording changes as compared to the definition of "law enforcement officer" in the current APO statute. For example, subparagraph (G) of the revised definition of "law enforcement officer" pecifies an on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Divisoin, and deletes as surplsuage "any officer or employee" of the specified agencies "charged with intake, assessment, or community supervision" in the current definition in the current APO statute.

As applied to certain RCC offenses, the RCC definition of "law enforcement officer" may substantively change current District law. For example, the revised assault statute, which replaces the District's current APO statute (D.C. Code § 22-405), varies in scope as compared to the current APO statute in terms of the complainants that constitute a "law enforcement officer." In addition, some RCC offenses against persons, such as robbery, include enhanced penalties for a complainant that is a "law enforcement officer" in certain circumstances through gradations for a "protected person," which is a change to current District law.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "law enforcement officer" on current District law.

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

Explanatory Note. The definition of "legal cause" exclusively appears in RCC § 22E-204 and is addressed in the Commentary accompanying the statute.

"Live broadcast" means a streaming video, or any other electronically transmitted image, for simultaneous viewing by an audience, including an audience of one person.

Explanatory Note. The RCC definition of "live broadcast" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "live broadcast" is used in the revised offense of attending or viewing a live sexual performance of a minor.[1]

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

[1] RCC § 22E-1810.

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

Explanatory Note. The RCC definition of "live performance" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "live performance" is used in the revised offenses of arranging a live sexual performance of a minor,[1] attending or viewing a live sexual performance of a minor,[2] and unlawful creation or possession of a recording.[3]

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

[1] RCC § 22E-1809.
[2] RCC § 22E-1810.
[3] RCC § 22E-2105.

"Machine gun" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "machine gun" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "machine gun" is used in the revised offenses of possession of a prohibited weapon or accessory[1] and unlawful transfer of a firearm,[2] as well as in the revised civil provisions for licenses of firearms dealers.[3]

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

[1] RCC § 22E-4101.
[2] RCC § 22E-4112.
[3] RCC § 22E-4114.

"Misdemeanor" means an offense punishable by a term of imprisonment that is one year or less.

Explanatory Note. The RCC definition of "midemeanor" depends on the maximum term of imprisonment. All offenses punishable by a term of imprisonment of one year or less, including any offenses punishable by fine only, are categorized as misdemeanor. The RCC definition of "misdemeanor" is used in the revised provisions for offense classification,[1] authorized terms of imprisonment,[2] authorized fines,[3] repeat offender penalty enhancement,[4] and pretrial release penalty enhancement,[5] as well as in the revised offenses of failure to appear after release on citation or bench warrant bond[6] and failure to appear in violation of a court order.[7]

Relation to Current District Law. While there is no current D.C. Code definition of a "misdemeanor," the RCC definition reflects current DCCA case law.[8]

[1] RCC § 22E-601.
[2] RCC § 22E-603.
[3] RCC § 22E-604.
[4] RCC § 22E-606.
[5] RCC § 22E-607.
[6] RCC § 23-586.
[7] RCC § 23-1327.
[8] *Henson v. United States*, 399 A.2d 16, 20 (D.C. 1979) ("No statute applicable to the District of Columbia provides a general definition of either "felony" or "misdemeanor." Largely for historical reasons, the courts in this jurisdiction generally define "felony" as any offense for which the maximum penalty provided for the offense is imprisonment for more than one year; generally, all other crimes are misdemeanors. Stephens v. United States, 106 U.S.App.D.C. 249, 250 n.1, 271 F.2d 832, 833 n.1 (1959).").

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

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

The RCC definition of "monitoring equipment or software" is new; the term is not currently defined in Title 22 of the D.C. Code (although the current stalking statute[1] includes a definition of "any device"[2] and undefined references to "monitor" and "place under surveillance"). The RCC definition of "monitoring equipment or software" is used in the revised offense of electronic stalking.[3]

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

[1] D.C. Code § 22-3132.

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

[3] RCC § 22E-1802.

"Motor vehicle" means any automobile, all-terrain vehicle, self-propelled mobile home, motorcycle, truck, truck tractor with or without a semitrailer or trailer, bus, or other vehicle designed to be propelled only by an internal-combustion engine or electricity.

Explanatory Note. The RCC defines "motor vehicle" to include most self-propelled vehicles used for the transportation of persons. "Other vehicle designed to be propelled only by an internal-combustion engine or electricity" is intended to include motorized boats and aircraft. The "designed to be" language includes vehicles that happen to be moved by human exertion in a given case, but are "designed" to be propelled only by an internal-combustion engine or electricity.[1]

The RCC definition of "motor vehicle" replaces the definitions of "motor vehicle" in D.C. Code § 22-3215(a),[2] applicable to the unauthorized use of a motor vehicle statute, and D.C. Code § 22-3233(c)(2),[3] applicable to the altering or removing motor vehicle identification numbers statute. The RCC definition of "motor vehicle" is used in the RCC definition of "transportation worker"[4] and "vehicle identification number,"[5] in the revised offenses of robbery,[6] theft,[7] unauthorized use of a motor vehicle,[8] alteration of a motor vehicle identification number,[9] trespass,[10] possession of an open container or consumption of alcohol in a motor vehicle,[11] and in the revised civil provisions for lawful transportation of a firearm or ammunition.[12]

Relation to Current District Law. The RCC definition of "motor vehicle" makes two clear changes to the statutory definitions of "motor vehicle" in D.C. Code § 22-3215(a)[13] and D.C. Code § 22-3233(c)(2).[14]

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[1] E.g., an electric bicycle, skateboard, or scooter that one can also operate manually.

[2] D.C. Code § 22-3215(a)("For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.").

[3] D.C. Code § 22-3233(c)(2) ("'Motor vehicle' means any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

[4] RCC § 22E-701.

[5] RCC § 22E-701.

[6] RCC § 22E-1201.

[7] RCC § 22E-2101.

[8] RCC § 22E-2103.

[9] RCC § 22E-2403.

[10] RCC § 22E-2601.

[11] RCC § 25-1001.

[12] RCC § 22E-4109.

[13] D.C. Code § 22-3215(a)(for the offense of unauthorized use of a motor vehicle, defining "motor vehicle" as "For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.").

[14] D.C. Code § 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle" as "'Motor vehicle' means any automobile, self-

First, the revised definition of "motor vehicle" includes any vehicle "designed to be propelled only by an internal-combustion engine or electricity," which includes motorized boats and aircraft. The statutory definition of "motor vehicle" for the current unauthorized use of a motor vehicle (UUV) offense does not have such a provision.[15] The statutory definition for the alteration of a motor vehicle number (VIN) offense has a similar provision, but does not require that the vehicle be propelled "only" by internal-combustion engine or electricity.[16] In contrast, the revised definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity." This language includes motorized boats and aircraft and eliminates possible gaps in current District law.

Second, the revised definition of "motor vehicle" excludes vehicles such as mopeds, which are designed to be propelled, in whole or in part, by human exertion. The statutory definition of "motor vehicle" for the current UUV statute is limited to a list of specified vehicles,[17] although the DCCA has held that mopeds fall within this definition.[18] The statutory definition of "motor vehicle" for the VIN offense includes other vehicles "propelled by an internal-combustion engine, electricity, or steam."[19] In contrast, the revised definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity." This language excludes vehicles like mopeds, that are designed to be propelled, in part, by human exertion. These types of vehicles are generally not as expensive and do not pose the same safety risks to others that a "motor vehicle" does. Unauthorized use of vehicles such as mopeds, that fall outside the RCC definition of "motor vehicle," remains criminalized by the RCC unauthorized use of property offense (RCC § 22E-2102). This revision improves the clarity, consistency, and proportionality of the revised definition.

Other changes to the statutory definitions of "motor vehicle" in D.C. Code § 22-3215(a) and D.C. Code § 22-3233(c)(2) are clarificatory and are not intended to change current District law.

First, the revised definition of "motor vehicle" no longer states that the definition includes "any non-operational vehicle that is being restored or repaired." This language is present in the current definition of "motor vehicle" for the VIN offense.[20] There is no

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propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semitrailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

[15] D.C. Code § 22-3215(a).

[16] D.C. Code § 22-3233(c)(2).

[17] D.C. Code § 22-3215(a).

[18] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[19] D.C. Code § 22-3233(c)(2).

[20] D.C. Code § 22-3233(c)(2).

DCCA case law interpreting this language. The scope of this language is unclear and any non-operational vehicle that is being restored or repaired would still qualify as a "motor vehicle" if the other requirements of the revised definition are met. Deleting this language improves the clarity of the revised definition without changing current District law.

Second, the revised definition includes a reference to all-terrain vehicles. The DCCA has held that all-terrain vehicles[21] fall within the current definition of "motor vehicle" for the purpose of the UUV statute, and such all-terrain vehicles would satisfy the current statutory definition of the VIN offense.[22] This revision improves the completeness of the revised definition without changing current District law.

Finally, the revised definition of "motor vehicle" includes a "truck tractor with or without a semitrailer or trailer." Both statutory definitions for "motor vehicle" in Title 22 of the current D.C. Code refer to a "truck tractor,"[23] and include a reference to either a truck tractor with a semitrailer or trailer[24] or with just a semitrailer.[25] The revised definition of "motor vehicle" deletes the reference to "truck tractor" and instead specifies that a truck tractor "with or without a semitrailer or trailer" constitutes a "motor vehicle." This language clarifies that the truck tractor, and not the semitrailer or trailer, is the "motor vehicle" and does not change current District law.

As applied to certain RCC offenses, the RCC definition of "motor vehicle" may substantively change current District law. For example, due to the revised definition of "motor vehicle," the revised unauthorized use of a motor vehicle offense (RCC § 22E-2103) no longer includes vehicles like mopeds that are designed to be propelled, in whole or in part, by human exertion, although the DCCA has held explicitly held that mopeds[26] fall within the current definition of "motor vehicle."

The commentaries to relevant RCC offenses discuss in detail the effect of the RCC definition of "motor vehicle" on current District law.

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[21] In *Gordon v. United States*, the DCCA stated that the "trial judge concluded correctly, as a matter of statutory interpretation, that an ATV—a vehicle propelled by a motor—is a motor vehicle under [the UUV statute]." *Gordon v. United States*, 906 A.2d 862, 885 (D.C. 2006). The jury instruction for UUV adopts the holding in *Gordon* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[22] D.C. Code § 22-3233(c)(2).

[23] D.C. Code §§ 22-3215(a) (for the offense of unauthorized use of a motor vehicle, defining "motor vehicle," in part, as "any . . . truck tractor . . . ."); 22-3233(c)(2) (for the offense of altering or removing vehicle identification numbers, defining "motor vehicle," in part, as "any . . . truck tractor, ...").

[24] D.C. Code § 22-3215(a).

[25] D.C. Code § 22-3233(c)(2).

[26] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." *Stancil v. United States*, 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

"Movie theater" means a theater, auditorium, or other venue that is being utilized primarily for the exhibition of a motion picture to the public.

Explanatory Note. The RCC definition of "movie theater" requires that the venue be utilized primarily for the exihibtion of a motion picture to the public.

The RCC definition of "movie theater" replaces the current statutory definition of "motion picture theater" in D.C. Code § 22-3214.02,[1] applicable to the current D.C. Code unlawful operation of a recording device in a motion picture theater offense,[2] and undefined references to "motion picture theater" in an affirmative defense for the current D.C. Code sexual performance of a minor statute.[3] The RCC definition of "movie theater" is used in the revised offenses of distribution of an obscene image,[4] distribution of an obscene image to a minor,[5] creating or trafficking an obscene image of a minor,[6] possession of an obscene image of a minor,[7] arranging a live sexual performance of a minor,[8] attending or viewing a live sexual performance of a minor,[9] and unlawful operation of a recording device in a movie theater.[10]

Relation to Current District Law. *The revised definition of "movie theater" makes three possible changes to the statutory definition of "motion picture theater" in § 22-3214.02.*[11]

First, the revised definition of "movie theater" includes "other venue[s]" that are "being utilized primarily for the exhibition of a motion picture to the public." The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[12] It is unclear whether the current D.C. Code definition extends to other venues where a movie may be exhibited, such as a drive-in theater or a concert hall. There is no DCCA case law interpreting this definition. Resolving this ambiguity, the revised definition of "movie theater" includes "other venue[s]" that are "being utilized primarily for the exhibition of a motion picture to the public." This change improves the clarity and completeness of the revised statutes.

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[1] D.C. Code § 22-3214.01(a)(1) ("'Motion picture theater' means a theater or other auditorium in which a motion picture is exhibited.").
[2] D.C. Code § 22-3214.02.
[3] D.C. Code § 22-3104(b) (" (1) Except as provided in paragraph (2) of this subsection, in any prosecution for an offense pursuant to § 22-3102(2) it shall be an affirmative defense that the person so charged was: (A) A librarian engaged in the normal course of his or her employment; or (B) A motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater.").
[4] RCC § 22E-1805.
[5] RCC § 22E-1806.
[6] RCC § 22E-1807.
[7] RCC § 22E-1808.
[8] RCC § 22E-1809.
[9] RCC § 22E-1810.
[10] RCC § 22E-2106.
[11] D.C. Code § 22-3214.02(a)(1).
[12] D.C. Code § 22-3214.02(a)(1).

Second, the revised definition of "movie theater" excludes venues where a motion picture is exhibited, but such an exhibition is not the primary purpose of the venue. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[13] It is unclear whether the current D.C. Code definition extends to venues where a motion picture may be exhibited, but it is incidental to the primary purpose of the venue—such as an electronics store where portions of a movie are being shown to demonstrate the capabilities of a widescreen television. There is no DCCA case law interpreting this definition. Resolving this ambiguity, the revised definition of "movie theater" requires that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current D.C. Code unlawful recording statute[14] and a comparable federal offense.[15] This change improves the clarity and proportionality of the revised offense.

Third, the revised definition of "movie theater" excludes venues where a motion picture is being exhibited, but the exhibition is not open to the public. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[16] It is unclear whether the current D.C. Code definition extends to venues where a motion picture may be exhibited, but the exhibition is not open to the public—such as person's home television screen. There is no DCCA case law interpreting this definition. Resolving this ambiguity, the revised definition of "movie theater" requires that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current D.C. Code

[13] D.C. Code § 22-3214.02(a)(1).

[14] The legislative history for the current D.C. Code unlawful recording statute indicates that the statute was part of an effort to combat "film and video piracy" on a "local level." Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.

[15] A substantively similar federal offense exists in 18 U.S.C. § 2319B, enacted after the District's current statute. The legislative history for the federal statute notes that "the bill is not intended to permit a prosecution of . . . a salesperson at a store who uses a camcorder to record portions of a movie playing to demonstrate the capabilities of a widescreen television" or "a university student who records a short segment of a film being show in film class." Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3. In these instances, the venue is not being used "primarily" to exhibit a motion picture. *Id.* The legislative history for the federal statute notes that it "deals with the very specific problem of illicit 'camcording' of motion pictures in motion picture exhibition facilities. Typically, an offender attends a pre-opening 'screening' or a first-weekend theatric release, and uses sophisticated digital equipment to record the movie. A camcorded version is then sold to a local production factory or to an overseas producer where it is converted into DVDs or similar products and sold on the street for a few dollars per copy." *Id*. at 2.

[16] D.C. Code § 22-3214.02(a)(1).

unlawful recording statute[17] and a comparable federal offense.[18] This change improves the clarity and proportionality of the revised offense.

Other changes that the revised definition of "move theater" makes to the current definition "motion picture theater" in D.C. Code § 22-3214.02 are clarificatory and do not substantively change District law.

The commentaries to relevant RCC offenses discuss further the effect of the RCC definition of "movie theater" on current District law.

[17] Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[18] Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3

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

Explanatory Note. The definition of "negligently" is addressed in the Commentary accompanying RCC § 22E-206. The revised definition of "negligently" and other parts of speech, including "negligent" and "negligence," appears in three revised provisions,[1] two revised defenses,[2] and seven revised offenses.[3]

[1] Culpable mental state requirement (RCC § 22E-205); Principles of liability governing accident, mistake, and ignorance (RCC § 22E-208); Principles of liability governing intoxication (RCC § 22E-209).

[2] Lesser harm (RCC § 22E-401); Duress (RCC § 22E-501).

[3] Murder (RCC § 22E-1101); Manslaughter (RCC § 22E-1102); Negligent homicide (RCC § 22E-1103); Stalking (RCC § 22E-1801); Electronic stalking (RCC § 22E-1802); Negligent discharge of a firearm (RCC § 22E-4106); Unlawful storage of a firearm (RCC § 7-2507.02A).

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

Explanatory Note. The definition of "objective element" is addressed in the Commentary accompanying RCC § 22E-201. The RCC definition of "objective element" is used in the revised defenses of lesser harm[1] and the duress,[2] in the revised provision for charging and proof of penalty enhancements,[3] as well as in the revised offense of endangerment with a firearm.[4]

[1] RCC § 22E-401.
[2] RCC § 22E-501.
[3] RCC § 22E-605.
[4] RCC § 22E-4120.

"Obscene" means:

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

(B) Patently offensive; and

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

Explanatory Note. The RCC definition of "obscene" is consistent with the multi-factor test for obscenity announced by the United States Supreme Court in *Miller v. California*.[1] Namely, to determine whether material is obscene, one must consider: (a) whether the average person,[2] applying contemporary community standards[3] would find that the work, taken as a whole, appeals to the prurient interest,[4] (b) whether the work depicts or describes, in a patently offensive way,[5] sexual conduct specifically defined by the applicable state

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[1] 413 U.S. 15 (1973); *see also Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

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

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

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

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

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

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some

law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The RCC definition of "obscene" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "obscene" are in some current Title 22 offenses[6]). The RCC definition of "obscene" is used in the revised offenses of distribution of an obscene image,[7] distribution of an obscene image to a minor,[8] creating or trafficking an obscene image of a minor,[9] possession of an obscene image of a minor,[10] arranging a live sexual performance of a minor,[11] and attending or viewing a live sexual performance of a minor.[12]

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

> evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

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

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

[7] RCC § 22E-1805.

[8] RCC § 22E-1806.

[9] RCC § 22E-1807.

[10] RCC § 22E-1808.

[11] RCC § 22E-1809.

[12] RCC § 22E-1810.

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

Explanatory Note. The definition of "offense element" exclusively appears in RCC § 22E-201 and is addressed in the Commentary accompanying the statute.

"Official custody" means full submission after an arrest or substantial physical restraint after an arrest.

Explanatory Note. Official custody may include, for example, being detained by an officer on the street, being securely confined to a holding cell, and being securely transported to a court appearance or medical facility. Official custody is not established merely because officers tell a suspect he is under arrest or seize him for investigative purposes.[1] There must be a completed arrest.[2] A defendant is in official custody when he is physically restrained by an officer pursuant to a lawful arrest or when he fully[3] submits to a lawful arrest.[4]

The RCC definition of "official custody" is new; the term is not currently defined in Title 22 of the D.C. Code (although an undefined reference to "custody" appears in the escape from institution or officer offense[5]). The RCC definition of "official custody" is used in the revised duress defense,[6] as well as in the revised offenses of murder,[7] sexual abuse by exploitation,[8] and escape from a correctional facility or officer.[9]

Relation to Current District Law. The RCC definition of "official custody" is new and does not substantively change District law.

As applied in the revised Escape from a Correctional Facility or Officer offense (RCC § 22E-3401), the term "official custody" does not substantively change District law. Case law has interpreted the term to require physical restraint.[10] The revised code adds a definition of "official custody" that incorporates this current District case law. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the RCC sexual abuse by exploitation statute (RCC § 22E-1303), the definition of "official custody" may change current Districdt law and is discussed further in the commentary to that offense.

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[1] *Davis v. United States*, 166 A.3d 944, 947 (D.C. 2017).
[2] *Id*. (reversing an escape conviction where police told the defendant he was arrested and touched his arm and the defendant lunged free and began running).
[3] *Mack v. United States*, 772 A.2d 813, 817 (D.C. 2001) (reversing an escape conviction where police ordered the defendant to kneel and grabbed him by his jacket and the defendant kneeled, sprang up, removed his jacket, threw punches, and ran away).
[4] *Id*.
[5] D.C. Code § 22-3401.
[6] RCC § 22E-501.
[7] RCC § 22E-1101.
[8] RCC § 22E-1303.
[9] RCC § 22E-3401.
[10] *Mack v. United States*, 772 A.2d 813, 817 (D.C. 2001).

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

Explanatory Note. The definition of "omission" is addressed in the Commentary accompanying RCC § 22E-202. The revised definition of "omission" is used in the revised provisions for proof of offense elements beyond a reasonable doubt[1] and voluntariness requirement,[2] the revised hate crime penalty enhancement civil provisions,[3] and the revised offenses of criminal abuse of a vulnerable adult or elderly person[4] and criminal neglect of a vulnerable adult or elderly person.[5]

[1] RCC § 22E-201.
[2] RCC § 22E-203.
[3] RCC § 22E-609.
[4] RCC § 22E-1503.
[5] RCC § 22E-1504.

"Open to the general public" means a location:

(A) To which the public is invited; and

(B) For which no payment, membership, affiliation, appointment, or special permission is required for an adult to enter, other than proof of age or a security screening.

Explanatory Note. The RCC defines "open to the general public" to mean no payment or special permission is required to enter. The term includes location where there is a security screening, such as a District government building, or a location where proof of age is required, such as a restaurant serving alcohol. For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public.[1] Locations for which the general public always needs special permission to enter, such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public."

The RCC definition of "open to the general public" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "open to the general public" appear in the current disorderly conduct[2] and aggressive panhandling[3] statutes and an undefined reference to "in public" appears in the current lewdness statute[4]). The RCC definition of "open to the general public" is used in the revised offenses of criminal restraint,[5] distribution of an obscene image,[6] distribution of an obscene image to a minor,[7] burglary,[8] endangerment with a firearm,[9] disorderly conduct,[10] public nuisance,[11] and indecent exposure.[12]

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

As applied in the revised burglary offense, the term "open to the general public" may change District law. The current burglary statute does not distinguish between public and private locations leading to some counterintuitive outcomes.[13] In contrast, the revised burglary statute requires a trespass into a dwelling or into a building or business yard that

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[1] *See also Broome v. United States,* 240 A.3d 35 (D.C. 2020).
[2] D.C. Code § 22-1321.
[3] D.C. Code § 22-2302.
[4] D.C. Code § 22-1312.
[5] RCC § 22E-1402.
[6] RCC § 22E-1805.
[7] RCC § 22E-1806.
[8] RCC § 22E-2701.
[9] RCC § 22E-4120.
[10] RCC § 22E-4201.
[11] RCC § 22E-4202.
[12] RCC § 22E-4206.
[13] For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law, even though their presence in the specified location was invited.

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

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

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

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

Explanatory Note. The RCC definition of "owner" specifies the requirements for being considered an "owner" in the RCC. Under the RCC definition, there can be more than one "owner" for a given piece of property. The RCC definition also includes a person whose interest in property is possessory but otherwise unlawful. For example, it is possible for a third party to rob from a thief.[1]

The RCC definition of "owner" replaces the current statutory definition in D.C. Code § 22-3214(a)(1),[2] applicable to the commercial piracy statute, and undefined references to "owner" in several current Title 22 property provisions and offenses.[3] The RCC definition of "owner" is used in the revised defense for defense of property[4] and the revised civil provisions for taking and destruction of dangerous articles,[5] as well as in four revised definitions[6] and thirteen revised offenses.[7]

Relation to Current District Law. Although several of the current property offenses in Title 22 of the D.C. Code use the term "owner," only one offense, commercial piracy, statutorily defines it. The RCC definition of "owner" may substantively change current District law for the commercial piracy offense, because the current definition[8] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. The revised unlawful creation or possession of a recording statute, through the

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[1] The thief has an unlawful, but superior, possessory interest in the third party as to the third party.

[2] D.C. Code § 22-3214 (a)(1) ("'Owner', with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.").

[3] *See, e.g.*, D.C. Code §§ 22-3201(2)(B) (definition of "deprive."); 22-3215 (unauthorized use of a motor vehicle); 22-3214.02 (unlawful operation of a recording device in a motion picture theater); 22-3218.03 (presumptions and rebuttal evidence provisions for theft of a utility service); 22-3312.01 (defacing public or private property)' 22-3312.05(4) (definition of "graffiti.").

[4] RCC § 22E-404.

[5] RCC § 22E-4117.

[6] "Counterfeit mark" (RCC § 22E-701); "deprive" (RCC § 22E-701); "fair market value" (RCC § 22E-701); "value" (RCC § 22E-701).

[7] Robbery (RCC § 22E-1201); Theft (RCC § 22E-2101); Unauthorized use of property (RCC § 22E-2102); Unauthorized use of a motor vehicle (RCC § 22E-2103); Unlawful creation or possession of a recoding (RCC § 22E-2105); Unlawful operation of a recording device in a movie theater (RCC § 22E-2106); Fraud (RCC § 22E-2201); Financial exploitation of a vulnerable adult or elderly person (RCC § 22E-2208); Trademark counterfeiting (RCC § 22E-2210); Extortion (RCC § 22E-2301); Possession of stolen property (RCC § 22E-2401); Criminal damage to propery (RCC § 22E-2503); Criminal graffiti (RCC § 22E-2504)

[8] D.C. Code § 22-3214 (a)(1) ("'Owner', with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.").

RCC definition of "owner," is intended to more broadly identify the relevant person whose consent must be obtained. The definition of "owner" reduces potential gaps in the offense and improves the consistency of definitions across property offenses. The commentary to the revised unlawful creation or possession of a recording statute (RCC § 22E-2105) discusses this possible change further.

For the other current D.C. Code property offenses that use the term "owner" without statutorily defining it,[9] there is no D.C. Court of Appeals (DCCA) case law discussing the term "owner" or a similar term. As the commentaries to the RCC property offenses discuss, the RCC definition of "owner" does not appear to change current District law. It should also be noted that the RCC definition of "owner" is also consistent with District practice apparently recognizing that in robbery, the victim need not have strict legal ownership of the item taken, but merely some legally superior custody and control over the item.[10]

Codifying a definition of "owner" improves the clarity and consistency of District law.

[9] *See, e.g.*, D.C. Code §§ 22-3201(2)(B) (definition of "deprive."); 22-3215 (unauthorized use of a motor vehicle); 22-3214.02 (unlawful operation of a recording device in a motion picture theater); 22-3218.03 (presumptions and rebuttal evidence provisions for theft of a utility service); 22-3312.01 (defacing public or private property)' 22-3312.05(4) (definition of "graffiti.").

[10] D.C. Crim. Jur. Instr. § 4.300 commentary ("While larceny remains an offense against possession, robbery is essentially a crime against the person. *U.S. v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972). Thus, "possession" under the robbery statute does not require strict legal ownership in the larcenous sense, but only some custody and control by the victim. *See, e.g.*, *U.S. v. Spears*, 449 F.2d 946 (D.C. Cir. 1971) (although money stolen did not belong to foreman, it was in his control at the time of a robbery); *U.S. v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975) (where different parties owned property taken, it was nevertheless either in the control of the complainant or under his custody and control at the time it was stolen); *Jones v. U.S.*, 362 A.2d 718 (D.C. 1976) (it is not required to show that victim of robbery owned property that was taken but only that the victim had custody and control of the property).").

"Payment card" means an instrument of any kind, whether tangible or digital, including an instrument that is a credit card or debit card, that is issued for use by the cardholder to obtain or pay for property, or the number inscribed on such a card.

Explanatory Note. The RCC definition of "payment card" includes any instrument issued for use by the cardholder to pay for or obtain property. The definition includes credit cards and debit cards. The definition includes the physical cards themselves, intangible payment cards[1], and the number or description of the cards.

"Payment card" is not statutorily defined for Title 22 of the current D.C. Code. However, "credit card" is currently defined in D.C. Code § 22-3223(a)[2] for the current credit card fraud offense. The RCC definition of "payment card" replaces the definition of "credit card" in D.C. Code § 22-3223(a) and is used in the RCC definitions of "revoked or canceled"[3] and "value,"[4] as well as the revised offense of payment card fraud.[5]

Relation to Current District Law. The RCC definition of "payment card" clarifies, but makes no substantive changes, to current District law.

[1] For example, an issuer may provide a credit card number attached to an account that allows payments on credit, without actually providing a physical card. This intangle "credit card" would be included in the definition of "payment card."

[2] D.C. Code § 22-3223 ("the term 'credit card' means an instrument or device, whether known as a credit card, debit card, or by any other name, issued for use of the cardholder in obtaining or paying for property or services").

[3] RCC § 22E-701.

[4] RCC § 22E-701.

[5] RCC § 22E-2202.

"Pecuniary gain" means before-tax profit that is monetary or readily measurable in money, including additional revenue or cost savings.

Explanatory Note. The RCC definition of "pecuniary gain" means before-tax profit that is monetary or readily measured in money. The definition specifies that pecuniary gain includes non-monetary benefits that are readily measurable in money, such as cost savings.

The term "pecuniary gain" is used in D.C. Code § 22-3571.02, but the term is undefined. The RCC definition of "pecuniary gain" is used in the revised provision for authorized fines.[1]

Relation to Current District Law. The term "pecuniary gain" is used in D.C. Code § 22-3571.02 (b), but the term is undefined. The Fine Proportionality Act authorizes fines of up to twice the pecuniary gain to the actor, or the pecuniary loss to the complainant.[2] However, the Fine Proportionality Act fails to define any of these terms, and no case law has been published interpreting these phrases. The definitions of "pecuniary loss" and "pecuniary gain" are modeled on the definitions provided in the Federal Sentencing Guidelines.[3] This change improves the clarity and completeness of the revised statutes.

[1] RCC § 22E-604.
[2] D.C. Code § 22-3571.02 (b)(1).
[3] U.S. Sentencing Guidelines Manual §§ 2B1.1, 8A1.2 (2016).

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

Explanatory Note. The RCC definition of "pecuniary loss" means actual harm that is monetary or readily measurable in money. The definition specifies that "pecuniary loss" includes actual monetary losses, as well as other losses that are readily measurable in money.[1]

The term "pecuniary loss" is used in D.C. Code § 22-3571.02, but the term is undefined. The RCC definition of "pecuniary loss" is used in the revised provision for authorized fines[2], as well as in the revised hate crime penalty enhancement[3] and hate crime enhancement civil provisions statutes.[4]

Relation to Current District Law. The term "pecuniary loss" is used in D.C. Code § 22-3571.02 (b), but the term is undefined. The Fine Proportionality Act authorizes fines of up to twice the pecuniary gain to the actor, or the pecuniary loss to the complainant.[5] However, the Fine Proportionality Act fails to define any of these terms, and no case law has been published interpreting these phrases. The definitions of "pecuniary loss" and "pecuniary gain" are modeled on the definitions provided in the Federal Sentencing Guidelines.[6] This change improves the clarity and completeness of the revised statutes.

[1] For example, property damage may constitute actual harm that is readily measurable in money.
[2] RCC § 22E-604.
[3] RCC § 22E-608.
[4] RCC § 22E-609.
[5] D.C. Code § 22-3571.02 (b)(1).
[6] U.S. Sentencing Guidelines Manual §§ 2B1.1, 8A1.2 (2016).

"Person," in Subtitle III of this Title, means an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity, notwithstanding the definition in D.C. Code § 45-604.

Explanatory Note. This provision codifies a definition of "person" that applies only to Subtitle III of Title 22E (Property offenses). The definition establishes that "person" categorically includes natural persons and non-human legal entities such as trusts, estates, companies, etc. The definition applies to the property offenses and provisions in Subtitle III of Title 22E notwithstanding the definition of "person" in D.C. Code § 45-604 that appears to otherwise apply.[1] This definition of "person" replaces the current statutory definition of "person" in D.C. Code § 22-3201(2A),[2] applicable to Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions in Chapter 32 of the current Title 22. The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions in Subtitle III of Title 22 that use the term. In addition, the revised definition is applicable to the revised definitions of "actor," "complainant," "owner," and "property of another" when they are used in Subtitle III, because these definitions refer to a "person."

Relation to Current District Law. *The RCC definition of "person" for property offenses makes one possible substantive change to the current statutory definition of "person" in D.C. Code § 22-3201(2A).* The plain language of the current D.C. Code statutory definition of "person" makes no distinction in use of the definition for a complainant or an actor. However, legislative history at times suggests that the Council was focused on including businesses and similar non-natural entities as complainants who may be the victims of property loss, and there may not have been an intent to categorically

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[1] D.C. Code § 45-604 contains a more limited and flexible definition of "person" that includes partnerships and corporations "unless such construction would be unreasonable." *See* D.C. Code § 45-604 (stating that "person" shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). This definition in D.C. Code § 45-604 applies to the entire D.C. Code. *See* D.C. Code § 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."). As such, the definition of "person" in D.C. Code § 45-604 appears to apply to the current D.C. Code theft and related offenses in Chapter 32 of Title 22, notwithstanding the specific definition in Chapter 32 for those offenses. D.C. Code 22-3201(2A) ("For the purposes of this chapter, the term . . . 'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity."). There is no DCCA case law on the definition of "person" in D.C. Code § 22-3201(2A) or D.C. Code § 45-604, or any DCCA case law that addresses the apparent conflict between the two definitions.

[2] D.C. Code 22-3201(2A) ("'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.").

include liability for such non-natural entities as actors who commit theft, etc.[3] The RCC resolves this ambiguity by following the plain language of the current statutory definition in D.C. Code § 22-3201(2A) and making the definition applicable to both complainants and actors—anywhere the definition of "person" appears in the revised statutes, or is contained an RCC definition like "owner" or "property of another." This change clarifies the revised statutes.

The RCC definition of "person" for property offenses makes one clarificatory change to the current statutory definition of "person" in D.C. Code § 22-3201(2A). The RCC definition of "person" replaces "government department, agency, or instrumentality" in the current definition of "person" in D.C. Code § 22-3201(2A) with "government," and "government instrumentality." This language is consistent with other RCC provisions,[4] but does not change the meaning of the statute which reaches any "any other legal entity."[5]

As applied to several RCC property offenses, however, the RCC definition of "person" may be viewed as a substantive change in law. The current definition of "person" in D.C. Code § 22-3201(2A) establishes that "person" includes natural persons as well as non-human legal entities. The current definition in D.C. Code § 22-3201(2A) applies only to the offenses and provisions in Chapter 32 of the current D.C. Code Title 22—theft, fraud, receiving stolen property, extortion, etc. It does not apply to other property offenses codified elsewhere in the current D.C. Code, such as malicious destruction of property,[6] despite a similar scope of conduct. Limiting the specific definition of "person" to theft offenses leads to inconsistent liability and disproportionate penalties. For example, if an actor steals money from a donation box for a charity, the charity, as a non-human entity, clearly falls within the definition of "person," and the actor's conduct is criminalized. However, if the defendant chooses to set the money in the donation box on fire, it is unclear

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[3] Committee on Public Safety and the Judiciary, *Report on Bill 18-151, "Omnibus Public Safety and Justice Amendment Act of 2009"* (June 26, 2009) at 18 ("This provision would amend D.C. Official Code 22-3201 *et seq.* to: amend definitions to . . . ensure that businesses and entities that may be victimized are contemplated by law."). Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) at 3 (regarding the meaning of "property of another" protected by the statutes: "Paragraph (4) of this section defines the term "property of another". This term is defined as property in which another has an interest which the offender may not infringe upon or interfere with without consent, whether or not the offender also has an interest in the property. In this context, "person" not only means individuals, but includes corporations, partnerships, associations and other entities."). *But see id.* at 74 (Regarding a provision for enhanced penalties: "The term 'commits' as used in this section is meant to be interpreted to cover persons who act as principals as well as persons who aid or abet the commission of one of the offenses: The term "person" is intended to include individuals as well as corporations, partnerships, associations am other legal entities. Thus, individual defendants as well as corporate defendants are subject to the enhanced penalty.").

[4] RCC § 22E-4203. Blocking a Public Way.

[5] D.C. Code 22-3201(2A).

[6] D.C. Code § 22-303.

in the current D.C. Code whether the theft-specific definition of "person" would apply.[7] Similarly, applying the specific definition of "person" to theft ensures that corporations and other non-human entities can be held liable as actors for theft and other property crimes, whereas it is unclear in the current D.C. Code if corporations and other non-human entities could be held liable for property damage or destruction.[8] The RCC resolves this ambiguity by applying this specific definition of "person" to both the defendant and the complainant in all property offenses in Subtitle III of Title 22E.

[7] As was noted earlier in this commentary, D.C. Code § 45-604 would still apply to theft offenses in Chapter 32 of Title 22, but the definition in D.C. Code § 45-604 is not categorical. It includes partnerships and corporations in the definition of "person" "unless such construction would be unreasonable." *See* D.C. Code § 45-604. It is thus ultimately unclear whether a non-human legal entity would be included in the scope of current D.C. Code property offenses that are not in Chapter 32 of Title 22.

[8] As was noted earlier in this commentary, D.C. Code § 45-604 would still apply to theft offenses in Chapter 32 of Title 22, but the definition in D.C. Code § 45-604 is not categorical. It includes partnerships and corporations in the definition of "person" "unless such construction would be unreasonable." *See* D.C. Code § 45-604. It is thus ultimately unclear whether a non-human legal entity would be included in the scope of current D.C. Code property offenses that are not in Chapter 32 of Title 22.

"Person acting in the place of a parent under civil law" means:

(A) A person who has put themselves in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption; or

(B) A person acting by, through, or under the direction of a court with jurisdiction over the child.

Explanatory Note. The RCC definition of "person acting in the place of a parent under civil law" refers in the first part of the definition to persons acting *in loco parentis*, as that doctrine has been described in District law.[1] The second part of the definition refers broadly to persons assigned jurisdiction over a child by court order, including a person with "legal custody" as defined under D.C. Code § 16-2301 (21) of a child and a "permanent guardian" as defined under D.C. Code § 16–2382.

The RCC definition of "person acting in the place of a parent under civil law" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "person acting in the place of a parent under civil law" is used in the revised definitions of "person with legal authority over the complainant"[2] and "position of trust with or authority over,"[3] as well as in the revised special responsibility for care, discipline, or safety defense,[4] and the revised hate crime penalty enhancement civil provisions.[5]

Relation to Current District Law. The RCC definition of "person acting in the place of a parent under civil law" does not itself substantively change current District law.

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[1] *See, e.g., In re K.J.,* 11 A.3d 273, 276 (D.C. 2011) ("In *Fuller,* we discussed the in loco parentis relationship as follows:

> The status assumed by one in loco parentis is a "somewhat nebulous legal relationship of a temporary character dependent on the intention of the party assuming the obligations of a parent." The continuance of that relationship is a matter which lies within the will of one standing in loco parentis and may be abrogated by him at any time. It differs from adoption in that it is strictly temporary in nature, rather than permanent.

Fuller v. Fuller, 247 A.2d 767, 770 (D.C.1968) *(quoting Cooley v. Washington,* 136 A.2d 583, 585 (D.C.1957)).").

[2] RCC § 22E-701.

[3] RCC § 22E-701.

[4] RCC § 22E-408.

[5] RCC § 22E-609.

"Person with legal authority over the complainant" means:

(A) When the complainant is a person under 18 years of age:

a. A parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant; or

b. Someone who is acting with the effective consent of such a parent or such a person; or

(B) When the complainant is an incapacitated individual:

a. A court-appointed guardian to the complainant; or

b. Someone who is acting with the effective consent of such a guardian.

Explanatory Note. The RCC definition of "person with legal authority over the complainant" refers to two main categories of people with legal authority over the complainant.

Subparagraph (A) applies only when the complainant is under 18 years of age. Then, the phrase "person with legal authority over the complainant" refers to: a parent who is responsible for the health, welfare, or supervision of the complainant; a person acting in the place of a parent under civil law who is responsible for the health, welfare, or supervision of the complainant; or a person acting with the effective consent of such a parent or such a person. The modifier "responsible for the health, welfare, or supervision of the complainant" limits the definition to those parents who have a relevant legal duty to the complainant at the time of the alleged offense.[1] The phrase "person acting in the place of a parent under civil law" refers to persons acting *in loco parentis*, as that doctrine has been described in District law.[2] Under the definition, a person must not only have rights as a person acting *in loco parentis*, but also a relevant legal duty to the complainant at the time of the alleged offense. Finally, a person who is acting with the effective consent, a defined term,[3] of such a parent or person also falls within the scope of the definition.

Subparagraph (B) applies only when the complainant is an "incapacitated individual," a defined term referring to an adult with certain impairments.[4] In that instance,

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[1] For example, an estranged parent with no legal rights over the minor would not be within the scope of the definition.

[2] *See, e.g., In re K.J.,* 11 A.3d 273, 276 (D.C. 2011) ("In *Fuller,* we discussed the in loco parentis relationship as follows:

> The status assumed by one in loco parentis is a "somewhat nebulous legal relationship of a temporary character dependent on the intention of the party assuming the obligations of a parent." The continuance of that relationship is a matter which lies within the will of one standing in loco parentis and may be abrogated by him at any time. It differs from adoption in that it is strictly temporary in nature, rather than permanent.

Fuller v. Fuller, 247 A.2d 767, 770 (D.C.1968) *(quoting Cooley v. Washington,* 136 A.2d 583, 585 (D.C.1957)).").

[3] RCC § 22E-701.

[4] RCC § 22E-701 ("'Incapacitated individual' has the meaning specified in D.C. Code § 21-2011."); D.C. Code § 21–2011 (11) ("'Incapacitated individual' means an adult whose ability to receive and evaluate information effectively or to communicate decisions is

the phrase "person with legal authority over the complainant" refers to either the court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian. The term "court-appointed guardian" refers to broadly to persons assigned jurisdiction over an incapacitated person by court order, including a "permanent guardian" as defined under D.C. Code § 16–2382.

The RCC definition of "person with legal authority over the complainant" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "person with legal authority over the complainant" is used in the revised offenses of assault,[5] offensive physical contact,[6] kidnapping,[7] criminal restraint,[8] criminal abuse of a minor, [9] criminal neglect of a minor,[10] criminal abuse of a vulnerable adult or elderly person, [11] and criminal neglect of a vulnerable adult or elderly person.[12]

Relation to Current District Law. The RCC definition of "person with legal authority over the complainant" does not itself substantively change current District law.

impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.").

[5] RCC § 22E-1202.
[6] RCC § 22E-1205.
[7] RCC § 22E-1401.
[8] RCC § 22E-1402.
[9] RCC § 22E-1501.
[10] RCC § 22E-1502.
[11] RCC § 22E-1503.
[12] RCC § 22E-1504.

"Personal identifying information" means:

(A) Name, address, telephone number, date of birth, or mother's maiden name;

(B) Driver's license or driver's license number, or non-driver's license or non-driver's license number;

(C) Savings, checking, or other financial account number;

(D) Social security number or tax identification number;

(E) Passport or passport number;

(F) Citizenship status, visa, or alien registration card or number;

(G) Birth certificate or a facsimile of a birth certificate;

(H) Credit or debit card, or credit or debit card number;

(I) Credit history or credit rating;

(J) Signature;

(K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information;

(L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(M) Place of employment, employment history, or employee identification number; and

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

Explanatory Note. The RCC definition of "personal identifying information" provides a non-exhaustive list of information that relates to a person's identity, and is taken nearly verbatim from the current identity theft sub-chapter of the D.C. Code.[1] This definition is intended to have the same meaning as under current law.

"Personal identifying information" is currently defined in D.C. Code § 22-3227.01(3)[2] for the identity theft offense and related provisions. The RCC definition of "personal identifying information" replaces the definition of "personal identifying information" in D.C. Code § 22-3227.01(3) and is used in the revised offense of identity theft.[3]

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[1] D.C. Code § 22-3227.01

[2] D.C. Code § 22-3227.01(3) ("'Personal identifying information' includes, but is not limited to, the following: (A) Name, address, telephone number, date of birth, or mother's maiden name; (B) Driver's license or driver's license number, or non-driver's license or non-driver's license number; (C) Savings, checking, or other financial account number; (D) Social security number or tax identification number; (E) Passport or passport number; (F) Citizenship status, visa, or alien registration card or number; (G) Birth certificate or a facsimile of a birth certificate; (H) Credit or debit card, or credit or debit card number; (I) Credit history or credit rating; (J) Signature; (K) Personal identification number, electronic identification number, password, access code or device, electronic address, electronic identification number, routing information or code, digital signature, or telecommunication identifying information; (L) Biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; (M) Place of employment, employment history, or employee identification number; and (N) Any other numbers or information that can be used to access a person's financial resources, access medical information, obtain identification, act as identification, or obtain property.").

[3] RCC § 22E-2205.

Relation to Current District Law. The RCC definition of "personal identifying information" does not substantively change current District law.

"Physically following" means maintaining close proximity to a person, near enough to see or hear the person's activities as they move from one location to another.

Explanatory Note. The phrase "close proximity" refers to the area near enough for the accused to see or hear the person's activities and does not require that the defendant be near enough to reach the person. Distances may vary widely, depending on facts including crowd density, noise, and height. Examples may include walking a couple of stores down the street from the complainant or driving near a person in a vehicle.

The RCC definition of "physically following" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language appears in the current stalking statute[1]). The RCC definition of "physically following" is used in the revised offense of stalking.[2]

Relation to Current District Law. The RCC definition of "physically following" is new and does not substantively change District law.

As applied in the revised offense stalking, the term "physically following" clarifies, but does not substantively change, District law. The current statute uses the word "follow" but does not define it. Case law has not directly addressed its meaning.[3] This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

[1] D.C. Code § 22-3132(8) ("To engage in a course of conduct" means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to: (A) Follow…").

[2] RCC § 22E-1801.

[3] However, the District of Columbia Court of Appeals discussed an allegation of following in *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *2–3 (D.C. Mar. 7, 2019). In that case, the defendant sprinted across a baseball field and stood eight feet in front of the complainant, in her pathway. When the complainant left the field and walked home, the defendant also exited and remained outside the complainant's home long enough for a neighbor and a family member to each come outside and tell the defendant to leave. The defendant testified that he had not been intentionally following the complainant but had simply been "follow[ing] everyone else off the field" and trying to go to his own home. During these events, the defendant and the complainant were near enough to one another to engage in a conversation. The revised code defines "physically following" to require maintaining a close enough proximity to see or hear the complainant. Remotely following or monitoring another person will be separately punished as Electronic Monitoring in RCC § 22E-1804.

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

Explanatory Note. The phrase "close proximity" refers to the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height.

The RCC definition of "physically monitoring" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language appears in the current stalking statute[1]). The RCC definition of "physically monitoring" is used in the revised offense of stalking.[2]

Relation to Current District Law. The RCC definition of "physically monitoring" is new and does not substantively change District law.

As applied in the revised offense stalking, the term "physically monitoring" may change District law. The current statute uses the word "monitor" and the phrase "place under surveillance" but does not define these terms. Case law has not directly addressed their meanings. The revised code defines "physically monitoring" to require maintaining a close enough proximity to see or hear the complainant. Remotely following or monitoring another person will be separately punished as Electronic Monitoring in RCC § 22E-1804. This change applies consistent, clearly articulated definitions and improves the logical organization and clarity of the revised offenses.

[1] D.C. Code § 22-3132(8).
[2] RCC § 22E-1206.

"Pistol" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "pistol" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "pistol" is used in the definition of "firearm"[1] and in the revised offenses of carrying a dangerous weapon,[2] unlawful sale of a pistol,[3] use of false information for purchase or license of a firearm,[4] and carrying a pistol in an unlawful manner,[5] as well as in the revised civil provisions for issuance of a license to carry a pistol[6] and in the revised provisions for exclusions from liability for weapon offenses.[7]

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

[1] RCC § 22E-701.
[2] RCC § 22E-4102.
[3] RCC § 22E-4111.
[4] RCC § 22E-4116.
[5] RCC § 7-2509.06A.
[6] RCC § 22E-4110.
[7] RCC § 22E-4118.

"Position of trust with or authority over" means a relationship to a complainant that is:

(A) A parent, grandparent, great-grandparent, sibling, or a parent's sibling, or an individual with whom such a person is in a romantic, dating, or sexual relationship, whether related by:

(i) Blood or adoption; or

(ii) Marriage, domestic partnership, either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends;

(B) A half-sibling related by blood;

(C) A person acting in the place of a parent under civil law, the current spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship;

(D) Any person, at least 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant;

(E) A religious leader described in D.C. Code § 14-309;

(F) A coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer, provided that such an actor is an employee, contractor, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming;

(G) Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, that exercises supervisory or disciplinary authority over the complainant; or

(H) A person responsible under civil law for the health, welfare, or supervision of the complainant.

Explanatory Note. The RCC definition of "position of trust with or authority over" provides a close-ended list of individuals based upon their relationship with a complainant.

Subparagraph (A) includes a "parent, grandparent, great-grandparent, sibling, or a parent's sibling," as well as an individual with whom such a person is in "a romantic, dating, or sexual relationship." The language "romantic, dating, or sexual relationship" tracks the language in the District's current definition of "intimate partner violence"[1] and is intended to have the same meaning. Sub-subparagraph (A)(i) establishes that the specified relationships established by blood or adoption are sufficient. Sub-subparagraph (A)(ii) establishes that the specified relationships established by marriage or domestic partnership are sufficient, both while the marriage or domestic partnership creating the relationship exists, and after such marriage or domestic partnership ends. "Domestic partnership" is a defined term in RCC § 22E-701.

Subparagraph (B) includes a "half-sibling" related by blood.

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

Subparagraph (C) includes a "person acting in the place of a parent under civil law," a defined term in RCC § 22E-701, as well as the current spouse or domestic partner of such a person, or an individual with whom such a person is in "a romantic, dating, or sexual relationship." The language "romantic, dating, or sexual relationship" tracks the language in the District's current definition of "intimate partner violence"[2] and is intended to have the same meaning. "Domestic partner" is a defined term in RCC § 22E-701. Unlike subparagraph (A) of the revised definition, which includes former spouses or domestic partners, subparagraph (C) does not.

Subparagraph (D) includes any person, at least 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant. The terms "complainant" and "dwelling" are defined in RCC § 22E-701.

Subparagraph (E) includes a "religious leader described in D.C. Code § 14-309." A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,"[3] regardless of whether the religious leader hears confessions or receives other communications.

Subparagraph (F) includes a "coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer" that "is an employee, contractor or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming."[4]

Subparagraph (G) includes any employee, contractor, or volunteer of a school, religious institution, or other specified institution, such as a youth organization, provided that that individual "exercises supervisory or disciplinary authority over the complainant."

Finally, subparagraph (H) includes a "person responsible under civil law for the health, welfare, or supervision of the complainant." "Person responsible under civil law for the health, welfare, or supervision of the complainant" is a phrase used in several RCC provisions and offenses, such as the statutes for the criminal abuse of minors[5] and criminal neglect of minors,[6] and has intended to have the same meaning that is discussed there. There may be overlap between subparagraph (H) and the other subparagraphs of the revised definition, but subparagraph (H) is a stand-alone category that does not modify any of the other categories of individuals in subparagraphs (A) through (G).

The RCC definition of "position of trust with or authority over" replaces the term "significant relationship," currently defined in D.C Code § 22-3001(10),[7] (applicable to

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

[3] D.C. Code § 14-309.

[4] Educational services and programming may include, for example, sports practices, music lessons, or a required class.

[5] RCC § 22E-1501.

[6] RCC § 22E-1502.

[7] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or

provisions in Chapter 30, Sexual Abuse), and is used in the revised offenses of sexual assault,[8] sexual abuse of a minor,[9] sexually suggestive conduct with a minor,[10] enticing a minor into sexual conduct,[11] arranging for sexual conduct with a minor or person incapable of consenting,[12] creating or trafficking an obscene image of a minor,[13] possession of an obscene image of a minor,[14] arranging a live sexual performance of a minor,[15] attending or viewing a live sexual performance of a minor,[16] as well as in the revised civil provisions on the duty to report a sex crime.[17]

Relation to Current District Law. *The RCC definition "position of trust with or authority over" makes two clear substantive changes to the current statutory definition of "significant relationship in D.C. Code § 22-3001(10).*[18].

First, the RCC definition of "position of trust with or authority over" is close-ended and requires that an individual satisfy at least one of the categories in subparagraphs (A) – (H). The current D.C. Code definition of "significant relationship" is open-ended and defines the term as "includ[ing]" the specified individuals or "any other person in a position of trust with or authority over" the complainant."[19] There is no DCCA case law interpreting the D.C. Code definition of "significant relationship." It is unclear whether a job title or specified relationship to the complainant is sufficient, or if a substantive analysis of the relationship between the actor and the complainant is required. In contrast, the RCC definition of "position of trust with or authority over" is limited to the specified individuals in subparagraphs (A) – (H). The RCC definition makes clear that no substantive analysis of the relationship between the actor and the complainant is necessary beyond determining if it fits into one of the specified categories. This revision improves the clarity and completeness of the revised definition.

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adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[8] RCC § 22E-1301.
[9] RCC § 22E-1302.
[10] RCC § 22E-1304.
[11] RCC § 22E-1305.
[12] RCC § 22E-1306.
[13] RCC § 22E-1807.
[14] RCC § 22E-1808.
[15] RCC § 22E-1809.
[16] RCC § 22E-1810.
[17] RCC § 22E-1309.
[18] D.C. Code § 22-3001(10).
[19] D.C. Code § 22-3001(10)(D).

Second, the revised definition includes great-grandparents in the list of "per se" relatives in subparagraph (A). The current D.C. Code definition of "significant relationship" establishes a "per se" list of relatives that includes grandparents, but not great-grandparents.[20] In contrast, subparagraph (A) of the revised definition includes great-grandparents, whether related by blood, adoption, marriage, or domestic partnership. Including great-grandparents recognizes that great-grandparents occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

The RCC definition of "position of trust with or authority over" makes eight possible substantive changes to the current statutory definition of "significant relationship in D.C. Code § 22-3001(10).[21]

First, subparagraph (A) of the revised definition includes an individual with whom a specified relative, such as a parent, is "in a romantic, dating, or sexual relationship." Subparagraph (A) of the current D.C. Code definition of "significant relationship"[22] establishes a "per se" list of relatives, including these relatives' spouses or domestic partners, regardless of whether these individuals have any responsibility for the complainant ("A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). Subparagraph (C) of the current D.C. Code definition of "significant relationship,"[23] however, includes "the spouse, domestic partner, or "paramour" of "the person who is charged with any duty for the health, welfare, or supervision of the complainant." To the extent that the specified relatives in subparagraph (A), for example, a biological parent, also have a responsibility for the complainant, subparagraph (A) and subparagraph (C) of the current D.C. Code definition overlap, and also for those relatives' spouses or domestic partners. However, subparagraph (C) of the current D.C. Code definition includes a "paramour" of the person with a responsibility for the health, welfare, or supervision of the complainant and subparagraph (A) does not. This apparent discrepancy means that the current D.C. Code definition of "significant relationship" includes the "paramour" of an individual that has a responsibility for the complainant (subparagraph (C)), but does not include the "paramour" of a specified "per se" relative with no responsibility for the complainant (subparagraph (A))—for example, the paramour of a biological parent with no responsibility for the complainant. There is no DCCA case law interpreting the definition of "significant relationship." Resolving this

[20] D.C. Code § 22-3001(10)(A) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").
[21] D.C. Code § 22-3001(10).
[22] D.C. Code § 22-3001(10)(A) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").
[23] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include "The person *or the spouse, domestic partner, or paramour* of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act." (emphasis added).

ambiguity, the revised definition includes the paramour" of the specified relatives in subparagraph (A), regardless of the relatives' relationship with the complainant. There is no reason to categorically treat a paramour of a specified relative in subparagraph (A) differently than a spouse or a domestic partner. This change improves the clarity of the revised definition and removes a possible gap in liability.

Second, subparagraph (A) of the revised definition includes specified relatives that are related by marriage or domestic partnership "either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends." The current D.C. Code definition of "significant relationship"[24] includes specified relatives "related by . . . marriage [or] domestic partnership" and it is unclear whether this includes the specified relatives after the marriage or domestic partnership ends. There is no DCCA case law interpreting the definition of "significant relationship." Resolving this ambiguity, the revised definition includes specified relatives that are related by marriage or domestic partnership "either while the marriage or domestic partnership creating the relationship exists, or after such marriage or domestic partnership ends." Including specified relatives after the marriage or domestic partnership ends recognizes that they occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

Third, the revised definition includes a "half-sibling related by blood." The current D.C. Code definition of "significant relationship" includes a "sibling . . . related by blood."[25] It is unclear whether this definition includes a half-sibling and there is no DCCA case law on the definition. Resolving this ambiguity, the revised definition includes a "half-sibling related by blood." Including half-siblings by blood recognizes that they occupy a position of trust with or authority over minor complainants and is consistent with the scope of the RCC incest statute (RCC § 22E-1308). This change improves the clarity, consistency, and proportionality of the revised statutes, and removes a gap in liability.

Fourth, subparagraph (C) and subparagraph (H) of the revised definition replace subparagraph (C) of the current D.C. Code definition of "significant relationship." Subparagraph (C) of the current D.C. Code definition of "significant relationship" includes "The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision" of the complainant."[26] The scope of "charged with any duty or responsibility for the health, welfare, or supervision" of the complainant is unclear and, interpreted broadly, would include the spouses, domestic partners, and significant others of any individual with any duty or responsibility for the health, welfare or supervision of the complainant, such as doctors, taxi drivers, etc. There is no DCCA case law interpreting the current definition of "significant relationship." Resolving this ambiguity, the revised definition replaces subparagraph (C) of the current D.C. Code definition with subparagraph (C) and subparagraph (H). Subparagraph (C) ("A person acting in the place of a parent under civil law, the current spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship") limits spouses, domestic

[24] D.C. Code § 22-3001(10)(A) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").
[25] D.C. Code § 22-3001(10)(A).
[26] D.C. Code § 22-3001(10)(C).

partners, and significant others to those of a person acting in the place of a parent under civil law, as opposed to any individual with any duty for the health, welfare, or supervision. In addition, as opposed to subparagraph (A) of the revised definition, subparagraph (C) of the revised definition is limited to the "current" spouse or domestic partner of such an individual, which is consistent with the scope of a "person acting in the place of a parent under civil law," as that term is defined in RCC § 22E-701. Subparagraph (H) of the revised definition ("A person responsible under civil law for the health, welfare, or supervision of the complainant") continues to provide liability for any individual that has a duty under civil law for the health, welfare, or supervision of the complainant. This language improves the clarity, consistency, and proportionality of the revised definition.

Fifth, subparagraph (E) of the revised definition codifies a "per se" list of religious leaders—"A religious leader described in D.C. Code § 14-309." The current D.C. Code definition of "significant relationship" includes "[a]ny employee or volunteer of a . . . church, synagogue, mosque, or other religious institution . . . including a . . . clergy, youth leader, chorus director . . . administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."[27] There is no DCCA case law interpreting the current D.C. Code definition of "significant relationship." It is unclear in the current D.C. Code definition whether "any other person in a position of trust with or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. Resolving this ambiguity, the revised definition codifies "A religious leader described in D.C. Code § 14-309" as a "per se" category of a "position of trust with or authority over." A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,"[28] regardless of whether the religious leader hears confessions or receives other communications. The relationship between these individuals and a minor complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. Subparagraph (G) and subparagraph (H) of the revised definition may provide liability for employees, contractors, and volunteers at a religious institution that fall outside of the specified religious leaders in subparagraph (E), such as youth leaders and chorus directors. This revision improves the clarity, consistency, and proportionality of the revised statute.

Sixth, subparagraph (F) of the revised definition codifies a "per se" list of actors in a school—"A coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer, provided that such an actor is an employee, contractor, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming." The current D.C. Code definition of "significant relationship" includes "[a]ny employee or volunteer of a school . . . including a teacher, coach, counselor . . . chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."[29] There is no DCCA case law

[27] D.C. Code § 22-3001(10)(D).
[28] D.C. Code § 14-309.
[29] D.C. Code § 22-3001(10)(D).

interpreting the current D.C. Code definition of "significant relationship." It is unclear in the current D.C. Code definition whether "any other person in a position of trust with or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. Resolving this ambiguity, the revised definition codifies as a "per se" category of a "position of trust with or authority over" "A coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer, provided that such an actor is an employee, contractor, or volunteer at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming." In current law[30] and in the RCC, whether an actor that is 18 years of age or older is in a "position of trust with or authority over" or a "significant relationship" with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Subparagraph (F) of the revised definition requires that the actor is at the school at which the complainant is enrolled or at a school where the complainant receives educational services or attends educational programming, and, in the case of a coach, that the actor is not also a secondary school student. These requirements ensure that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. Subparagraph (G) and subparagraph (H) of the revised definition may provide liability for employees, contractors, and volunteers at a school that fall outside of the specified individuals in subparagraph (F), such as bus drivers or support staff. This revision improves the clarity, consistency, and proportionality of the revised statute.

Seventh, subparagraph (F) and subparagraph (G) of the revised definition of "position of trust with or authority over" include a "contractor" at a school, religious institution, or other specified organization. Subparagraph (D) of the current D.C. Code definition of "significant relationship" includes "any employee or volunteer" of a school, religious institution, or other specified organization.[31] There is no DCCA case law interpreting the current D.C. Code definition of "significant relationship" and it is unclear whether a "contractor" would be included. Resolving this ambiguity, subparagraph (F) and subparagraph (G) of the RCC definition of "position of trust with or authority over" specifically include a "contractor." A contractor may fill one of the specified roles at a school (subparagraph (F)) or exercise supervisory or disciplinary authority over minors at a school or other institution (subparagraph (G)), similar to an employee or volunteer. This change clarifies and may eliminate a gap in liability in the revised statutes.

Eighth, subparagraph (G) of the RCC definition of "position of trust with or authority over" requires that the actor "exercises supervisory or disciplinary authority over the complainant" and deletes the phrase "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff" that is in the current D.C. Code definition. Subparagraph (D) of the current D.C. Code definition of "significant relationship" specifies "any employee or volunteer" of a school, specified

[30] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[31] D.C. Code § 22-3001(10)(D).

institution, etc., "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."[32] There is no DCCA case law interpreting the definition of "significant relationship." It is unclear in subparagraph (D) of the current D.C. Code definition whether "any other person in a position of trust with or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. In current law[33] and in the RCC, whether an actor that is 18 years of age or older is in a "position of trust with or authority over" or a "significant relationship" with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under the age of 18 years. Requiring the actor to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. Subparagraph (E) and subparagraph (F) of the revised definition establish "per se" categories of religious leaders and actors at a school that are in a "position of trust with or authority over the complainant," regardless of whether they exercise supervisory or disciplinary authority over the complainant. This change improves the clarity, consistency, and proportionality of the revised statute.

The remaining changes to the current definition of "significant relationship" in D.C. Code § 22-3001(10) are clarificatory and are not intended to change current District law.

First, subparagraph (C) of the revised definition replaces "legal or de facto guardian" in the current D.C. Code definition of "significant relationship"[34] with a "person acting in the place of a parent under civil law." "A legal or de facto guardian" is undefined in the current D.C. Code definition of "significant relationship" and there is no DCCA case law interpreting its scope in the current D.C. Code sexual abuse statutes. The RCC consistently uses the term "person acting in the place of a parent under civil law," as defined in RCC § 22E-701. This change improves the clarity of the revised statute.

Second, subparagraph (C) of the revised definition replaces "paramour" in the current D.C. Code definition of "significant relationship"[35] with an individual with whom a specified person is "in a romantic, dating, or sexual relationship." "Paramour" is undefined in the current D.C. Code definition of "significant relationship," not everyday language, and there is no DCCA case law interpreting its scope in the current D.C. Code

[32] D.C. Code § 22-3001(10)(D).
[33] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[34] D.C. Code § 22-3001(10)(B) (defining "significant relationship" to include "A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim.").
[35] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include "The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").

sexual abuse statutes. "Romantic, dating, or sexual relationship" is identical to the language in the current D.C. Code definition of "intimate partner violence"[36] and is used throughout the RCC. This change improves the clarity of the revised statute.

Third, subparagraph (D) of the revised definition replaces "more than 4 years older" in the current D.C. Code definition of "significant relationship" with "at least 4 years older." The current D.C. Code definition of "significant relationship" includes certain individuals "more than 4 years older than the complainant."[37] The current D.C. Code child sexual abuse statutes, in contrast, are worded to require that the complainant be "at least four years older" than the complainant.[38] Consequently, there is a difference of a day in liability due to the different required age gaps.[39] For clarification, the revised definition uses "at least four years older," the same age gap that is in other RCC sex offenses, such as sexual abuse of a minor (RCC § 22E-1302). The change improves the consistency of the revised offense.

Fourth, subparagraph (G) of the revised definition deletes "church, synagogue, mosque" from the phrase "church, synagogue, mosque, or other religious institution" in subparagraph (D) of the current D.C. Code definition of "significant relationship."[40] Subparagraph (G) of the revised definition still specifies a "religious institution," and subparagraph (E) codifies as a "per se" category the religious leaders in D.C. Code § 14-309. Including specific types of religious institutions is unnecessary and inconsistent with the general references to school, athletic program, etc. in the rest of the subparagraph. The reference to a "religious institution" in subparagraph (G) is intended to include a church, synagogue, or mosque. This change clarifies the revised definition.

Fifth, subparagraph (H) of the revised definition of "position of trust with or authority over" does not specify "at the time of the act" like the generally equivalent

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

[37] D.C. Code § 22-3001(10)(B) (defining "significant relationship" to include "A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim.").

[38] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[39] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be included in the current definition of "significant relationship" because the actor is not "more than four years older" than the complainant.

[40] D.C. Code § 22-3001(10)(D) (defining "significant relationship" to include "Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution . . .").

provision in the current D.C. Code definition of "significant relationship."[41] The RCC sex offenses specify that the actor must be in the "position of trust with or authority over" the complainant at the time of the sexual conduct and this language is surplusage. This clarifies the revised statute.

Sixth, the revised definition replaces "victim" in the current D.C. Code definition of "significant relationship"[42] with "complainant," consistent with the meaning of "complainant" in RCC § 22E-701.

Seventh, subparagraph (A) of the revised statute replaces the references to "aunt" and "uncle" in the current D.C. Code definition of "significant relationship"[43] with references to a "parent's sibling." This language is consistent with the other references in the subparagraph to "parent," "grandparent," etc., and with the language used in the RCC incest statute (RCC § 22E-1308). This change improves the clarity and consistency of the revised statute.

[41] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include the "person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").
[42] D.C. Code § 22-3001(10).
[43] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include the "person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").

"Possess," and other parts of speech, including "possesses," "possessing," and "possession," mean:

(A) To hold or carry on one's person; or

(B) To have the ability and desire to exercise control over.

Explanatory Note. Subparagraph (A) of the RCC definition addresses actual possession, while subparagraph (B) addresses constructive possession.

The RCC definition of "possess" is new, the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "possess" are in some current offenses[1]). The RCC definition of "possess" and other parts of speech, including "possesses," "possessing," and "possession," appear in numerous RCC provisions.

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

The RCC definition of "possess" closely follows current District practice in defining actual and constructive possession.[2] The definition of actual possession in subparagraph (A) is rooted in longstanding District case law.[3] As under current law,

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[1] D.C. Code §§ 22-3154 (Manufacture or possession of a weapon of mass destruction); 22-1835 (Unlawful conduct with respect to documents in furtherance of human trafficking); 22-2603.02 (Unlawful possession of contraband); 22-3102 (Prohibited acts); 22-4504.02 (Lawful transportation of firearms); 22-4510 (Licenses of weapons dealers; records; by whom granted; conditions); 22-902 (Trademark counterfeiting); 22-4515a (Manufacture, transfer, use, possession, or transportation of molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties); 22-3214 (Commercial piracy); 22-2603.01 (Definitions); 22-4508 (Transfers of firearms regulated); 22-4507 (Certain sales of pistols prohibited); 22-3214.01 (Deceptive labeling); 22-3227.02 (Identity theft); 22-1006.01 (Penalty for engaging in animal fighting); 22-3312.04 (Penalties); 22-3231 (Trafficking in stolen property); 22-811 (Contributing to the delinquency of a minor); 22-1708 (Gambling pools and bookmaking; athletic contest defined); 22-1001 (Definitions and penalties); 22-1831 (Definitions); 22-3232 (Receiving stolen property); 22-4514 (Possession of certain dangerous weapons prohibited; exceptions); 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception); 22-4504 (Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty).

[2] *See* D.C. Crim. Jur. Instr. § 3-104. Possession-Defined. ("C.- WHERE THE GOVERNMENT ALLEGES JOINT ACTUAL POSSESSION OR CONSTRUCTIVE POSSESSION Possession means to have physical possession or to otherwise exercise control over tangible property. A person may possess property in either of two ways. First, the person may have physical possession of it by holding it in his or her hand or by carrying it in or on his or her body or person. This is called 'actual possession.' Second, a person may exercise control over property not in his or her physical possession if that person has both the power and the intent at a given time to control the property. This is called 'constructive possession.'").

[3] *United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449

subparagraph (B) of the RCC definition of "possess" requires both an ability and desire to control the item possessed in order to prove constructive possession.[4] Constructive possession requires intent to guide an object's destiny.[5] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[6] Although District case law has frequently used the phrase "dominion or control"[7] or the phrase "dominion and control"[8] to describe constructive possession, the RCC follows current District practice in omitting reference to "dominion" as unnecessary and potentially confusing.[9]

F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940).").

[4] *Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc).

[5] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[6] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[7] *Id.*

[8] *Guishard v. U.S.*, 669 A.2d 1306, 1312 (D.C. 1995).

[9] *See* D.C. Crim. Jur. Instr. § 3-104. Possession-Defined. Comment. ("In previous editions, the Committee recommended deletion of the term "dominion" from this instruction. 'Dominion,' which is not used in everyday speech, may create misunderstanding, especially among lay jurors, and adds nothing intellectually distinct to the concept of 'control.' The Committee adheres to this view.").

"Prior conviction" means a final order by any court of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, that enters judgment of guilt for a criminal offense. The term "prior conviction" does not include:

(A) An adjudication of juvenile delinquency;

(B) Probation under D.C. Code § 48-904.01(e);

(C) A conviction that has been reversed, vacated, sealed, or expunged; or

(D) A conviction for which a person has been granted a pardon.

Explanatory Note. The term "prior conviction" does not include juvenile adjudications[1] or convictions that have been reversed or vacated[2] but does include convictions that have been set aside under the Youth Rehabilitation Act.[3] The RCC definition of "prior conviction" is new; the term is not currently defined in Title 22 of the D.C Code. The term "prior conviction" is used in the revised provisions for the charging and proof of penalty enhancement[4] and the repeat offender penalty enhancement,[5] as well as in the revised offenses of stalking,[6] electronic stalking,[7] and possession of a firearm by an unauthorized person.[8]

Relation to Current District Law. The RCC definition of "prior conviction" is new and does not substantively change District law.

As applied in the revised statutes, the RCC definition of "protected person" may substantively change current District law in one way.

Although Title 22 does not define the term "conviction," other titles define it to mean a finding of guilt, an entry of judgment, or a sentence.[9] Defining "conviction" to

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[1] D.C. Code § 16-2318 states that a juvenile delinquency adjudication is not a conviction of a crime.

[2] The DCCA did not resolve the question of whether pending appeals or reversals qualify as prior convictions in *Blocker v. United States*, 240 A.3d 35 (D.C. 2020).

[3] *See* D.C. Code §24-901(6) (specifying that a qualifying conviction set aside pursuant to the Youth Rehabilitation Act is a predicate for unlawful possession of a firearm); *see also Wade v. United States*, 173 A.3d 87, 94 (D.C. 2017); *United States v. Aka,* 339 F. Supp. 3d 11 (D.D.C. 2018).

[4] RCC § 22E-605.

[5] RCC § 22E-606.

[6] RCC § 22E-1801.

[7] RCC § 22E-1802.

[8] RCC § 22E-4105.

[9] In Title 2, it means "a judicial finding, jury verdict, or final administrative order, including a finding of guilt, a plea of nolo contendere, or a plea of guilty to a criminal charge…" D.C. Code § 2-1515.01(3). In Title 3, it means "a finding by a court that an individual is guilty of a criminal offense through adjudication, or entry of a plea of guilt or no contest to the charge by the offender." D.C. Code § 3-1271.02(3). In Title 4 and Title 42, it means "a verdict or plea of guilty or nolo contendere."[9] D.C. Code §§ 4-1305.01(3); 42-3541.01(4). In Title 16, it means "the judgment (sentence) on a verdict or a finding of guilty, a plea of guilty or a plea of nolo contendere, or a plea or verdict of not guilty by reason of insanity." D.C. Code § 16-801(3). In Title 24, it means "the judgment on a verdict or a finding of guilty, a plea of guilty, or a plea of no contest." D.C. Code § 24-

require a sentencing may result in some unintuitive outcomes.[10] On the other hand, defining "conviction" to attach upon a finding of guilt may be overinclusive of pleas that will not ultimately lead to a final sentence. To resolve this ambiguity, the revised term is defined to mean a finding of guilt but carves out several exceptions for circumstances in which the finding may be only temporary. This change improves the clarity and proportionality of the revised offense.

901(2). In Title 32, it means "any sentence arising from a verdict or plea of guilty or nolo contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of unconditional discharge." D.C. Code § 32-1341(4).

[10] Consider, for example, a person who is found guilty but flees before sentencing. *See* D.C. Super. Ct. R. Crim. P. 32 (requiring a defendant's presence at sentencing).

"Property" means anything of value and includes:

(A) Real property, including things growing on, affixed to, or found on land;

(B) Tangible or intangible personal property, including an animal;

(C) Services;

(D) Credit;

(E) Money, or any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed; and

(F) A government-issued license, permit, or benefit.

Explanatory Note. The RCC definition of "property" replaces the current definition of "property" in D.C. Code § 22-3201(3),[1] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "property" is used in seven revised provisions,[2] twelve revised definitions,[3] and twenty-one revised offenses.[4]

Relation to Current District Law. *The RCC definition of "property" makes one possible substantive change to the statutory definition of "property" in D.C. Code § 22-3201(3).* The RCC definition deletes "debt" and instead includes "money" and "any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed." The current definition of "property" includes "debt."[5] The term is not

[1] D.C. Code § 22-3201(3) ("'Property' means anything of value. The term "property" includes, but is not limited to: (A) Real property, including things growing on, affixed to, or found on land; (B) Tangible or intangible personal property; (C) Services; (D) Credit; (E) Debt; and (F) A government-issued license, permit, or benefit.").

[2] Merger of related offenses (RCC § 22E-214); Defense of property (RCC § 22E-404); Hate crime penalty enhancement (RCC § 22E-608); Hate crime penalty enhancement civil provisions (RCC § 22E-609); Forfeiture (RCC § 22E-1609); Aggregation to determine property offense grades (RCC § 22E-2001); Civil provisions for prohibitions of firearms on public or private property (RCC § 22E-4108).

[3] "Amount of damage" (RCC § 22E-701); "deceive" (RCC § 22E-701); "deprive" (RCC § 22E-701); "fair market value" (RCC § 22E-701); "financial injury" (RCC § 22E-701); "owner" (RCC § 22E-701); "payment card" (RCC § 22E-701); "personal identifying information" (RCC § 22E-701); "property of another," (RCC § 22E-701); "value" (RCC § 22E-701); "vulnerable adult" (RCC § 22E-701); "written instrument" (RCC § 22E-701).

[4] Robbery (RCC § 22E-1201); Criminal threats (RCC § 22E-1204); Blackmail (RCC § 22E-1403); Benefiting from human trafficking (RCC § 22E-1606); Theft (RCC § 22E-2101); Unauthorized use of property (RCC § 22E-2102); Shoplifting (RCC § 22E-2104); Fraud (RCC § 22E-2201); Payment card fraud (RCC § 22E-2202); Check fraud (RCC § 22E-2203); Forgery (RCC § 22E-2204); Identity theft (RCC § 22E-2205); Financial exploitation of a vulnerable adult or elderly person (RCC § 22E-2208); Trademark counterfeiting (RCC § 22E-2210); Extortion (RCC § 22E-2301); Possession of stolen property (RCC § 22E-2401); Trafficking of stolen property (RCC § 22E-2402); Criminal damage to property (RCC § 22E-2503); Disorderly conduct (RCC § 22E-4201); Rioting (RCC § 22E-4301); Failure to disperse (RCC § 22E-4302).

[5] D.C. Code § 22-3201(3) ("'Property' means anything of value. The term "property" includes, but is not limited to: (A) Real property, including things growing on, affixed to,

defined statutorily and there is no DCCA case law interpreting it. It is unclear, however, how "debt" can be "anything of value" that is required by the definition of "property." Resolving this ambiguity, the revised definition of "property" deletes "debt" and specifies types of property that satisfy the definition's requirement of "anything of value." This change improves the clarity of the revised statute.

The RCC definition of "property" makes one clarificatory change to the statutory definition of "property" in D.C. Code § 22-3201(3). Subparagraph (B) of the revised definition includes an "animal." This change improves the clarity and consistency of the revised definition.

The RCC definition of "property" is otherwise identical to the statutory definition under current law.[6]

or found on land; (B) Tangible or intangible personal property; (C) Services; (D) Credit; (E) Debt; and (F) A government-issued license, permit, or benefit.").

[6] D.C. Code 22-3201(3).

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

Explanatory Note. In the RCC, the revised definition of "property of another" generally builds upon separate, civil law determinations of property rights. With the exception of property in the possession of the accused that the other person has only a security interest, the definition of "property of another" follows civil law determinations of property rights.

Property is "property of another" when a person has an interest in the property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. It is irrelevant that the other person may be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband.[1] In addition, this language does not categorically determine issues of joint ownership, such as, for example, whether a spouse can steal from a spouse or a partner can steal from a partnership. The phrase "regardless of whether the accused also has an interest in that property" in the revised definition clarifies that having joint ownership or other property interests in an item does not necessarily mean it is not "property of another." The state of civil law as to whether a joint owner or person with a property interest has a right to interfere with the other joint owner's right to an item will continue to control whether that property is "property of another," as it does under current District law.

The second sentence of the revised definition of "property of another" establishes a narrow exclusion for security interests. Under this part of the revised definition, an individual who is a debtor cannot steal, misappropriate, or damage property in his or her possession in which the other person—the complainant—has only a security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation between the debtor and creditor. However, under the revised definition, a third party can be criminally liable for stealing, misappropriating, or damaging property that is in the possession of the debtor because the debtor does not have only a security interest in that property, the debtor also has a possessory interest.

The RCC definition of "property of another" replaces the current statutory definition of "property of another" in D.C. Code § 22-3201(4),[2] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions.

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[1] For example, a second thief can steal previously stolen property or contraband from the first thief, even though the second thief may not be able to sue the first thief in civil court to recover the property or contraband.

[2] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

The RCC definition of "property of another" is used in the revised defense for defense of property[3] as well as in twelve revised offenses.[4]

Relation to Current District Law. The RCC definition of "property of another" makes one clear change to the current statutory definition of "property of another" in current D.C. Code § 22-3201(4). The RCC definition of "property of another" narrows the scope of the security interest exception that is in the current definition of "property of another." The last sentence of the current definition of "property of another" states that "property of another" excludes property in the possession of the accused as to which "any" person has only a security interest.[5] As a result, any offense that requires property to be "property of another" excludes from its coverage a broad category of property. The legislative history for the current definition of "property of another" contains conflicting explanations of the intended meaning of the exclusion of security interests.[6] The legislative history does not recognize that its explanations conflict with one another, which indicates that the Council likely did not intend to exclude all property in which another person has a security interest. In contrast, the revised definition of "property of another" narrows the exclusion for security interests to situations where "the other person"—the complaining witness—is the party that has the security interest. Civil remedies such as contract liability, rather than criminal liability, address this situation. The revised definition of "property of another" does not change the limited D.C. Court of Appeals (DCCA) case law holding that the government does not have to prove the security interest exception as an element of shoplifting.[7] This change clarifies the definition and reduces a gap in District law.

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[3] RCC § 22E-404.

[4] Robbery (RCC § 22E-1201); Electronic stalking (RCC § 22E-1802); Theft (RCC § 22E-2101); Unauthorized use of property (RCC § 22E-2102); Shoplifting (RCC § 22E-2104); Fraud (RCC § 22E-2201); Forgery (RCC § 22E-2204); Identity theft (RCC § 22E-2205); Financial exploitation of a vulnerable adult or elderly person (RCC § 22E-2208); Extortion (RCC § 22E-2301); Criminal damage to property (RCC § 22E-2503); Criminal graffiti (RCC § 22E-2504).

[5] D.C. Code 22-3201(4) ("The term 'property of another' does not include any property in the possession of the accused as to which any other person has only a security interest.").

[6] The legislative history for the 1982 Theft Act notes that the definition of "property of another" "does not extend to *property in which the other person* has only a security interest. Thus, the ordinary credit transaction is not included in this definition." *Extension of Comments on Bill No. 4-193* at 17 (emphasis added). However, the legislative history also notes that "property of another" "is not intended to cover property that is in *a person's* possession and in which another person has only a security interest." *Id.* at 4 (emphasis added). Given the different wordings in the explanations of "property of another," it appears that the drafters of the 1982 Theft Act did not consider or realize that the definition of "property of another" may exclude *all* property that has a security interest from theft offenses.

[7] *Alston v. United States*, 509 A.2d 1129, 1130-1131 (D.C. 1986) ("there was no intention [on the part of the Council] to transform the exception for property in which a security interest is held by another in the definitional section into an element of the offense of shoplifting which must be proved by the government in its case in chief. We therefore may not impose that requirement of prof on the government in shoplifting cases.").

The remaining changes to the revised definition are clarificatory and are not intended to change current District law.

First, the revised definition of "property of another" deletes the reference to "government" in the first sentence of the current definition.[8] The reference is surplusage because the revised definition of "property of another" incorporates the revised definition of "person." The revised definition of "person" in 22E-701 includes governments, corporations, and other legal entities, where such construction is reasonable. Deleting the reference to government clarifies the definition without changing District law.

Second, the revised definition deletes the sentence, "The term 'property of another' includes the property of a corporation or other legal entity established pursuant to an interstate compact" that is in the current definition.[9] The sentence is superfluous because the revised definition of "property of another" incorporates the revised definition of "person." The revised definition of "person" in 22E-701 includes corporations and other legal entities, where such construction is reasonable.

Third, the revised definition of "property of another" refers to "actor" instead of the "accused" that is in the current definition.[10] RCC § 22E-701 defines "actor" as a "person accused of any criminal offense." Using "actor" instead of "accused" is a drafting change and does not substantively change current District law.

Finally, the revised definition deletes "infringe upon" that is in the current definition of "property of another."[11] The revised definition specifies "not privileged to interfere," rendering "infringe upon" superfluous. Deleting "not privileged to interfere" does not change District law.

[8] D.C. Code 22-3201(4) ("'Property of another' means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.").

[9] *Id*.

[10] D.C. Code § 22-3201(4).

[11] *Id*.

"Protected person" means:

(A) A person who is under 18 years of age and at least 4 years younger than an actor who is 18 years of age or older;

(B) A person who is 65 years of age or older and at least 10 years older than an actor who is under 65 years of age;

(C) A vulnerable adult;

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

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

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

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

Explanatory Note. The RCC definition of "protected person" is new, the term is not currently defined in Title 22 of the D.C. Code (although there are several similar terms and related provisions in Title 22 concerning crimes against minors,[1] elderly persons,[2]

[1] D.C. Code § 22-3611 ("(a) Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both. (b) It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence. (c) For the purposes of this section, the term: (1) "Adult" means a person 18 years of age or older at the time of the offense. (2) "Crime of violence" shall have the same meaning as provided in § 23-1331(4). (3) "Minor" means a person under 18 years of age at the time of the offense.").

[2] D.C. Code §§ 22-932(3) (abuse of a vulnerable adult or elderly person statutes defining "elderly person" as "a person who is 65 years of age or older."); 22-3601 ("(a) Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both. (b) The provisions of subsection (a) of this section shall apply to the following offenses: Abduction, arson, aggravated assault, assault with a dangerous weapon, assault with intent to kill, commit first degree sexual abuse, or commit second degree sexual abuse, assault with intent to commit any other offense, burglary, carjacking, armed carjacking, extortion or blackmail accompanied by threats of violence, kidnapping, malicious disfigurement, manslaughter, mayhem, murder, robbery, sexual abuse in the first, second, and third degrees, theft, fraud in the first degree, and fraud in the second degree, identity theft, financial exploitation of a vulnerable adult or elderly person, or an attempt or conspiracy to commit any of the foregoing offenses. (c) It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

vulnerable adults,[3] law enforcement officers,[4] public safety employees,[5] taxicab drivers,[6] transit operators and Metrorail station managers,[7] and District officials or employees.[8]).

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[3] D.C. Code § 22-932(5) (abuse of a vulnerable adult or elderly person statutes defining "vulnerable adult" as a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.").

[4] D.C. Code § 22-405 ("(a) For the purposes of this section, the term "law enforcement officer" means any officer or member of any police force operating and authorized to act in the District of Columbia, including any reserve officer or designated civilian employee of the Metropolitan Police Department, any licensed special police officer, any officer or member of any fire department operating in the District of Columbia, any officer or employee of any penal or correctional institution of the District of Columbia, any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District, any investigator or code inspector employed by the government of the District of Columbia, or any officer or employee of the Department of Youth Rehabilitation Services, Court Services and Offender Supervision Agency, the Social Services Division of the Superior Court, or Pretrial Services Agency charged with intake, assessment, or community supervision. (b) Whoever without justifiable and excusable cause assaults a law enforcement officer on account of, or while that law enforcement officer is engaged in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned not more than 6 months or fined not more than the amount set forth in § 22-3571.01, or both. (c) A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both. (d) It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."); D.C. Code § 22-2106 "(a) Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person. (b) For the purposes of subsection (a) of this section, the term: (1) "Law enforcement officer" means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including

but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers. (2) "Public safety employee" means: (A) A District of Columbia firefighter, emergency medical technician/paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph. (c) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[5] D.C. Code § 22-2106 ("(a) Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person. (b) For the purposes of subsection (a) of this section, the term: . . . (2) "Public safety employee" means: (A) A District of Columbia firefighter, emergency medical technician/paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph. (c) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[6] D.C. Code § 22-3751 ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[7] D.C. Code § 22-3751.01 ("(a) Any person who commits an offense enumerated in § 22-3752 against a transit operator, who, at the time of the offense, is authorized to operate and is operating a mass transit vehicle in the District of Columbia, or against Metrorail station manager while on duty in the District of Columbia, may be punished by a fine of up to one and ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and ½ times the maximum term of imprisonment otherwise authorized by the offense, or both. (b) For the purposes of this section, the term: (1) "Mass transit vehicle" means any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia. (2) "Metrorail station manager" means any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station. (3) "Transit operator" means a person who is licensed to operate a mass transit vehicle.").

[8] D.C. Code § 22-851 ("(a) For the purposes of this section, the term: . . . (2) "Official or employee" means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions . . . (c) A person who stalks, threatens, assaults, kidnaps, or injures any official or employee or vandalizes, damages, destroys, or takes the property of an official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law. (d) A person who stalks, threatens, assaults, kidnaps, or injures a family member or vandalizes, damages, destroys, or takes the property of a family member on account of the

The RCC definition of "protected person" replaces these terms and provisions and is used in the revised offenses of murder,[9] manslaughter,[10] robbery,[11] assault,[12] criminal threats,[13] offensive physical contact,[14] kidnapping,[15] and criminal restraint.[16]

Relation to Current District Law. The revised definition of "protected person" makes seven clear changes to the statutory language of the provisions in current Title 22 for crimes against minors,[17] elderly persons,[18] vulnerable adults,[19] law enforcement officers,[20] public safety employees,[21] taxicab drivers,[22] transit operators and Metrorail station managers,[23] and District officials or employees.[24]

First, subparagraph (A) requires at least a four year age gap between the actor and the complainant. The District's current penalty enhancement for certain crimes against minors requires only a two year age gap[25] between an actor that is 18 years of age or older and a complainant that is under 18 years of age.[26] In contrast, subparagraph (A) of the RCC definition of "protected person" requires a four year age gap, which is consistent with the required age gap in several current District offenses[27] as well as several of the revised

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performance of the official or employee's duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[9] RCC § 22E-1101.

[10] RCC § 22E-1102.

[11] RCC § 22E-1201.

[12] RCC § 22E-1202.

[13] RCC § 22E-1204.

[14] RCC § 22E-1205.

[15] RCC § 22E-1401.

[16] RCC § 22E-1403.

[17] D.C. Code § 22-3611.

[18] D.C. Code § 22-932(3).

[19] D.C. Code § 22-932(5).

[20] D.C. Code §§ 22-405; 22-2106.

[21] D.C. Code § 22-2106.

[22] D.C. Code § 22-3751.

[23] D.C. Code § 22-3751.01.

[24] D.C. Code § 22-851.

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

[26] Subparagraph (A) of the RCC definition of "protected person" and the current penalty enhancement for crimes against minors have the same age requirements for the actor and the complainant. The current penalty enhancement defines "adult" as a "person 18 years of age or older at the time of the offense" and a "minor" as a "person under 18 years of age at the time of the offense." D.C. Code § 22-3601(c). Rather than separately defining the terms of "adult" and "minor" like the current statute, subparagraph (A) incorporates the definitions of these terms directly into the revised statute, improving the clarity of the definition.

[27] The District's current child sexual abuse, enticing a child, and arranging for a sexual contact with a real or fictitious child statutes require at least a four year age gap between the actor and a complainant under the age of 16 years. D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3010 (enticing a child); 22-3010.02 (arranging for a sexual contact with a real or fictitious child); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
The District's current contributing to the delinquency of a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years. D.C. Code § 22-811.

sex offenses in RCC chapter 13. This change improves the clarity, consistency, and proportionality of the revised offenses against persons.

Second, subparagraph (B) requires that the actor is under 65 years of age and that there is at least a 10 year age gap with the elderly complainant. The current penalty enhancement for crimes committed against senior citizens[28] and the current offenses for criminal abuse[29] and criminal neglect of an elderly person[30] do not require an age gap between the elderly complainant and the actor or an age for the actor. In contrast, subparagraph (B) of the RCC definition of "protected person" requires that the actor be under the age of 65 years and at least 10 years younger than the elderly complainant. The age gap and age requirements for the actor reserve enhanced penalties for predatory behavior targeting the elderly, rather than violence between elderly persons, and are consistent with a penalty enhancement in the revised sexual assault statute (RCC § 22E-1301). This change improves the consistency and proportionality of the revised offenses against persons statutes.

Third, subparagraph (C) of the RCC definition of "protected person" includes a complainant that is a "vulnerable adult," as that term is defined in RCC § 22E-701. Under current District law, a vulnerable adult is extended special protection under the criminal abuse of a vulnerable adult,[31] financial exploitation of a vulnerable adult,[32] and criminal neglect of a vulnerable adult[33] statutes, but those are the only offenses. In contrast, subparagraph (C) of the RCC definition of "protected person" consistently enhances penalties for harms to a "vulnerable adult" in certain RCC offenses against persons because vulnerable adults are among those most susceptible to criminal acts. This change improves the clarity, consistency, and proportionality of the revised offenses against persons.

Fourth, subparagraph (D) and subparagraph (E) of the RCC definition of "protected person" include complainants that are a "law enforcement officer" and a "public safety officer," as those terms are defined in RCC § 22E-701. Under current District law, harms to law enforcement officers receive enhanced penalties for assault and murder,[34] and harms to public safety employees receive enhanced penalties for murder.[35] In contrast,

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

[29] D.C. Code §§ 22-933; 22-932(3) (defining "elderly person" as "a person who is 65 years of age or older.").

[30] D.C. Code §§ 22-934; 22-932(3) (defining "elderly person" as "a person who is 65 years of age or older.").

[31] D.C. Code § 22-933.

[32] D.C. Code § 22-933.01.

[33] D.C. Code § 22-934.

[34] D.C. Code §§ 22-405 (assault on a police officer statute); 22-2106 (murder of a law enforcement officer statute). In addition to these specific offenses, D.C. Code § 22-851 prohibits committing specified crimes against a law enforcement officer while the law enforcement officer is engaged in the performance of his or her duties or on account of the performance of those duties, provided that the law enforcement officer is also a District "official or employee," as that term is defined in D.C. Code § 22-851. D.C. Code § 22-851(a)(2), (c).

[35] D.C. Code § 22-2106. In addition, D.C. Code § 22-851 prohibits committing specified crimes against a public safety employee while the public safety employee is engaged in the performance of his or her duties

subparagraph (D) and subparagraph (E) of the RCC definition of "protected person" consistently enhance penalties for harms to law enforcement officers and public safety employees in certain RCC offenses against persons. This change improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

Fifth, subparagraph (F) of the RCC definition of "protected person" includes complainants that are a "transportation worker," as that term is defined in RCC § 22E-701. Under current District law, certain harms to taxicab drivers,[36] transit operators, [37] and Metrorail station managers[38] receive enhanced penalties, but the enhancements apply to different offenses as compared to other current penalty enhancements in District law, such as the penalty enhancement for crimes committed against minors.[39] Current District law also does not have a penalty enhancement for crimes committed against private car service drivers. In contrast, subparagraph (F) of the RCC definition of "protected person, through the definition of "transportation worker" in RCC § 22E-701, consistently enhances penalties for harms to transportation workers, including private car service drives, in certain RCC offenses against persons. This change improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

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or on account of the performance of those duties, provided that the public safety employee is also a District "official or employee," as that term is defined in D.C. Code § 22-851. D.C. Code § 22-851(a)(2), (c).

[36] D.C. Code § 22-3751.

[37] D.C. Code § 22-3751.01.

[38] D.C. Code § 22-3751.01.

[39] For example, the current penalty enhancement for crimes committed against minors applies to any crime that is a "crime of violence," as that term is defined in D.C. Code § 22-1331(4). D.C. Code § 22-3611(a), (c)(2). The definition of "crime of violence" is broad and includes several crimes that are not included in the penalty enhancements for taxicab drivers, transit operators, and Metrorail station managers in D.C. Code §§ 22-3751, 22-3751.01, and 22-3752. For example, assault with significant bodily injury, assault with intent to kill, assault with intent to commit first degree or second degree child sexual abuse, and burglary are included in the penalty enhancement for crimes against minors, but not the penalty enhancement for the transit operators, and Metrorail station managers. Although the scope of crimes for the penalty enhancement against minors is far broader than the penalty enhancement for crimes committed against transit operators, and Metrorail station managers, there are a few crimes in the penalty enhancement for crimes committed against transit operators, and Metrorail station managers that are not include in the penalty enhancement for minors, such as fourth degree sexual abuse and misdemeanor sexual abuse.

Sixth, subparagraph (G) of the RCC definition of "protected person" effectively repeals current D.C. Code § 22-851. Current D.C. Code § 22-851(b)[40] and (c)[41] prohibit committing specified crimes against any District "official or employee," broadly defined in D.C. Code § 22-851(a)[42] as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions."[43] Current D.C. Code D.C Code § 22-851(d) prohibits committing specified crimes against a "family member" of a District official or employee, as defined in D.C. Code § 22-851(a),[44] on account of the official or employee's performance of official duties.[45] In contrast, subparagraph (G) of the RCC definition of "protected person" is limited to a "District official," as that term is defined in RCC § 22E-701,[46] and does not include family members of District officials. The RCC definition of "District official" narrows the penalty enhancement to individuals that have

[40] D.C. Code § 22-851(b) ("A person who corruptly or, by threat or force, or by any threatening letter or communication, intimidates, impedes, interferes with, or retaliates against, or attempts to intimidate, impede, interfere with, or retaliate against any official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both."). Conduct within the scope of subsection (b) of D.C Code § 22-851 may also be affected by the revised [obstruction of justice offenses in RCC § 22E-XXXX, forthcoming].

[41] D.C. Code § 22-851(c) ("A person who stalks, threatens, assaults, kidnaps, or injures any official or employee or vandalizes, damages, destroys, or takes the property of an official or employee, while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[42] D.C. Code § 22-851(a) ("For the purposes of this section, the term: (2) 'Official or employee' means a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions.").

[43] D.C. Code § 22-851(a)(2).

[44] D.C. Code § 22-851(a) ("For the purposes of this section, the term: (1) 'Family member" means an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship.').

[45] D.C. Code § 22-851(d) ("A person who stalks, threatens, assaults, kidnaps, or injures a family member or vandalizes, damages, destroys, or takes the property of a family member on account of the performance of the official or employee's duties, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 3 years, or both, in addition to any other penalties authorized by law.").

[46] RCC § 22E-701 defines "District official" as having the same meaning as the term "public official" in D.C. Code § 1-1161.01(47). D.C. Code § 1-1161.01(47) is limited to individuals that have special ethical and campaign finance obligations under the current D.C. Code and is discussed further in the commentary to RCC § 22E-701.

special obligations in District government.[47] This change improves the consistency and proportionality of the revised offenses against persons.

Seventh, the RCC definition of "protected person" eliminates the current penalty enhancement for a "citizen patrol member." Current District law has a penalty enhancement for committing specified crimes against a member of a citizen patrol in the course of his or her duties or because of his or her participation in a citizen patrol.[48] In contrast, the RCC definition of "protected person" does not include citizen patrol members and, by extension, does not enhance penalties for this category of complainants in the RCC offenses against persons. This change improves the consistency and proportionality of the revised offenses against persons.

Other changes to the statutory language of the provisions in current Title 22 for crimes against minors,[49] elderly persons,[50] vulnerable adults,[51] law enforcement officers,[52] public safety employees,[53] taxicab drivers,[54] transit operators and Metrorail station managers,[55] and District officials or employees[56] are merely clarificatory. For instance, because the element that the complainant is a "protected person" is part of the gradations in several RCC offenses against persons, rather than a stand-alone penalty enhancement, there is no need to specify that the complainant must satisfy the requirements of the definition "at the time of the offense" as some current sentencing enhancements do.[57]

As applied to certain RCC offenses against persons, the RCC definition of "protected person" may substantively change current District law. For example, the RCC assault and robbery offenses eliminate the affirmative defenses in the current penalty enhancements for committing crimes against the elderly or minors. Under current District law, it is an affirmative defense to the senior citizen penalty enhancement that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[58] Similarly, under the current minor victim enhancement, it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[59] Instead of an affirmative defense, the RCC assault and robbery offenses apply a "reckless" culpable mental state to penalty enhancements that require that the complaint is a "protected

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[47] For example, many of the individuals in the definition of "public official" are required to file annual public financial disclosures, D.C. Code § 1-1162.24, and all public officials are subject to possible censure for certain ethical violations. D.C. Code § 1-1162.22(a).
[48] D.C. Code § 22-3602.
[49] D.C. Code § 22-3611.
[50] D.C. Code §§ 22-932(3).
[51] D.C. Code § 22-932(5).
[52] D.C. Code §§ 22-405; 22-2106.
[53] D.C. Code § 22-2106.
[54] D.C. Code § 22-3751.
[55] D.C. Code § 22-3751.01.
[56] D.C. Code § 22-851.
[57] D.C. Code § 22-3601; D.C. Code § 22-3611(c)(1), (c)(2); D.C. Code § 22-3751; D.C. Code § 22-3751.01(a).
[58] D.C. Code § 22-3601(c).
[59] D.C. Code § 22-3611(b).

person." "Reckless" is defined in RCC § 22E-206 and here requires that the accused must consciously disregard a substantial risk that the complainant was under 18 or was 65 years of age or older. The "reckless" culpable mental state preserves the substance of the defenses for both the senior citizen enhancement and minor enhancement.[60] However, requiring a "reckless" culpable mental state improves the clarity and consistency of the offenses because the RCC assault and robbery statutes apply a "recklessly" mental state to the other categories of individuals in the definition of "protected person."

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "protected person" on current District law.

[60] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial risk that the complainant was 65 years of age or older. Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age.

"Public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including any airplane, train, bus, or boat.

Explanatory Note. The RCC definition of "public conveyance" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "public conveyance" appear in the current disorderly conduct statute[1]). The RCC definition of "public conveyance" is used in the revised offenses of endangerment with a firearm,[2] disorderly conduct,[3] public nuisance,[4] and indecent exposure.[5]

Relation to Current District Law. The RCC definition of "public conveyance" is new and does not substantively change District law.

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

[1] D.C. Code § 22-1321(c).
[2] RCC § 22E-4120.
[3] RCC § 22E-4201.
[4] RCC § 22E-4202.
[5] RCC § 22E-4206.

"Public official" means a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47).

***Explanatory Note*.** The RCC definition of "public official" is new; the term is not currently defined in Title 22 of the D.C Code. The term "law enforcement officer" is defined elsewhere in RCC § 22E-701. The RCC definition of "public official" is used in the RCC definition of "District official,"[1] as well as in the revised provisions for execution of public duty[2] and the abuse of government power penalty enhancement.[3]

Relation to Current District Law. The RCC definition of "public official" is new and does not substantively change District law.

[1] RCC § 22E-701.
[2] RCC § 22E-402.
[3] RCC § 22E-610.

"Public safety employee" means:

(A) An on-duty District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician;

(B) Any other on-duty firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician operating in the District of Columbia; or

(C) An on-duty District of Columbia investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector.

Explanatory Note. The RCC definition of "public safety employee" replaces the current statutory definition of "public safety employee" in D.C. Code § 22-2106(b)(1),[1] applicable to the current murder of a law enforcement officer statute. The RCC definition of "public safety employee" is used in the RCC definition of "protected person"[2] and in the revised offenses of murder,[3] manslaughter,[4] assault,[5] criminal threats,[6] offensive physical contact,[7] kidnapping,[8] criminal restraint,[9] and impersonation of an official.[10]

Relation to Current District Law. *The RCC definition of "public safety employee" makes one clear change to the current statutory definition in D.C. Code § 22-2106(b)(2).*[11] The current definition of "public safety employee" is limited to specified firefighters and emergency medical personnel, as well as any federal, state, county, or municipal officers performing comparable functions.[12] In contrast, subparagraph (B) of the RCC definition expands the definition to include "[a]ny on-duty investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector, employed by the government of the District of Columbia." These categories of complainants are included in the definition of "law enforcement officer" for the District's current assault on a police officer (APO) statute,[13] as well as the assault on a public vehicle inspection officer statutes.[14] This

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[1] D.C. Code § 22-2106(b)(1) ("'Public safety employee' means: (A) A District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; and (B) Any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in subparagraph (A) of this paragraph.").

[2] RCC § 22E-701.

[3] RCC § 22E-1101.

[4] RCC § 22E-1102.

[5] RCC § 22E-1202.

[6] RCC § 22E-1204.

[7] RCC § 22E-1205.

[8] RCC § 22E-1401.

[9] RCC § 22E-1402.

[10] RCC § 22E-3201.

[11] D.C. Code § 22-2106(b)(2).

[12] D.C. Code § 22-2106(b)(2).

[13] D.C. Code § 22-405(a) (defining "law enforcement officer" for the APO statute to include "any officer or member of any fire department operating in the District of Columbia" and "any investigator or code inspector employed by the government of the District of Columbia.").

[14] D.C. Code §§ 22-404.02; 22-404.03. Although the criminal offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have

change clarifies District law by distinguishing persons who are regularly involved with criminal law enforcement from others who are not, and creating broad, consistent definitions as to who constitutes a law enforcement officer or public safety employee.

The revised definition of "public safety employee" makes two possible changes to the statutory definition of "public safety employee" in D.C. Code § 22-2106(b)(2).[15]

First, the revised definition requires that District of Columbia firefighters, emergency medical technicians (EMTs), and paramedics be "on-duty." The definition of "public safety employee" in current D.C. Code § 22-2106(b)(2) does not specify whether District of Columbia firefighters, EMTs, or paramedics must be "on-duty" and there is no DCCA case law interpreting the definition. Resolving this ambiguity, the revised definition requires that the firefighter, EMT, or paramedic be "on-duty." This is consistent with the scope of the RCC definition of "law enforcement," which requires specific types of law enforcement other than police officers be "on-duty."[16] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC definition of "public safety employee" does not include an off-duty federal, state, county, or municipal firefighter, EMT, or paramedic that does not operate in the District. The current D.C. Code definition of "public safety employee" includes "[a]ny federal, state, county, or municipal officer performing functions comparable" to the District of Columbia firefighters, EMTs, and paramedics specified in the definition. This definition provides no specific exception for off-duty firefighters, EMTs, and paramedics from other jurisdictions, so they may qualify as "public safety employees." There is no DCCA case law on point. The revised definition of "public safety

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the same meaning as provided in § 50-303(19)," in fact the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430), although the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer." D.C. Code §50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation.") The VFHIAA legislative history does not, however, appear to include reference to the assault on public vehicle inspection officers offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of "public vehicle inspection officers."

[15] D.C. Code § 22-2106(b)(2).

[16] In the context of a conviction for carrying a pistol without a license, the DCCA has stated that "a special police officer" will be considered a policeman or law enforcement officer "only to the extent that he acts in conformance with the regulations governing special officers." *Timus v. United Staes*, 406 A.2d 1269, 1272 (D.C. 1979)). Based upon this case law, the RCC definition of "law enforcement officer" limits a special police officer and other specific types of "law enforcement officer" to those that are on-duty. In addition, there is no on-duty requirement in subparagraphs (A) or (B) of the revised definition of "law enforcement officer" pertaining to police officers due to DCCA case law stating that the current assault on a police officer statute includes "off-duty" police officers "provided they are engaged in the performance of official duties." *Mattis v. United States*, 995 A.2d 223, 227 (D.C. 2010).

employee" resolves this ambiguity and clarifies that *off-duty* firefighters, EMTs, or paramedics from other jurisdictions do not constitute "public safety employees" under the RCC. This change clarifies the revised statutes.

As applied to certain RCC offenses against persons, the RCC definition of "public safety employee" may substantively change District law. For example, under current District law, murder is the only offense that enhances penalties specifically for physical harms to paramedics and emergency medical technicians.[17] Through their gradations referencing a "protected person," however, additional RCC offenses against persons, such as robbery and assault, provide new, enhanced penalties where a public safety employee—including paramedics, and emergency medical technicians—is victimized. The expansion of a penalty enhancement for harming such persons improves these offenses' consistency and proportionality of statutes by treating persons in similarly protected positions equally.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "public safety employee" on current District law.

[17] Note however, that assault-type behavior against all District employees in the course of their duties (including paramedics and emergency medical technicians) are subject to higher level penalties under the District's protection of district public officials statute, D.C. Code § 22-851.

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

Explanatory Note. The definition of "purposely" is addressed in the Commentary accompanying RCC § 22E-206. The revised definition of "purposely" and other parts of speech, including "purpose," appears in numerous RCC provisions.

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

Explanatory Note. The RCC definition of "rail transit station" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "rail transit station" is used in the revised offenses of endangerment with a firearm,[1] disorderly conduct,[2] and indecent exposure.[3]

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

[1] RCC § 22E-4120.
[2] RCC § 22E-4201.
[3] RCC § 22E-4206.

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

Explanatory Note. The definition of "recklessly" is addressed in the Commentary accompanying RCC § 22E-206. The revised definition of "recklessly" and other parts of speech, including "reckless" and "recklessness," appears in numerous RCC provisions.

"Recording device" means a photographic or video camera, audio recorder, or any other device that is later developed that may be used for recording sounds or images or both.

Explanatory Note. The RCC definition of "recording device" replaces the current definition of "recording device" in D.C. Code § 22-3214.02,[1] applicable to the current unlawful operation of a recording device in a movie theater statute. The RCC definition of "recording device" is used in the revised offense of unlawful operation of a recording device in a movie theater.[2]

Relation to Current District Law. The RCC definition of "recording device" is nearly identical to the statutory definition in current law, with only clarificatory changes.[3]

[1] D.C. Code § 22-3214.02(a)(2) ("'Recording device' means a photographic or video camera, audio or video recorder, or any other device not existing, or later developed, which may be used for recording sounds or images.").

[2] RCC § 22E-2106.

[3] D.C. Code § 22-3214.02(a)(2).

"Restricted explosive" means any device that is designed to explode or produce uncontained combustion upon impact, including a breakable container containing flammable liquid and having a wick or a similar device capable of being ignited, but excluding any device that is lawfully and commercially manufactured primarily for the purpose of illumination, construction work, or other lawful purpose.

Explanatory Note. Lawfully and commercially manufactured explosives may include, but are not limited to, emergency flares, kerosene lamps, candles, toy pistol paper caps, chemistry sets, liquid nitrogen,[1] gunpowder,[2] pest control bombs, and mining equipment.

The RCC definition of "restricted explosive" replaces the current definition of "molotov cocktail" D.C. Code § 22-4515a(a). The RCC definition of "restricted explosive" is used in the revised definition of "dangerous weapon,"[3] in the revised offenses of possession of a prohibited weapon or accessory[4] and carrying a dangerous weapon,[5] and in the revised civil provisions for taking and destruction of dangerous articles.[6]

Relation to Current District Law. The RCC definition of "restricted explosive" is similar to the definition "molotov cocktail" in D.C. Code § 22-4515a(a) and does not substantively change current District law.

[1] Often used in medicine.
[2] Often used for yardwork such as tree stump removal.
[3] RCC § 22E-701.
[4] RCC § 22E-4101.
[5] RCC § 22E-4102.
[6] RCC § 22E-4117.

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

Explanatory Note. The definition of "result element" is addressed in the Commentary accompanying RCC § 22E-201. The RCC definition of "result element" is used in the revised provisions for the causation requirement,[1] culpable mental state requirement,[2] definitions and hierarchy of culpable mental states,[3] rules of interpretation applicable to culpable mental states,[4] principles of liability governing accident, mistake, and ignorance,[5] principles of liability governing intoxication,[6] accomplice liability,[7] criminal attempt,[8] criminal solicitation,[9] and criminal conspiracy.[10]

[1] RCC § 22E-204.
[2] RCC § 22E-205.
[3] RCC § 22E-206.
[4] RCC § 22E-207.
[5] RCC § 22E-208.
[6] RCC § 22E-209.
[7] RCC § 22E-210.
[8] RCC § 22E-301.
[9] RCC § 22E-302.
[10] RCC § 22E-303.

"Retail value" means the actor's regular selling price for the item or service bearing or identified by the counterfeit mark. In the case of items bearing a counterfeit mark which are components of a finished product, the retail value shall be the actor's regular selling price of the finished product on or in which the component would be utilized.

Explanatory Note. The definition of "retail value" specifies the relevant value of items bearing or identified with a counterfeit mark. The RCC definition of "retail value" is used in the revised offense of trademark counterfeiting.[1]

Relation to Current District Law. No change to current District law. This definition is taken verbatim from D.C. Code § 22-901 (3), and is intended to have the same meaning as under current law.

[1] RCC § 22E-2210.

"Revoked or canceled" means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer.

Explanatory Note. This term defines when a payment card may be deemed to have been revoked or cancled. The RCC definition of "revoked or canceled" is used in the revised offense of payment card fraud.[1]

Relation to Current District Law. The definition of "revoked or canceled" does not change current District law. The definition is adapted from current D.C. Code § 22-3233.

[1] RCC § 22E-2202.

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

Explanatory Note. The RCC definition of "sadomasochistic abuse" replaces the current definition of "sado-masochistic abuse" in D.C. Code § 22-2201(b)(2)(E)[1] and the reference to "[s]adomasochistic sexual activity for the purpose of sexual stimulation" in the definition of "sexual conduct" in D.C. Code § 22-3101(5)(D). The RCC definition of "sadomasochistic abuse" is used in the revised offenses of unauthorized disclosure of a sexual recording,[2] distribution of an obscene image,[3] distribution of an obscene image to a minor,[4] creating or trafficking an obscene image of a minor,[5] possession of an obscene image of a minor,[6] arranging a live sexual performance of a minor,[7] and attending or viewing a live sexual performance of a minor.[8]

Relation to Current District Law. The RCC definition of "sadomasochistic abuse" makes one clear change to the definition of "sado-masochistic abuse" in D.C. Code § 22-2201(b)(2)(E). The revised definition makes no reference to the type of clothing that must be worn by the participants in sado-masochistic abuse. The current definition of "sado-masochistic abuse" includes any "flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed." Read literally, this definition is both overinclusive and underinclusive.[9] In contrast, the revised definition requires sexual stimulation or gratification without reference to any particular manner of dress. This change improves the clarity of the revised distribution of an obscene image and distribution of an obscene image to a minor statutes.[10]

As applied in the revised creating or trafficking an obscene image of a minor, possession of an obscene image of a minor, arranging a live sexual performance of a minor, and attending or viewing a live sexual performance of a minor offenses,[11] the RCC definition of "sadomasochistic abuse" clarifies current District law. The current sexual performance of a minor statute prohibits "sadomasochistic sexual activity for the purpose of sexual stimulation"[12] without any further definition and there is no DCCA case law. The

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[1] "The term 'sado-masochistic abuse' includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed."

[2] RCC § 22E-1804.

[3] RCC § 22E-1805.

[4] RCC § 22E-1806.

[5] RCC § 22E-1807.

[6] RCC § 22E-1808.

[7] RCC § 22E-1809.

[8] RCC § 22E-1810.

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

[10] RCC §§ 22E-1805 and 22E-1806.

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

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

RCC definition specifies discrete types of sadomasochistic abuse and retains the requirement of sexual stimulation. The RCC definition also adds sexual "gratification" for consistency with the desire to sexually "gratify" in the RCC definitions of "sexual act"[13] and "sexual contact."[14] The revised definition clarifies the scope of the revised statutes.

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

[13] RCC § 22E-701 (subparagraph (C)).
[14] RCC § 22E-701.

"Sawed-off shotgun" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "sawed-off shotgun" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "sawed-off shotgun" is used in the revised offenses of possession of a prohibited weapon or accessory[1] and unlawful transfer of a firearm,[2] as well as in the revised civil provisions for licenses of firearms dealers.[3]

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

[1] RCC § 22E-4101.
[2] RCC § 22E-4112.
[3] RCC § 22E-4114.

"Secure juvenile detention facility" means any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.

Explanatory Note. Building grounds refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter. The word "secure" makes clear that a placement at home or in a community-based residential facility is excluded.[1] The definition does not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. The definition does not include buildings used by private businesses to detain suspected criminals, such as a booking room in a retail store.

The RCC definition of "secure juvenile detention facility" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current escape from institution or officer,[2] escape from juvenile facilities,[3] and unlawful possession of contraband[4] offenses). The term "building" that is used in the definition of "secure juvenile detention facility" is defined elsewhere in RCC § 22E-701. The RCC definition of "secure juvenile detention facility" is used in the revised offenses of escape from a correctional facility or officer[5] and correctional facility contraband.[6]

Relation to Current District Law. The RCC definition of "secure juvenile detention facility" is new and does not substantively change District law.

As applied in the revised escape from a correctional facility or officer offense, the term "secure juvenile detention facility" may substantively change District law. D.C. Code § 22-2601 uses the phrase "penal or correctional institution or facility" but does not define it. DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), this phrase also includes the District's halfway houses,[7] however, case law is silent as to whether any juvenile detention facilities qualify.[8] D.C. Code § 10-509.01a uses the word "institution" and cross-references D.C. Code § 10-509.01, which is limited to locations outside the District of Columbia that operate as a "sanitorium, hospital, training school, correctional institution, reformatory, workhouse, or jail." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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[1] Community-based residential facilities include group homes, therapeutic foster care, extended family homes, and independent living programs.

[2] D.C. Code § 22-2601.

[3] D.C. Code § 10-509.01a.

[4] D.C. Code § 22-2603.02.

[5] RCC § 22E-3401.

[6] RCC § 22E-3403.

[7] *See Demus v. United States,* 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States,* 498 A.2d 1172, 1174 (D.C.1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

[8] Juvenile detention facilities are generally regarded as service providers and are not, strictly speaking, "penal" or correctional in nature.

As applied in the revised correctional facility contraband offense, the term "secure juvenile detention facility" may substantively change District law. D.C. Code § 22-2603.01 defines "secure juvenile residential facility" to mean "a locked residential facility providing custody, supervision, and care for one or more juveniles that is owned, operated, or under the control of the Department of Youth Rehabilitation Services, excluding residential treatment facilities and accredited hospitals." It defines "grounds" to mean "the area of land occupied by the penal institution or secure juvenile residential facility and its yard and outbuildings, with a clearly identified perimeter." In contrast, the revised code separately defines "correctional facility," "halfway house," and "secure juvenile detention facility" to be used universally throughout the RCC. Each definition includes buildings (also defined in RCC § 22E-701) and building grounds. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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

Explanatory Note. The definition of "self-induced intoxication" is addressed in the Commentary accompanying RCC § 22E-209. The RCC definition of "self-induced intoxication" is used in the revised offenses of murder,[1] manslaughter,[2] and assault.[3]

[1] RCC § 22E-1101.
[2] RCC § 22E-1102.
[3] RCC § 22E-1202.

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

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

Explanatory Note. "Serious bodily injury" is the highest of the three levels of bodily injury defined in the RCC. The definition incorporates the definitions of both lower levels: "bodily injury" and "significant bodily injury," also defined in RCC § 22E-701. The injury must involve a substantial risk of death or result in protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or protracted loss of consciousness. "Protracted" is intended to have the same meaning in subparagraphs (B), (C), and (D).

The RCC definition of "serious bodily injury" replaces the current statutory definition of "serious bodily injury" in D.C. Code § 22-3001(7),[1] applicable to provisions in Chapter 30, Sexual Abuse, and undefined references to "serious bodily injury" in the current aggravated assault,[2] criminal abuse or neglect of a vulnerable adult,[3] and unauthorized use of motor vehicle[4] statutes. There are undefined references to the term[5]

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[1] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[2] D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person…."); D.C. Code § 22-404.03 ("A person commits the offense of aggravated assault on a public vehicle inspection officer if that person…causes serious bodily injury to the public vehicle inspection officer; or…engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.").

[3] D.C. Code § 22-936 ("A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury….").

[4] D.C. Code § 22-3215(d)(2)(ii) ("If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.").

[5] D.C. Code §§ 22-811(b)(4) (penalty provision for the contributing to the delinquency of a minor statute requiring that the minor or any other person sustain "serious bodily injury."); 22-3152(12)(A), (C), (D), (E), (defining "weapon of mass destruction" for the terrorism statutes to include "[a]ny destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury . . .", "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a toxic or poisonous chemical," "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of a biological agent or toxin," and "[a]ny weapon that is designed, intended, or otherwise used to cause death or serious bodily injury through the release, dissemination, or impact of radiation or radioactivity, or that contains nuclear material."); 22-3154(a), (b) (manufacture or possession of a weapon of mass destruction

and a different definition of the term[6] in other Title 22 statutes. The RCC definition of "serious bodily injury" is used in the revised defenses for defense of self or another person,[7] special responsibility for care, discipline, or safety,[8] in the revised definitions of "dangerous weapon"[9] and "deadly force,"[10] and in fifteen revised offenses.[11]

Relation to Current District Law. The RCC definition of "serious bodily injury" makes three clear changes to the current statutory definition of "serious bodily injury" in D.C. Code § 22-3001(7),[12] applicable to provisions in Chapter 30, Sexual Abuse.

First, the revised definition of "serious bodily injury" requires a "protracted loss of consciousness" instead of "unconsciousness." The District's current aggravated assault statute requires "serious bodily injury," but does not define the term,[13] and the DCCA has generally applied the sex offense definition of "serious bodily injury."[14] In the context of aggravated assault, the DCCA has specifically declined to hold that "unconsciousness" is categorically of the same severity as the other harms in the definition of "serious bodily injury."[15] In contrast, the RCC definition of "serious bodily injury" requires a "protracted

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statute requiring that the weapon of mass destruction be "capable of causing . . . serious bodily injuries to multiple persons."); 22-3155(a), (b) (use, dissemination, or detonation of a weapon of mass destruction statute requiring that the weapon of mass destruction be "capable of causing . . . serious bodily injuries to multiple persons."). [To date, the RCC has not recommended revisions to these statutes.]

[6] D.C. Code §§ 22-1001(c) (defining "serious bodily injury" for the animal cruelty statute as "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ. Serious bodily injury includes, but is not limited to, broken bones, burns, internal injuries, severe malnutrition, severe lacerations or abrasions, and injuries resulting from untreated medical conditions."). [To date, the RCC has not recommended revisions to this statute.]

[7] RCC § 22E-403.

[8] RCC § 22E-408.

[9] RCC § 22E-701.

[10] RCC § 22E-701.

[11] Murder (RCC § 22E-1101); Manslaughter (RCC § 22E-1102); Robbery (RCC § 22E-1201); Assault (RCC § 22E-1202); Criminal threats (RCC § 22E-1204); Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Kidnapping (RCC § 22E-1401); Criminal abuse of a minor (RCC § 22E-1501); Criminal neglect of a minor (RCC § 22E-1502); Criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503); Criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504); Arson (RCC § 22E-2501); Carrying a dangerous weapon (RCC § 22E-4102); Contributing to the delinquency of a minor (RCC § 22E-4601).

[12] D.C. Code § 22-3001(7).

[13] D.C. Code § 22-404.01.

[14] *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute.).

[15] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to

loss of consciousness." In the RCC offenses against persons, a brief loss of consciousness constitutes at least "significant bodily injury," also defined in RCC § 22E-701. This revision improves the clarity and proportionality of the revised definition.

Second, the revised definition of "serious bodily injury" no longer includes "extreme physical pain." The DCCA has stated that the term "extreme physical pain" "is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain."[16] This revision improves the clarity and proportionality of the revised definition.

Third, the revised definition of "serious bodily injury" no longer includes "protracted loss or impairment of the function" of a "mental faculty." It is unclear whether "mental *faculty*" (emphasis added) refers to the physical condition of the brain or more generally to psychological distress. The DCCA has not interpreted this part of the current definition of "serious bodily injury." To the extent that "mental faculty" refers to the brain, "mental faculty" is redundant with "organ" in the current definition of "serious bodily injury." To the extent that "mental faculty" refers generally to emotional or psychological distress, it may be hard to qualify, similar to "unconsciousness" and "extreme physical pain" in the current definition. This revision improves the clarity and the proportionality of the revised definition.

Other than these changes, the revised definition does not change existing District law on the meaning of "serious bodily injury" as defined in the current sexual abuse statutes and applied to the current aggravated assault statute. The revised definition is meant to preserve case law interpreting the parts of the current D.C. Code definition, including "disfigurement," that were carried over to the RCC definition. The threshold for such an injury remains high.[17] The syntax of the revised definition clarifies that, as under current

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significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

[16] *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006).

[17] *Swinton v. United States*, 902 A.2d 772, 775 (D.C. 2006) ("Our decisions since *Nixon* have emphasized 'the high threshold of injury, that "the legislature intended in fashioning a crime that increases twenty-fold the maximum prison term for simple assault." *Jenkins v. United States,* 877 A.2d 1062, 1069 (D.C.2005) (internal quotation marks and citations omitted). The cases in which we have found sufficient evidence of 'serious bodily injury' to support convictions for aggravated assault thus have involved grievous stab wounds, severe burnings, or broken bones, lacerations and actual or threatened loss of consciousness. The injuries in these cases usually were life-threatening or disabling. The victims typically required urgent and continuing medical treatment (and, often, surgery), carried visible and long-lasting (if not permanent) scars, and suffered other consequential damage, such as significant impairment of their faculties. In short, these cases have been horrific." (internal citations omitted)).

District case law interpreting the definition for the sexual abuse statutes,[18] the "substantial risk" applies only to the risk of death.

However, as applied to certain RCC offenses against persons, the revised definition of "serious bodily injury" may change current District law. For example, the revised sexual assault statute (RCC § 22E-1301) and revised sexual abuse of a minor statute (RCC § 22E-1302) have a penalty enhancement if the actor recklessly causes "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. The current sexual abuse statutes have a similar penalty enhancement for causing "serious bodily injury,"[19] as that term is defined by the current sex offense statutes. Due to the revised definition of "serious bodily injury," the penalty enhancement in the RCC sexual assault offense and RCC sexual abuse of a minor statute no longer apply to injury that results in any unconsciousness, extreme physical pain, or protracted loss or impairment of a "mental faculty," unless the other requirements of the revised definition are met. The revised penalty enhancement ensures the enhancement is reserved for the most serious injuries.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "serious bodily injury" on current District law.

[18] *Scott v. United States*, 954 A.2d 1037, 1046 (D.C. 2008) ("[W]e readily conclude that the 'substantial risk' . . . is only a substantial risk of death, not a substantial risk of extreme pain, disfigurement, or any of the other conditions listed.").
[19] D.C. Code § 22-3020(a)(3).

"Serious mental injury" means substantial, prolonged harm to a person's psychological or intellectual functioning, that may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and that may be demonstrated by a change in behavior, emotional response, or cognition.

Explanatory Note. The RCC definition of "serious mental injury" differs from the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[1] by adding the requirement that the harm be "substantial" and "prolonged."

The RCC definition of "serious mental injury" is new, the term is not currently statutorily defined in Title 22 of the D.C. Code. The RCC definition of "serious mental injury" is used in the revised offenses of criminal abuse of a minor,[2] criminal neglect of a minor,[3] criminal abuse of a vulnerable adult or elderly person,[4] and criminal neglect of a vulnerable adult or elderly person.[5]

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

As applied to the RCC offenses for criminal abuse and criminal neglect of minors, vulnerable adults, and elderly persons, the term "serious mental injury" may change current District law. These RCC offenses prohibit either causing serious mental injury to the complainant[6] or creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience serious mental injury,[7] but the current equivalent offenses in Title 22 either do not include such harm or risk of harm, or it is unclear whether they do. For example, the current District child cruelty statute is silent as to whether the offense covers purely psychological harms,[8] but DCCA case law is clear that the offense extends at least to serious psychological harm.[9] However, the court has not articulated a precise definition of the requisite psychological harm, making it unclear whether the revised definition of "serious mental injury" changes current District law. Similarly, the current

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[1] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[2] RCC § 22E-1501.

[3] RCC § 22E-1502.

[4] RCC § 22E-1503.

[5] RCC § 22E-1504.

[6] Criminal abuse of a minor (RCC § 22E-1501); criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503).

[7] Criminal neglect of a minor (RCC § 22E-1502); criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504).

[8] D.C. Code § 22-1101.

[9] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted,[10] but the statute does not define the term and there is no DCCA case law. Applying the RCC definition of "serious mental injury" to these offenses improves the clarity, completeness, and consistency of the revised offenses.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "serious mental injury" on current District law.

[10] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

"Services" includes:

(A) Labor, whether professional or nonprofessional;

(B) The use of vehicles or equipment;

(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;

(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;

(E) Admission to public exhibitions or places of entertainment; and

(F) Educational and hospital services, accommodations, and other related services.

Explanatory Note. The RCC definition of "services" replaces the current definition of "services" in D.C. Code § 22-3201(5),[1] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "services" is used in the RCC definitions of "counterfeit mark,"[2] "debt bondage,"[3] and "property,"[4] as well as in the revised offenses of forced labor,[5] trafficking in labor,[6] misuse of documents in furtherance of human trafficking,[7] fraud,[8] and forgery.[9]

Relation to Current District Law. The RCC definition of "services" is identical to the statutory definition under current law.[10]

[1] D.C. Code 22-3201(5) ("'Services' includes, but is not limited to: (A) Labor, whether professional or nonprofessional; (B) The use of vehicles or equipment; (C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity; (D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere; (E) Admission to public exhibitions or places of entertainment; and (F) Educational and hospital services, accommodations, and other related services.").

[2] RCC § 22E-701.

[3] RCC § 22E-701.

[4] RCC § 22E-701.

[5] RCC § 22E-1601.

[6] RCC § 22E-1603.

[7] RCC § 22E-1607.

[8] RCC § 22E-2201.

[9] RCC § 22E-2204.

[10] D.C. Code § 22-3201(5).

"Sexual act" means:

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

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

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

(D) Conduct described in subparagraphs (A)-(C) of this paragraph between a person and an animal.

Explanatory Note. The RCC definition of "sexual act" specifies several types of sexual penetration and oral sexual contact. The requirement in subparagraph (C) that the penetration be done with "the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire," excludes penetration done for legitimate medical, hygienic, or law-enforcement reasons. "Sexually" modifies each adjective in this desire requirement and requires that the penetration be sexual in nature.

The RCC definition of "sexual act" replaces the current statutory definition of "sexual act" in D.C. Code § 22-3001(8),[1] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual act" is used in the revised defenses for defense of self or another person[2] and duress,[3] in the RCC definitions of "commercial sex act"[4] and "sexual contact,"[5] and in twenty-two revised offenses.[6]

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

[2] RCC § 22E-403.

[3] RCC § 22E-501.

[4] RCC § 22E-701.

[5] RCC § 22E-701.

[6] Robbery (RCC § 22E-1201); Criminal threats (RCC § 22E-1204); Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Sexual abuse by exploitation (RCC § 22E-1303); Sexually suggestive conduct with a minor (RCC § 22E-1304); Enticing a minor into sexual conduct (RCC § 22E-1305); Arranging for sexual conduct with a minor or person incapable of consenting (RCC § 22E-1306); Nonconsensual sexual conduct (RCC § 22E-1307); Incest (RCC § 22E-1308); Voyeurism (RCC § 22E-1803); Unauthorized disclosure of a sexual recording (RCC § 22E-1804); Distribution of an obscene image (RCC § 22E-1805); Distribution of an obscene image to a minor (RCC § 22E-1806); Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Arranging a live sexual performance of a minor (RCC § 22E-1809); Attending or viewing a live sexual performance of a minor (RCC § 22E-1810); Possession of a firearm by an unauthorized person (RCC § 22E-4105); Indecent exposure (RCC § 22E-4206); Prostitution (RCC § 22E-4401); Patronizing prostitution (RCC § 22E-4402).

Relation to Current District Law. *The revised definition of "sexual act" makes one clear change to the statutory definition of "sexual act" in D.C. Code § 22-3001(8).*[7]

Subparagraph (C) of the revised definition of "sexual act" requires that the defendant have the desire to "sexually abuse, humiliate, harass, degrade, arouse, or gratify" any person. "Sexually" modifies each adjective and requires that the penetration be sexual in nature. Subparagraph (C) of the current D.C. Code definition of "sexual act" requires an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[8] However the current D.C. Code definition's reference to the "sexual desire of any person" appears limited to an intent to "arouse or gratify" and the current subparagraph (C) appears to include penetration with any intent to abuse, humiliate, harass, or degrade. In contrast, subparagraph (C) of the revised definition of "sexual act" requires that the penetration be sexual in nature. It is disproportionate to include in the RCC sex offenses and similarly serious RCC offenses, like the human trafficking offenses in RCC Chapter 16, conduct that is not proven to be sexual in nature. The RCC provides liability for non-sexual conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205). However, practically, it would be an exceedingly rare fact pattern where penetration-type conduct would occur with intent to abuse, humiliate, harass, or degrade, that is not also done with intent to *sexually* abuse, humiliate, harass, degrade, or arouse or gratify.[9] This revision improves the clarity, consistency, and proportionality of the revised definition, and reduces unnecessary overlap with non-sexual assault offenses.

The revised definition of "sexual act" makes five possible substantive changes to the statutory definition of "sexual act" in D.C. Code § 22-3001(8).[10]

First, subparagraph (A) of the revised definition of "sexual act" requires the penetration of the anus or vulva of "any person" by a penis. The current definition of "sexual act" requires the penetration of the anus or vulva "of another" by a penis.[11] The "of another" requirement in the current definition creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in a "sexual act" with the complainant and liability for the involvement of a third party.[12] This revision improves the clarity and consistency of the revised sexual abuse statutes.

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[7] D.C. Code § 22-3001(8).

[8] D.C. Code § 22-3001(8)(C).

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

[10] D.C. Code § 22-3001(8).

[11] D.C. Code § 22-3001(8)(A).

[12] For example, when subparagraph (A) of the current definition of "sexual act" is inserted into first degree and second degree sexual abuse (D.C. Code §§ 22-3002 and 22-3003), the plain language reading is "engages in the penetration, however slight, of the anus or vulva of another, by a penis," "causes another person to engage in the penetration, however slight, of the anus or vulva of another, by a penis," or "causes another person to submit to the penetration, however slight of the anus or vulva of another, by a penis." The plain language

Second, subparagraph (C) of the revised definition of "sexual act" specifies penetration by "any body part or by any object." Subparagraph (C) of the current definition of "sexual act" requires penetration of the "anus or vulva" by "a hand or finger or by any object" with intent to abuse, humiliate, harass, etc.[13] It is unclear in subparagraph (C) of the current definition whether penetration by a body part is limited to "a hand or finger," or if penetration by another body part, such as a toe, would be included as "any object." The scope of subparagraph (C) of the current definition of "sexual act" is also unclear because the current subparagraph (A) requires penetration of the "anus or vulva" by "a penis."[14] Subparagraph (C) of the RCC definition of "sexual act" resolves this ambiguity by specifying penetration "by any body part or by any object." This change improves the clarity of the revised definition and removes a possible gap in liability.

Third, subparagraph (C) of the revised definition clarifies that the penetration can be done "at the direction of a person" with the desire to sexually abuse, harass etc. Subparagraph (C) of the current definition of "sexual act" requires the penetration to be done with an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[15] The current definition appears to require that the individual who does the penetration—be it the actor, the complainant, or a third party—also have the intent to abuse, humiliate, etc. This interpretation leads to counterintuitive results and disproportionate penalties for similar conduct[16] and is inconsistent with the legislative history.[17] It is also inconsistent with the part of the current subparagraph (C) that permits an intent to arouse or gratify the sexual desire "of any person." There is no DCCA case law on this issue. Resolving this ambiguity, subparagraph (C) of the revised definition specifies that the actor can himself or herself have the required desire to sexually abuse, etc., if the actor engages in the penetration, but it is also sufficient for the complainant or a third party to engage in the penetration at the direction of the actor or another person with

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readings create liability for the actor penetrating the complainant, but it is unclear if there is liability for the actor causing the complainant to penetrate a third person or for the actor causing a third person to penetrate the complainant.

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

[14] D.C. Code § 22-3001(8) ("'Sexual act' means: (A) The penetration, however slight, of the anus or vulva of another by a penis.").

[15] D.C. Code § 22-3001(8)(C).

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

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

such a desire.[18] This change improves the clarity and consistency of the revised definition and removes a possible gap in current law.

Fourth, subparagraph (C) of the revised definition of "sexual act" requires penetration with the "desire to" sexually abuse, etc. Subparagraph (C) of the current definition of "sexual act" requires that the defendant act "with an intent" to abuse, etc.[19] The meaning of "intent" is undefined and it is unclear as to whether the meaning is more similar to the RCC § 22E-206 definition of "purpose" as "conscious[] desire" or "intent" as "practically certain." Resolving this ambiguity, subparagraph (C) of the revised definition of "sexual act" requires that the defendant act "with the desire to" sexually abuse, etc. The reference to "desire" tracks the higher culpable mental state in the RCC definition of "purpose." In addition, "intent" is a defined culpable mental state in RCC § 22E-206, and per the rules of interpretation in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If "intent" is included in an RCC offense through the definition of "sexual act" or "sexual contact," that would complicate the interpretation of culpable mental states in that offense. This change improves the clarity of the revised definition.

Fifth, subparagraph (D) the revised definition of "sexual act" specifically includes certain forms of bestiality, mainly an animal sexually penetrating or making contact with a person or a person so sexually penetrating or making contact with an animal.[20] The

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

[19] D.C. Code § 22-3001(8)(C).

[20] Subparagraph (D) of the revised definition of "sexual act" prohibits "conduct described in subparagraphs (A)-(C) between a person and an animal." This requires reading subparagraphs (A) – (C) broadly to include an animal even if the statutory language specifies "person" or is silent as to the ownership of a body part.

As it pertains to subparagraph (A) of the revised definition, subparagraph (D) prohibits an animal penis penetrating the anus or vulva of a person, as well as a human penis penetrating the anus or vulva of an animal. It is not intended to include a human complainant using an animal penis to penetrate an animal.

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

As it pertains to subparagraph (C) of the revised definition, subparagraph (D) prohibits the body part of any animal penetrating the anus or vulva of a person, as well as a hand or

current definition of "sexual act" does not specifically refer to an animal, although subparagraphs (A) and (B) of the statute do not specifically exclude involvement of animals. Subparagraph (C) does refer to a "person" in the phrase "arouse or gratify the sexual desire of any person," but also includes penetration by "any object."[21] There is no DCCA case law interpreting the current definition of "sexual act" as it pertains to animals. The District does not have a separate bestiality statute. Resolving this ambiguity, the revised definition clearly specifies that a sexual act may occur between a human and an animal. This change improves the clarity, consistency, and proportionality of the revised definition.

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

First, subparagraph (B) of the revised definition clarifies that the contact must be with "another person's" penis, vulva, or anus. Subparagraph (B) of the current definition does not specify "any person" or "another person," requiring only "[c]ontact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus."[22] This omission creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in the prohibited contact with the complainant and liability for the involvement of a third party.[23] Specifying that the contact can be between the specified body parts of "another person" clarifies the definition.

Second, subparagraph (C) of the revised definition clarifies that the penetration can be of "any person." Subparagraph (C) of the current definition does not specify "any person" or "another person," requiring only "penetration…of the anus or vulva."[24] This omission creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in the prohibited penetration with the complainant and liability for the involvement of a third party.[25] Specifying that the penetration can be of "any person" (subparagraph (C)) clarifies the definition.

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finger of a person or an object wielded by a person penetrating the anus or vulva of any animal.

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

[22] D.C. Code § 22-3001(8)(B).

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

[24] D.C. Code § 22-3001(8)(C).

[25] For example, when subparagraph (B) of the current definition of "sexual act" is inserted into the current second degree child sexual abuse statute (D.C. Code § 22-3009), the plain language reading is "engages in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus with that child" and "causes that child to engage in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the

Third, the revised definition of "sexual act" no longer states that "the emission of semen is not required," as is the case in subparagraph (D) of the current definition of "sexual act."[26] Nothing in the remaining subparagraphs of the current definition[27] or in the revised definition of "sexual act" suggests that emission of semen is required. The language is surplusage and potentially confusing. Consequently, the revised definition of "sexual act" omits this language to improve the clarity of the definition.

As applied in the revised voyeurism offense[28] *the revised definition makes one possible substantive change to current District law.* The voyeurism offense in D.C. Code §§ 22-3531(b)(3) and (c)(1)(C) uses the term "sexual activity," without defining it. District case law has not addressed its meaning. Broadly construed, the term may include in voyeurism liability conduct short of penetration, such as kissing or caressing. Resolving this ambiguity, the revised voyeurism statute uses the defined term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.[29] Consequently, the revised voyeurism offense prohibits observing or recording a person who is engaging in a sexual act, masturbation, or displaying certain body parts[30]—but not mere kissing or caressing. This change improves the clarity and consistency of the revised offense.

As applied in the revised unauthorized disclosure of sexual recordings offense,[31] *the revised definition makes one possible substantive change to current District law.* The current non-consensual pornography statute protects against depictions of "sexual conduct," including masturbation and "[s]adomasochistic sexual activity for the purpose of sexual stimulation,"[32] while the current felony voyeurism statute protects depictions of "sexual activity"[33] without defining that term. Broadly construed, the term "sexual activity" may include conduct short of penetration, such as kissing or caressing. Resolving this ambiguity, the revised statute includes depictions of a "sexual act," as defined in RCC § 22E-701, as well as masturbation, sadomasochistic abuse, and images certain body parts[34]—but not mere kissing or caressing. This change improves the clarity and consistency of the revised offense.

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anus." It is unclear whether the specified body parts must belong to the complainant, the actor, or a third party.

[26] D.C. Code § 22-3001(8)(D).

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

[28] RCC § 22E-1803.

[29] RCC § 22E-701.

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

[31] RCC § 22E-1804.

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

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

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

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

"Sexual contact" means:

(A) Sexual act; or

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

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

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

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

The RCC definition of "sexual contact" replaces the current statutory definition of "sexual contact" in D.C. Code § 22-3001(9),[1] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual contact" is used in the revised defenses for defense of self or another person[2] and duress,[3] in the RCC definition of "commercial sex act,"[4] and in nineteen revised offenses.[5]

Relation to Current District Law. *The RCC definition of "sexual contact" makes two clear changes to the statutory definition of "sexual contact" in D.C. Code § 22-3001(9).*[6]

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

[2] RCC § 22E-403.

[3] RCC § 22E-501.

[4] RCC § 22E-701.

[5] Robbery (RCC § 22E-1201); Criminal threats (RCC § 22E-1204); Sexual assault (RCC § 22E-1301); Sexual abuse of a minor (RCC § 22E-1302); Sexual abuse by exploitation (RCC § 22E-1303); Sexually suggestive conduct with a minor (RCC § 22E-1304); Enticing a minor into sexual conduct (RCC § 22E-1305); Arranging for sexual conduct with a minor or person incapable of consenting (RCC § 22E-1306); Nonconsensual sexual conduct (RCC § 22E-1307); Incest (RCC § 22E-1308); Distribution of an obscene image (RCC § 22E-1805); Distribution of an obscene image to a minor (RCC § 22E-1806); Creating or trafficking an obscene image of a minor (RCC § 22E-1807); Possession of an obscene image of a minor (RCC § 22E-1808); Arranging a live sexual performance of a minor (RCC § 22E-1809); Attending or viewing a live sexual performance of a minor (RCC § 22E-1810); Possession of a firearm by an unauthorized person (RCC § 22E-4105); Prostitution (RCC § 22E-4401); Patronizing prostitution (RCC § 22E-4402).

[6] D.C. Code § 22-3001(9).

First, the revised definition of "sexual contact" specifically includes a "sexual act," as that term is defined in RCC § 22E-701. It is unclear in current District law whether "sexual contact" necessarily includes a "sexual act" because the current definition of "sexual contact" requires the intent to abuse, humiliate, etc., and subparagraph (A) and subparagraph (B) of the current definition of "sexual act" do not.[7] In contrast, the revised definition of "sexual contact" statutorily specifies that "sexual contact" includes a "sexual act." This change establishes that RCC sex offenses that require a "sexual contact" are lesser included offenses of otherwise identical RCC sex offenses that differ only in that they require a "sexual act"—for example first degree sexual assault and third degree sexual assault. This change improves the clarity, consistency, and proportionality of the revised sex offenses and removes a possible gap in current District law.

Second, the revised definition of "sexual contact" requires that the defendant have the desire to "sexually abuse, humiliate, harass, degrade, arouse, or gratify" any person. "Sexually" modifies each adjective and requires that the contact be sexual in nature. Subparagraph (C) of the current D.C. Code definition of "sexual contact" requires an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[8] However the current D.C. Code definition's reference to the "sexual desire of any person" appears limited to an intent to "arouse or gratify" and the current definition of "sexual contact" appears to include contact with any intent to abuse, humiliate, harass, or degrade.[9]

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

[8] D.C. Code § 22-3001(9).

[9] For example, if the current definition of "sexual contact" includes touching with any intent to abuse, humiliate, harass, or degrade, regardless of whether its sexual in nature, throwing a snowball at a person's buttocks with an intent to harass would be included in a "sexual contact."

In contrast, the revised definition of "sexual contact" requires that the touching be sexual in nature. It is disproportionate to include in the RCC sex offenses and similarly serious RCC offenses, like the human trafficking offenses in RCC Chapter 16, conduct that is not proven to be sexual in nature. The RCC provides liability for non-sexual conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205). This revision improves the clarity, consistency, and proportionality of the revised definition, and reduces unnecessary overlap with non-sexual assault offenses.

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

First, the revised definition clarifies that the touching can be done "at the direction of a person" with the desire to sexually abuse, etc. The current definition of "sexual contact" requires the touching to be done with an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[10] The current definition appears to require that the individual who does the touching—be it the actor, the complainant, or a third party—also have the intent to abuse, etc. This interpretation leads to counterintuitive results and disproportionate penalties for similar conduct[11] and is inconsistent with the legislative history.[12] It is also inconsistent with the part of the current definition that permits an intent to arouse or gratify the sexual desire "of any person." There is no DCCA case law on this issue. Resolving this ambiguity, the revised definition specifies that the actor can himself or herself have the required desire to sexually abuse, etc., if the actor engages in the touching, but it is also sufficient for the complainant or a third party to engage in the touching at the direction of the actor or another person with such a desire.[13] This change improves the clarity and consistency of the revised definition and removes a possible gap in current law.

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[10] D.C. Code § 22-3001(9).

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

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

[13] For example, an actor that causes the complainant to touch his or her own breast has satisfied part of the current and revised definitions of "sexual contact"—touching the breast of any person (the complainant). However, it is arguable that the required intent of the current definition has not been met. The actor may have the intent to abuse the complainant, but the complainant is the individual doing the actual touching and likely does not share this intent. Under the revised definition, however, there is no ambiguity as to whether the actor's conduct suffices because the complainant has engaged in the required touching "at the direction of" the actor with the desire to sexually abuse the complainant.

Second, the revised definition of "sexual contact" requires penetration with the "desire to" sexually abuse, etc. The current definition of "sexual contact" requires that the defendant act "with an intent" to abuse, etc.[14] The meaning of "intent" in the current statute is undefined and it is unclear as to whether the meaning is more similar to the RCC § 22E-206 definition of "purpose" as "conscious[] desire" or "intent" as "practically certain." Resolving this ambiguity, the revised definition of "sexual contact" requires that the defendant act "with the desire to" sexually abuse, etc. The reference to "desire" tracks the higher culpable mental state in the RCC definition of "purpose." In addition, "intent" is a defined culpable mental state in RCC § 22E-206, and per the rules of interpretation in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If "intent" is included in an RCC offense through the definition of "sexual act" or "sexual contact," that would complicate the interpretation of culpable mental states in that offense. This change improves the clarity of the revised definition.

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

[14] D.C. Code § 22-3001(9).

"Significant bodily injury" means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer, and, in addition, the following injuries constitute at least a significant bodily injury: a fracture of a bone; a laceration that is at least one inch in length and at least one quarter of an inch in depth; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.

Explanatory Note. "Significant bodily injury" is the intermediate level of three levels of bodily injury defined in the RCC. The definition incorporates the definition of "bodily injury," also defined in RCC § 22E-701. The injury must require hospitalization or immediate medical treatment beyond what a layperson can personally administer and the hospitalization or immediate medical treatment must be necessary to either prevent long-term physical damage or to abate severe pain. Regardless whether the requirements in the first clause of the definition are proven, the injuries specified in the last clause of the definition constitute at least "significant bodily injury," such as a fracture of a bone or a concussion. The reference to "neck or head" in "contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation" is intended to include the neck and eyes. There is no requirement that the bodily injury to the head or neck be caused by the strangulation or suffocation. Any contusion, petechia, or other bodily injury to the head or neck that the complainant sustains during the time in which strangulation or suffocation occurs is sufficient.[1]

The RCC definition of "significant bodily injury" replaces the current statutory definition of "significant bodily injury" in D.C. Code § 22-404(b),[2] applicable to the felony assault with significant bodily injury offense, and an undefined reference to "significant bodily injury" in the assault on a police officer[3] statute. The term is also defined in other Title 22 statutes.[4] The RCC definition of "significant bodily injury" is used in the RCC definition of "serious bodily injury"[5] and in the revised offenses of robbery,[6] assault,[7]

[1] For example, if the complainant bumps his or her head in an attempt to get free from the strangulation or suffocation, resulting in a contusion to his or her head, that contusion during strangulation or suffocation is sufficient to establish significant bodily injury.

[2] D.C. Code 22-404(b) ("For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention.").

[3] D.C. Code 22-405(c) ("A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.").

[4] D.C. Code § 22-861(a)(2) (injuring a police animal statute defining "significant bodily injury" as an injury that requires hospitalization or immediate medical attention."). [To date, the RCC has not recommended revisions to this statute.]

[5] RCC § 22E-701.

[6] RCC § 22E-1201.

[7] RCC § 22E-1202.

criminal abuse of a minor,[8] criminal neglect of a minor,[9] criminal abuse of a vulnerable adult or elderly person,[10] and criminal neglect of a vulnerable adult or elderly person.[11]

Relation to Current District Law. The RCC definition of "significant bodily injury" makes three clear changes to the statutory definition of "significant bodily injury" in D.C. Code § 22-404(b).[12]

First, the revised definition of "significant bodily injury" requires "immediate medical treatment beyond what a layperson can personally administer." The current definition of "significant bodily injury" merely requires "immediate medical attention"[13] for this prong of the definition. However, District case law has construed medical "attention" in the current statutory definition to mean medical "treatment,"[14] and has held that the treatment must be "to prevent long-term physical damage or to abate severe pain,"[15] and be "beyond what a layperson can personally administer."[16] By codifying these requirements, the revised definition adopts the position of the DCCA that determining

[8] RCC § 22E-1501.
[9] RCC § 22E-1502.
[10] RCC § 22E-1503.
[11] RCC § 22E-1504.
[12] D.C. Code § 22-404(b).
[13] D.C. Code § 22-404(b) ("For the purposes of this paragraph, the term 'significant bodily injury' means an injury that requires hospitalization or immediate medical attention.").
[14] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264-65 (D.C. 2013) ("medical attention means the treatment that is necessary to preserve the health and wellbeing of the individual, *e.g.*, to prevent long-term physical damage, possible disability, disfigurement, or severe pain . . . the attention required— treatment—is not satisfied by mere diagnosis.") (internal quotation marks omitted); *In re D.P.*, 122 A.3d 903, 911 (D.C. 2015) ("As interpreted by this court, immediate medical attention refers to treatment; in other words, the attention required . . . is not satisfied by mere diagnosis." (internal quotation marks omitted).
[15] *See, e.g.*, *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("In other words, there are two independent bases for a fact finder to conclude that a victim has suffered a significant bodily injury: (1) where the injury requires medical treatment to prevent "long-term physical damage" or "potentially permanent injuries"; or (2) where the injury requires medical treatment to abate the victim's "severe" pain."); *Wilson v. United States*, 140 A.3d 1212, 1218 (D.C. 2016) ("However bad the injuries, may seem, the government's combined evidence fails to show that immediate medical attention was required to prevent longterm [sic] physical damage and other potentially permanent injuries or abate pain that is severe instead of lesser, short-term hurts." (internal quotation marks omitted).
[16] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1265 (D.C. 2013) ("And we may infer, accordingly, that everyday remedies such as ice packs, bandages, and self-administered over-the-counter medications, are not sufficiently medical to qualify under the statute, whether administered by a medical professional or with self-help. Treatment of a higher order, requiring true medical expertise, is required.") (internal quotation marks omitted); *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("The focus here is not, however, whether [the complaining witness] needed to remove the glass to prevent long-term damage, but whether a medical professional was required to remove the glass because [the complaining witness] could not have safely removed it himself—for example, with tweezers or another self-administered remedy.").

whether an injury is sufficient to constitute a "significant bodily injury" is an objective[17] inquiry as to the nature of the injury. Assessment of the nature of the injury can be a difficult factual issue for a jury or fact finder,[18] and in some cases expert medical testimony may be required to prove a significant bodily injury.[19] Whether a person wants to receive medical care[20] and whether medical care occurs[21] are not dispositive as to whether an injury "requires" medical care under either current law or the RCC. This change improves the clarity, completeness, and consistency of the revised definition.

Second, "hospitalization" in the revised definition of "significant bodily injury" must be necessary to "prevent long-term physical damage or to abate severe pain." The current definition of "significant bodily injury" does not have any additional requirements for hospitalization beyond "requires hospitalization."[22] DCCA case law has speculated that the reference to "hospitalization" in the current definition may be intended to cover "latent" injuries that are not immediately apparent.[23] DCCA case law has also said that the requirements for an injury that requires "hospitalization" may be different from an injury that requires "immediate medical attention,"[24] the other prong of the current definition of

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[17] *Belt v. United States*, 149 A.3d 1048, 1055 (D.C. 2016) ("The term "immediate medical attention" and the issue of whether the victim required hospitalization are objective inquiries.").

[18] *Belt v. United States*, 149 A.3d 1048, 1056 (D.C. 2016).

[19] *See Jackson v. United States*, 996 A.2d 796, 798 (D.C. 2010) (noting that in some cases, such as where the subject of proper medical treatment is not within the realm of common knowledge and everyday experience a medical opinion may be necessary to demonstrate criminal neglect).

[20] *See, e.g.*, *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010) ("[N]or is a decision by the injured party not to seek immediate medical attention determinative as to whether the injury in fact called for such attention.").

[21] *See, e.g.*, *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("Again, the standard is an objective one, and the fact that medical treatment occurred does not mean that medical treatment was required."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Even assuming [the complaining witness] did receive some form of treatment in the hospital, therefore, the fact that medical treatment occurred does not mean that medical treatment was required." (internal quotation marks omitted) (citing *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015)).

[22] D.C. Code § 22-404(b) ("For the purposes of this paragraph, the term 'significant bodily injury' means an injury that requires hospitalization or immediate medical attention.").

[23] *In re R.S.*, 6 A.3d 854, 859 n.3 (D.C. 2010) ("It is not easy to envision a situation in which an injury might require hospitalization and yet not also require immediate medical attention. Perhaps the hospitalization definition, which is presented as an alternative, is to cover a situation where an injury is only latent and manifests itself a considerable time after the fact; *e.g.,* an unrecognized internal injury or concussion.").

[24] *See, e.g.*, *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 ("One can conceive of injuries (for example, a head injury that may or may not have resulted in a concussion) where immediate medical 'attention' in the form of monitoring or even testing is required, but where no 'treatment' is ultimately necessary to preserve or improve the victim's health. On the other hand, situations can surely arise when immediate then prolonged monitoring, coupled with testing, will eventuate in treatment. The question as to where the line is drawn between monitoring or testing and treatment in these fluid situations, however, is likely to

"significant bodily injury." This case law suggests that hospitalization for merely diagnostic purposes, and not treatment, may be sufficient to prove a significant bodily injury.[25] However, in each of the DCCA cases where hospitalization for diagnostic testing constituted "significant bodily injury," the complaining witness sustained an injury.[26] Consequently, neither the current definition nor existing case law provides a clear standard to be used to determine when "hospitalization" satisfies the current definition of "significant bodily injury." In contrast, the RCC definition of "significant bodily injury" specifies the standard for an injury that requires hospitalization at any point in time is whether the hospitalization is required to "prevent long-term physical damage or to abate severe pain." This is the same standard the DCCA has applied to injuries requiring "immediate medical attention" in the current definition of "significant bodily injury" and precludes finding a "significant bodily injury" where there is hospitalization for merely diagnostic purposes. This change improves the clarity, completeness, and consistency of the revised definition.

Third, the RCC definition of "significant bodily injury" provides a bright-line list of specific types of injuries that per se (inherently) constitute at least a "significant bodily

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become moot, as such scrutiny will normally involve hospitalization, the alternative basis for finding 'significant' bodily injury."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Then in *Quintanilla*, the court left open the possibility that an injury could require hospitalization in fluid situations that involve immediate then prolonged monitoring, coupled with testing, regardless of whether such monitoring or testing eventuate[s] in treatment.") (citations and quotation marks omitted).

[25] *Blair v. United States*, 114 A.3d 960, 979 (D.C. 2015) ("We distinguished hospitalization, which we called the alternative basis for finding significant bodily injury, observing that it may be entailed in fluid situations, involving immediate than prolonged monitoring, coupled with testing, that may (or may not) 'eventuate in treatment.'") (citations and quotation marks omitted).

[26] *Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury. Because the testimony and photographic evidence in this case showed that appellant 'kept banging [the complainant's] head against the ground' with the result that she felt disoriented; that the hospital emergency room physician ordered a CAT scan and X-ray of her head and neck to determine whether she sustained internal injuries; and that C.H. sustained multiple abrasions and bruising all over her body, including trauma around her eye, we hold that the evidence was sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that [the complainant's] injuries were significant and thus to support appellant's conviction of felony assault.") (internal citations omitted); *Brown v. United States*, 146 A.3d 110, 114-16 (D.C. 2016) (finding the evidence sufficient for significant bodily injury when the complainant went to the hospital five days after the assault due to lingering head pain and other symptoms, was given a CAT scan, was diagnosed with a concussion, and was instructed about what to do in order to avert worsened or prolonged symptoms).

injury." The current definition of "significant bodily injury" doesn't have such a list and DCCA case law does not provide specific injuries that constitute "significant bodily injury." In contrast, the RCC definition of "significant bodily injury" provides a bright-line list of per se injuries. Whether or not the listed injuries could also meet the standards described in the first clause of the RCC definition of "significant bodily injury" or also provide a basis for liability under the standard for the RCC definition of "serious bodily injury,"[27] proof of the listed injuries suffices to establish at least "significant bodily injury." Specifically listing per se significant injuries clarifies the current state of law, fills possible gaps in District law,[28] and may improve the consistency of adjudication.

The listed injuries in part reflect current District case law, which has generally held that concussions[29] and lacerations requiring stitches[30] are sufficient proof of significant bodily injury. The other injuries listed in the definition may frequently be the subject of criminal prosecutions but their status as significant bodily injuries has not been clearly (or at all) established in District case law. No District case law addresses severity of burns, but second degree burns are typically recognized as requiring medical treatment.[31] Loss of consciousness is currently a part of the statutory definition of "serious bodily injury" for sexual abuse offenses,[32] however DCCA case law has questioned, without resolving,

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[27] For example, a laceration that is one inch in length and one quarter inch in depth would be a per se significant bodily injury, but may also be a serious bodily injury if it results in protracted and obvious disfigurement.

[28] Current District case law appears to exclude from the definition of significant bodily injury latent injuries that, although requiring medical treatment, do not require admittance to a hospital. *Quintanilla v. United States*, 62 A.3d 1261, 1264 n.17 (D.C. 2013) ("[T]here is no provision in the statute for latent injuries that do not require hospitalization, even if they do ultimately require medical attention. It follows that, for injuries not requiring immediate medical attention, the injury will not be significant unless it does eventually require hospitalization."); *Teneyck v. United States*, 112 A.3d 906, 909 n.4 ("'[H]ospitalization' under the statute requires more than being admitted for outpatient care."); However, latent injuries (such as a concussion) that are per se significant bodily injuries listed in the second clause of the RCC definition would be covered, even without proof of admittance to a hospital.

[29] *See Brown v. United States*, 146 A.3d 110, 114-15 (finding the evidence sufficient for "significant bodily injury" even though the complaining witness did not go to the hospital until five days after the attack when the complaining witness sustained repeated blows to his head and leg and the complaining witness was diagnosed with a concussion).

[30] *See, e.g., Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015) (Upholding finding of significant bodily injury based on medical treatment that included nine stiches for "gashes to her face" going down to the "white meat."); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010)(Upholding finding of significant bodily injury based on medical treatment that included four to six inches); *Flores v. United States*, 37 A.3d 866, 867 (D.C.2011)(Upholding finding of significant bodily injury based on medical treatment that included "eight to ten stitches and a tetanus shot.").

[31] *See, e.g.,* https://www.cdc.gov/masstrauma/factsheets/public/burns.pdf (last visited December 1, 2017)(stating that, in contrast to first degree burns which may be treatable by a layperson, medical treatment from a trained professional is required.

[32] D.C. Code § 22-3001(7) ("'Serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious

whether loss of consciousness constitutes a "serious bodily injury" for purposes of assault.[33] The inclusion of a traumatic brain injury[34] requires proof of such an injury, and mere evidence of blows to the head or diagnostic medical activity will not suffice.[35] The inclusion of a contusion (bruise) or other bodily injury to the neck or head sustained during "strangulation or suffocation," as defined in RCC § 22E-701, reflects the heightened

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disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.").

[33] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

[34] For example, a concussion. *See* https://www.cdc.gov/headsup/basics/concussion_whatis.html (last visited Dec. 1, 2017).

[35] In one case, the DCCA upheld a conviction for felony assault based on injuries that chiefly, though not solely, consisted of head trauma which was subjected to diagnostic testing but apparently was not specifically diagnosed as a concussion. *See Blair v. United States*, 114 A.3d 960, 980 (D.C. 2015) ("While not every blow to the head in the course of an assault necessarily constitutes significant bodily injury, we conclude that where, as here, the defendant repeatedly struck the victim's head, requiring testing or monitoring to diagnose possible internal head injuries, and also caused injuries all over the victim's body, the assault is sufficiently egregious to constitute significant bodily injury.") (internal citations omitted). The RCC definition of significant bodily injury calls the *Blair* ruling into question to the extent that there may not have been sufficient evidence that the injury caused by the defendant was a traumatic brain injury or that the injury otherwise required, to prevent long-term physical damage or to abate severe pain, hospitalization or immediate medical treatment beyond what a layperson can personally administer. The DCCA avoided reliance on the need for a medical diagnosis in a subsequent case involving head trauma. *Brown v. United States*, 146 A.3d 110, 116 (D.C. 2016) ("At the hospital, [the complaining witness] did not receive mere diagnosis, but was instructed [by the doctor] about what he needed to do to avert worsened or prolonged head pain or other symptoms. Thus [the complaining witness's] injury was one that, to preserve his well-being, necessitated that he be taken to the hospital shortly after the injury was inflicted."). To the extent the *Brown* court relied upon the doctor's diagnosis of a traumatic brain injury of the need for medical advice to avoid longer term damage, the decision is consistent with the RCC definition of "significant bodily injury."

seriousness of such injuries, particularly in light of research indicating such injuries are often linked to more serious patterns of violence.[36]

In addition to the above-discussed clear substantive changes to the current statutory definition of "significant bodily injury" in D.C. Code § 22-404(b),[37] the revised definition makes one possible substantive change. The revised definition of "significant bodily injury" requires that the injury be a "bodily injury," defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." The current definition of "significant bodily injury" requires an "injury." There is no DCCA case law interpreting "injury" in the current definition. The RCC definition incorporates the defined term of "bodily injury" into the revised definition to clarify that a "significant bodily injury" always constitutes a bodily injury."

As applied to certain RCC offenses against persons, the revised definition of "significant bodily injury" may change current District law. For example, the RCC offenses for criminal abuse and criminal neglect of minors, vulnerable adults, and elderly persons prohibit either recklessly causing significant bodily injury to the complainant[38] or recklessly creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience significant bodily injury.[39] However, the current equivalent offenses in Title 22 either do not include such harm or risk of harm, or it is unclear whether the equivalent offenses in Title 22 do. For example, the current first degree child cruelty statute prohibits, in part, "tortures,"[40] "beats,"[41] and "maltreats,"[42] and second degree child cruelty prohibits, in part, "maltreats."[43] The current statute does not define these terms and there is no DCCA case law determining the required amount of physical harm.[44] Resolving this ambiguity, the revised criminal abuse of a minor statute specifies the minimal degree of physical harm required for each grade of the offense, including a gradation for "significant bodily injury." Similarly, the current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "serious bodily injury"[45] or "permanent bodily harm"[46] resulted. The statute does not define any of these terms and there is no DCCA case law interpreting "serious bodily injury" or "permanent bodily harm" for this offense. The RCC

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[36] *See, e.g.,* Nancy Glass et al., Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, Journal of Emergency Medicine, 35.3 (2008) (available online at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/) (last visited December 1, 2017).

[37] D.C. Code § 22-404(b).

[38] Criminal abuse of a minor (RCC § 22E-1501); criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503).

[39] Criminal neglect of a minor (RCC § 22E-1502); criminal neglect of a vulnerable adult or elderly person (RCC § 22E-1504).

[40] D.C. Code § 22-1101(a).

[41] D.C. Code § 22-1101(a).

[42] D.C. Code § 22-1101(a).

[43] D.C. Code § 22-1101(b)(1).

[44] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).

[45] D.C. Code § 22-936(b).

[46] D.C. Code § 22-936(c).

offense codifies a gradation for causing "significant bodily injury," improving the clarity and completeness of the offense.

The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "significant bodily injury" on current District law.

"Significant emotional distress" means substantial, ongoing mental suffering that may require medical or other professional treatment or counseling, and must rise significantly above the level of uneasiness, nervousness, unhappiness, or similar feeling, that is commonly experienced in day to day living.

Explanatory Note. The RCC defines "significant emotional distress" to mean substantial, ongoing mental suffering. Significant emotional distress does not include suffering minor inconveniences. The word "ongoing" makes clear that significant emotional distress must be continuous or continual in nature. Significant emotional distress is trepidation that outlasts the interaction. The degree of mental anguish must be something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which commonly experienced in day to day living, reaching a level that would possibly lead to seeking professional treatment.[1] The RCC definition of "significant emotional distress" replaces the definition of "emotional distress" in D.C. Code § 22-3132(4).[2] The RCC definition of "significant emotional distress" is used in the revised offenses of stalking[3] and electronic stalking.[4]

Relation to Current District Law. The RCC definition of "significant emotional distress" clarifies, but does not substantively change, District law. The current statute uses the phrases "emotional distress" and "seriously alarmed, disturbed, or frightened" but does not define them. Case law has explained that both phrases should be understood as mental harms that rise significantly above that which is commonly experienced in day to day living.[5] Emotional distress is "high," "markedly greater than the level of uneasiness, nervousness, unhappiness or the like," and "reaching a level that would possibly lead to seeking professional treatment."[6] The revised code adds a definition of "significant emotional distress" to more clearly state this case law. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

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[1] The government is not required to prove that the person actually sought or needed professional treatment or counseling.

[2] D.C. Code § 22-3132(4). ("'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;").

[3] RCC § 22E-1801.

[4] RCC § 22E-1802.

[5] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002 (D.C. Mar. 7, 2019).

[6] *Id*.

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

Explanatory Note. The RCC definition of "simulated" applies to specific types of sexual conduct in the RCC obscenity offenses such as a simulated "sexual act" or "simulated" masturbation. In this context, the definition of "simulated" is intended to include highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring,[1] not other portrayals that are clearly staged. The definition excludes highly suggestive sex scenes like one would find in a movie. This definition is similar to another jurisdiction's definition[2] and is supported by Supreme Court case law.[3]

The RCC definition of "simulated" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "simulated" are in some current Title 22 offenses[4]). The RCC definition of "simulated" is used in the revised offenses of distribution of an obscene image,[5] distribution of an obscene image to a minor,[6] creating or trafficking an obscene image of a minor,[7] possession of an obscene image of a minor,[8] arranging a live sexual performance of a minor,[9] and attending or viewing a live sexual performance of a minor.[10]

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

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

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

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

> 'Sexually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse. *Williams*, 553 U.S. at 296–97.

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

[5] RCC § 22E-1805.

[6] RCC § 22E-1806.

[7] RCC § 22E-1807.

[8] RCC § 22E-1808.

[9] RCC § 22E-1809.

[10] RCC § 22E-1810.

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

"Sound recording" means a material object in which sounds, other than those accompanying a motion picture or other audiovisual recording, are fixed by any method now existing or later developed, from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Explanatory Note. "Sound recordings" is currently defined in D.C. Code § 22-3214.01(a)(3)[1] for the current deceptive labeling statute. The RCC definition of "sound recording" replaces the current definition of "sound recordings" in D.C. Code § 22-3214.01(a)(3) and the definition of "phonorecords" in the current commercial piracy statute.[2] The RCC definition of "sound recording" is used in the revised offenses of unlawful creation or possession of a recording[3] and unlawful labeling of a recording,[4] as well as in the revised identity theft civil provisions.[5]

Relation to Current District Law. The RCC definition of "sound recording" is substantively identical to the definition of "sound recording"[6] in the current deceptive labeling statute.

[1] D.C. Code § 22-3214.01(a)(3) ("'Sound recordings' means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

[2] D.C. Code § 22-3214(a)(3) ("'Phonorecords means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

[3] RCC § 22E-2105.

[4] RCC § 22E-2207.

[5] RCC § 22E-2206.

[6] D.C. Code § 22-3214.01(a)(3) ("'Sound recording' means "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

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

Explanatory Note. Oral language means spoken words or sounds. Written language means inscribed words or letters. Symbols include images, icons, and props. Gestures means physical movements that communicate an idea. "Speech" is narrower than "communication."

The RCC definition of "speech" is new; the term is not currently defined in Title 22 of the D.C. Code (although similar language is used in the current disorderly conduct statute[1]). The RCC definition of "speech" is used in the revised defense for defense of self or another person[2] and in the revised offense of disorderly conduct.[3]

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

The current *disorderly conduct* statute does not use the word "speech," but does distinguish between "language," "gestures," and "conduct." Case law has not addressed the meanings of these terms. The revised code adds a definition of "speech" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

[1] D.C. Code § 22-1321.
[2] RCC § 22E-403.
[3] RCC § 22E-4201.

"Strangulation or suffocation" means a restriction of normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth.

Explanatory Note. "Strangulation or suffocation" is not statutorily defined in Title 22 of the current D.C. Code. The RCC definition is used in the RCC definition of "significant bodily injury."[1]

Relation to Current District Law. The RCC definition of "strangulation or suffocation" is new to District law.

[1] RCC § 22E-701.

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

Explanatory Note. The definition of "strict liability" is addressed in the Commentary accompanying RCC § 22E-205. The RCC definition of "strict liability" or "strictly liable" is used in the revised provision for rules of interpretation applicable to culpable mental states.[1]

[1] RCC § 22E-207.

"Stun gun" has the meaning specified in D.C. Code § 7-2501.01.

Explanatory Note. The RCC definition of "stun gun" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "stun gun" is used in the revised definition of "dangerous weapon"[1] and in the revised offense of possession of a stun gun.[2]

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

[1] RCC § 22E-701.
[2] RCC § 7-2502.15.

"Transportation worker" means:

(A) A person who is licensed to operate, and is operating, a publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia;

(B) Any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station within the District of Columbia; and

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

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

Explanatory Note. The RCC definition of "transportation worker" is new, the term is not currently defined in Title 22 of the D.C. Code (although there is a penalty enhancement[1] with similarly defined terms for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as a penalty enhancement[2] for certain crimes committed against a taxicab driver. The RCC definition of "transportation worker" replaces the penalty enhancement and defined terms[3] for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[4] for certain crimes committed against a taxicab driver. The RCC definition of "transportation worker" is used in the RCC definition of a "protected person"[5] and in the revised offense of criminal restraint.[6]

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[1] D.C. Code § 22-3751.01 ("(a) Any person who commits an offense enumerated in § 22-3752 against a transit operator, who, at the time of the offense, is authorized to operate and is operating a mass transit vehicle in the District of Columbia, or against Metrorail station manager while on duty in the District of Columbia, may be punished by a fine of up to one and ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and ½ times the maximum term of imprisonment otherwise authorized by the offense, or both."); 22-3751.01(b)(1), (b)(2), (b)(3) (defining "mass transit vehicle" as "any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia," "Metrorail station manager" as "any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station," and "transit operator" as a person who is licensed to operate a mass transit vehicle.").

[2] D.C. Code § 22-3751 ("Any person who commits an offense listed in § 22-3752 against a taxicab driver who, at the time of the offense, has a current license to operate a taxicab in the District of Columbia or any United States jurisdiction and is operating a taxicab in the District of Columbia may be punished by a fine of up to one and 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to one and 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[3] D.C. Code § 22-3751.01.

[4] D.C. Code § 22-3751.

[5] RCC § 22E-701.

[6] RCC § 22E-1402.

Relation to Current District Law. *The RCC definition of "transportation worker" makes one clear chang to the statutory language of the defined terms[7] in the current penalty enhancement for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[8] for certain crimes committed against a taxicab driver.*

First, subparagraph (D) of the definition of "transportation worker" codifies the requirements for a private vehicle-for-hire operator in contract with a private vehicle-for-hire company, as defined by D.C. Code § 50-301.03(16B).[9] The current penalty enhancement for certain crimes committed against a "Metrorail station manager" or a "transit operator," as well as the penalty enhancement[10] for certain crimes committed against a taxicab driver, do not include drivers of private vehicle-for-hire. Including this category of complainant in the RCC definition of "transportation worker" fills a gap in current District law, particularly given the ubiquity of private vehicle-for-hire services.

Finally, the RCC definition of "transportation worker" makes two clarificatory changes to the current definition that do not substantively change District law.

First, subparagraph (B) of the RCC definition of "transportation worker" is substantively identical to the definition of a "Metrorail station manager"[11] in the current penalty enhancement[12] for crimes committed against this category of complainant. However, subparagraph (B) does not require, as does current D.C. Code § 22-3751.01, that the Metrorail station manager be "on duty." Instead the definition of "protected person" in RCC § 22E-701 includes a transportation worker "in the course of official duties." This is a clarificatory change that is consistent with other categories of complainants in the RCC definition of "protected person" that require the complainant to be "in the course of official duties."

Second, subparagraph (A) of the RCC definition of "transportation worker" is substantively identical to the definitions of "mass transit vehicle"[13] and "transit operator"[14] in the current penalty enhancement[15] for these complainants and subparagraph (C) is

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[7] D.C. Code § 22-3751.01.

[8] D.C. Code § 22-3751.

[9] D.C. Code § 50-301.03(16B) ("'Private vehicle-for-hire company' means an organization, including a corporation, partnership, or sole proprietorship, operating in the District that uses digital dispatch to connect passengers to a network of private vehicle-for-hire operators.").

[10] D.C. Code § 22-3751.

[11] D.C. Code § 22-3751.01 (b)(2) (defining "Metrorail station manager" as "any Washington Metropolitan Area Transit Authority employee who is assigned to supervise a Metrorail station from a kiosk at that station," and "transit operator" as a person who is licensed to operate a mass transit vehicle.").

[12] D.C. Code § 22-3751.01.

[13] D.C. Code § 22-3751.01(b)(1) (defining "mass transit vehicle" as "any publicly or privately owned or operated commercial vehicle for the carriage of 6 or more passengers, including any Metrobus, Metrorail, Metroaccess, or DC Circulator vehicle or other bus, trolley, or van operating within the District of Columbia.").

[14] D.C. Code § 22-3751.01(b)(3) (defining "transit operator" as a person who is licensed to operate a mass transit vehicle.").

[15] D.C. Code § 22-3751.01.

substantively identical to the penalty enhancement[16] for crimes committed against a taxicab driver.[17] However, unlike the current penalty enhancements, subparagraph (A) does not require that the transit operator be "authorized" to operate the mass transit vehicle "at the time of the offense," and subparagraph (C) does not require that the taxicab driver be licensed and operating a taxicab "at the time of the offense." Instead, the definition of "protected person" in RCC § 22E-701 includes a transportation worker "in the course of his or her official duties" and the protected person gradations are codified directly into RCC offenses against persons. These are clarificatory changes that are consistent with other categories of complainants in the RCC definition of "protected person" that require the complainant to be "in the course of official duties."

As applied to certain RCC offenses against persons, the RCC definition of "transportation worker" may substantively change current District law. For example, the RCC's robbery and assault statutes provide more severe penalties for harms inflicted on protected persons, including transportation workers. While a penalty enhancement for robbery and assault already applies under current District law to commercial vehicle operators,[18] specified WMATA employees,[19] and taxicab drivers,[20] such penalty enhancements do not apply to private vehicle-for-hire operators. Consequently, subparagraph (D) effectively changes District law as applied to the RCC robbery and assault statutes, through their reference to "protected persons" and "transportation workers." Inclusion of these drivers in the same category as other transportation workers improves the proportionality of the revised offenses against persons and removes a gap in current District law. The commentaries to relevant RCC offenses against persons discuss in detail the effect of the RCC definition of "transportation worker" on current District law.

[16] D.C. Code § 22-3751.
[17] D.C. Code § 22-3751.
[18] D.C. Code § 22-3751.
[19] D.C. Code § 22-3751.
[20] D.C. Code § 22-3751.

"Undue influence" means mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes the person to act in a manner that is inconsistent with the person's financial, emotional, mental, or physical well-being.

Explanatory Note. This term specifies certain wrongful coercive means of overcoming the free will of a person. "Undue influence" must cause the person to act in a manner inconsistent with his or her financial, emotional, mental, or physical well-being. The RCC definition of "undue influence" is used in the revised offenses of incest[1] and financial exploitation of a vulnerable adult or elderly person.[2]

Relation to Current District Law. This definition changes current District law by not requiring that the other person is a vulnerable adult or elderly person. Under this change, a person can use undue influence against any other person, regardless of age or vulnerable status.[3] The definition of "undue influence" is otherwise taken verbatim from D.C. Code § 22-933.01, and is intended to have the same meaning as under current law.

As applied to the RCC incest statute (RCC § 22E-1308), the revised definition of "undue influence" changes current District law, which is discussed further in the commentary to the RCC incest offense.

[1] RCC § 22E-1308.

[2] RCC § 22E-2208.

[3] Although the term "undue influence" does not require that the other person is an elderly person or vulnerable adult, specific offenses may separately require that the complainant is an elderly person or vulnerable adult.

"Value" means:

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

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

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

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

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

(C) Notwithstanding subparagraphs (A) and (B) of this paragraph, the value of a payment card alone is $10.00 and the value of an unendorsed check alone is $10.00.

Explanatory Note. Subparagraph (A) of the RCC definition of "value" states that the "value" of property is its "fair market value," a defined term per RCC § 22E-701 that means the price which a purchaser who is willing but not obligated to buy would pay an owner who is willing but not obligated to sell, considering all the uses to which the property is adapted and might reasonably be applied. Moreover, the "value" is based on the fair market value at the time and place of the offense.

Subparagraph (B) provides alternative methods of determining "value" for written instruments and other property when the fair market value cannot be ascertained. These are rare situations when there is no evidence as to fair market value.[1]

[1] *See State v. Ohms*, 309 Mont. 263, 267 (2002) (interpreting the definition of "value," which required that replacement value be considered only when the market value "cannot be satisfactorily ascertained," as meaning "if the State is unable to present evidence of the stolen item's market value, it must establish that the market value of the stolen item cannot be ascertained before it resorts to the alternative of establishing value by proof of replacement value alone."); *State v. Foster*, 762 S.W.2d 51, 53 (Mo. Ct. App. 1988) (stating that "cost of replacement was not an authorized manner of proof" because "the state offered no evidence of the value of the items taken at the time and place of the crime" and "there is no basis for finding that the items could not have been appraised, or that evidence of their value at the time of the crime could not be satisfactorily ascertained" when the definition of "value" was "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime."); *Washington v. State*, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained. . . . [h]ere, there was evidence of market value…").

Sub-subparagraph (B)(i) specifies that, for property other than written instruments, a defined term per RCC § 22E-701, when fair market value cannot be ascertained, "value" is the cost to replace the property within a reasonable time after the offense.[2]

Sub-subparagraphs (B)(ii) and (B)(iii) clarify the methods of valuation for written instruments, a defined term in RCC 22E-701, when fair market value cannot be ascertained.[3] Sub-subparagraph (B)(ii) applies to written instruments that are "evidence of debt," such as checks, a defined term in RCC § 22E-701, drafts, or promissory notes. The "value" of such a written instrument is the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion that has been satisfied.[4] Sub-subparagraph (B)(iii) applies to written instruments other than evidence of debt "that create[s], release[s], discharge[s], or otherwise affect[s] any other valuable legal right, privilege, or obligation."[5] The "value" of such written instruments is "the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument." "Owner" is a defined term per RCC § 22E-701 meaning a person holding an interest in property with which the actor is not privileged to interfere without consent.

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[2] The facts of *State v. Ohms*, 309 Mont. 263 (2002) provide an example. The property at issue was a stolen masonry saw and the felony threshold for value was $1,000. *Ohms*, 309 Mont. at 264. At trial, the owner testified that he had purchased the used saw approximately nine years earlier for $400. *Id.* at 266. He also testified that after the purchase he had the motor rebuilt for $600. *Id.* An expert testified that an entirely new unit would be priced at $3,924. The definition of "value" in Montana allows evidence of replacement value only if market value "cannot be satisfactorily ascertained." *Id.* The court held that the state could not use replacement value because the state did not first establish that the market value of the property could not be ascertained. *Id.* at 267.
Washington v. State, 2013 Ark. App. 148, 3 (not reported in S.W.3d) ("Replacement value equals 'value' under the theft-of-property statute only if the market value cannot be ascertained… [h]ere, there was evidence of market value . . . .").

[3] Examples of written instruments whose fair market value can be reasonably ascertained include some public and corporate bonds and securities.

[4] For example, if a check is made out to an individual in the amount of $1,000 the value of that check normally is $1,000, the face amount of indebtedness. However, in one jurisdiction, the court used such an "ordinarily" caveat in a similar definition of "value" to determine that the value of a forged check was not the face amount of indebtedness. *See State v. Skorpen*, 57 Wash.App. 144, 149 (1990) ("The State argues that the value of the check 'shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount . . .' . In order to avoid rendering part of this phrase superfluous, it must be construed so as to recognize the possibility of situations in which the amount due or collectible on a written instrument is not its face amount.").

[5] For example, relying on such language, a case in New York held that two automobile registrations were "of value" because, in part, "the complainant herein has had his privilege to drive his vehicle suspended by the theft of its registration certificates. These certificates give rise at least to prosecution for theft of the piece of paper upon which proof of compliance with New York vehicle laws is indicated."). *People v. Saunders*, 82 Misc. 2d 542, 371 N.Y.S.2d 352 (Crim. Ct. 1975).

Subparagraph (C) provides that, notwithstanding subparagraphs (A) and (B), the "value" of a "payment card" alone is $10.00 and the "value" of a check that has not been endorsed, i.e. a blank check unsigned on the front by the drawer, alone is $10.00. "Payment card" and "check" are defined terms in RCC § 22E-701. These fixed valuations only apply to the payment cards and blank checks themselves, not the actor's use, if any, of the payment cards or checks to obtain or attempt to obtain property.[6]

"Value" is currently defined in D.C. Code § 22-3001(7),[7] applicable to provisions in Chapter 32, Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and provisions. The RCC definition of "value" is used in five revised definitions[8] and thirteen revised offenses,[9] as well as in the revised aggregation to determine property offense grades provision.[10]

Relation to Current District Law. *The RCC definition of "value" makes one clear change to the statutory definition of "value" in in D.C. Code § 22-3001(7).*[11]

The RCC definition of "value" provides a set value for a payment card of $1.00 and an unendorsed check at $1.00, per subparagraph (C). Under the current D.C. Code definition of "value," the "value" of a payment card or check is the amount of property "that has been or can be obtained through its use, or the amount promised or paid by the

[6] For example, theft of a purse containing three payment cards and a checkbook containing 25 unendorsed checks yields a set valuation of $28.00 that can be used for determining the gradation of theft of the purse—without requiring proof of available credit for each card or amount of funds available for the check at the time of the offense. However, if the defendant should then use a stolen payment card or check to obtain cash, goods, or property, the defendant may have additional liability for payment card fraud (RCC § 22E-2202) or check fraud (RCC § 22E-2203). If the defendant tries to, but does not actually obtain the property, there may be liability for attempted payment card fraud or check fraud under the RCC general attempt provision (RCC § 22E-301).

[7] D.C. Code § 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[8] "Commercial sex act" (RCC § 22E-701); "debt bondage" (RCC § 22E-701); "deprive" (RCC § 22E-701); "labor" (RCC § 22E-701); "property" (RCC § 22E-701).

[9] Robbery (RCC § 22E-1201); Theft (RCC § 22E-2101); Fraud (RCC § 22E-2201); Payment card fraud (RCC § 22E-2202); Forgery (RCC § 22E-2204); Identity theft (RCC § 22E-2205); Financial exploitation of a vulnerable adult or elderly person (RCC § 22E-2208); Trademark counterfeiting (RCC § 22E-2210); Extortion (RCC § 22E-2301); Possession of stolen property (RCC § 22E-2401); Trafficking of stolen property (RCC § 22E-2402); Alteration of a motor vehicle identification number (RCC § 22E-2403); Trafficking of a controlled substance (RCC § 48-904.01b).

[10] RCC § 22E-2001.

[11] D.C. Code § 22-3201(7).

credit card [or] check."[12] There is no case law on the meaning of this phrase.[13] In contrast, the RCC definition of "value" provides a nominal set value for a payment card or an unendorsed check. A fixed amount provides a fairer and more efficient means of calculating the value of an unused payment card or blank check. The revised definition dispenses with proof of the amount of credit or funds available to a given card or bank account at the time of the property crime. Doing so also avoids disparate valuation of the value of credit cards and checks based on the owner's available credit or size of the owner's bank account.[14] The provision instead strikes a balance between the greater, but unrealized, harm that the owner of the card or check could suffer if the stolen card or check was used, with the relatively minor, actual, inconvenience to the owner of losing the card or check. It also punishes more harshly a defendant who takes multiple cards or checks, as opposed to a defendant that takes only one card or check. This change improves the proportionality of the revised definition.

The RCC definition of "value" is generally consistent with the limited District case law interpreting the term "value" outside of the statutory definition in § 22-3001(7). Subparagraph (A) of the revised definition provides that, generally, the fair market value of property shall determine its "value." This codifies District case law for theft and theft-related offenses that establishes that "value" means "fair market value,"[15] as well as District case law recognizing that "fair market value" must be determined at the time[16] and place[17]

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[12] D.C. Code 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[13] There is limited case law on the value of a credit card under the District's pre-1982 Theft Act laws. In *In re V.L.M.*, a receiving stolen property case, the DCCA stated that a "currently usable credit card, was of obvious monetary value to its owner, and indeed, to anyone else who might attempt to use it to obtain gasoline on credit." *In re V.L.M.*, 340 A.2d 818, 820 (D.C. 1975). Beyond this statement, there is no indication in *In re V.L.M.* how the DCCA valued the credit card. The trial court found that the credit card had no value in excess of $100, but the trial court's reasoning, and whether the DCCA approved of this method of valuation, is unclear. To the extent that *In re V.L.M.* supports a method of valuation for credit cards different from the standard in the revised definition of "value," the revised definition of "value" is a change in law.

[14] For example, theft of a purse with two payment cards connected to accounts of $300 each would, if aggregated, provide a basis for theft of $600 under current law—graded as fourth degree theft in the RCC or a 180 day misdemeanor under current law. A purse with the same number of cards but with credit limits of $15,000 each would, if aggregated, provide a basis for theft of $30,000—graded as third degree theft in the RCC or a 10 year felony under current law.

[15] *See, e.g.*, *Foreman v. United States*, 988 A.2d 505, 507 (D.C. 2010);

[16] *See, e.g.*, *Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("The value of property is determined at the time the crime through which it is acquired occurs.");.

[17] *See Long v. United States*, 156 A.3d 698 (D.C. 2017) (stating in a receiving stolen property case that "[p]roperty value . . . is its market value at the time and place stolen, if

of the offense. In addition, this part of the revised definition of "value" reflects current District practice.[18] Subparagraph (B) of the revised definition provides a number of alternate means of determining the value of written instruments and other property in the rare case when fair market value cannot be ascertained. The limited DCCA case law on "value" does not provide a clear rule for instances when fair market value cannot be ascertained, although several cases refer generally to the "value" of an object as its "useful, functional purpose."[19] The provisions in subparagraph (B) appear to be consistent with the application of this "useful, functional purpose" standard, and are not intended to change the application of such a flexible standard for establishing whether an item has some minimal value. The revised definition of "value" fills a gap in the existing statutory definition about valuation when fair market value cannot be readily ascertained.

It should be noted that the revised definition of "value" does not affect long-standing District case law on the evidentiary requirements for proving "value." Some of this case law predates the Theft and White Collar Crimes Act of 1982, which significantly revised the District's theft and theft-related offenses.[20] To the extent that this case law is still good law, the revised definition of "value" does not change it—except as to payment cards and unendorsed checks. Nor does the revised definition of "value" change any first

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there is a market for it.") (quoting *Hebron v. United States*, 837 A.2d 910, 913 n.3 (D.C. 2003) (quoting LaFave, Criminal Law, § 8.4(b) (3d ed. 2000))).

[18] D.C. Crim. Jur. Instr. § 3.105 (jury instruction for "value" stating, in part, that "[v]alue means fair market value at the time when and the place where the property was allegedly" obtained).

[19] *See Jeffcoat v. United States*, 551 A.2d 1301, 1303 (D.C. 1988) ("[T]he value of an item is to be determined by its 'useful functional purpose.' " (quoting Jenkins v. United States, 374 A.2d 581, 586 n.9 (D.C. 1977))). Note, however, that several cases referring to the "useful functional purpose" standard of value appear to be primarily concerned with establishing that the object has some minimal value for a lowest grade of liability. See, e.g., *Jenkins v. United States*, 374 A.2d 581, 586 n. 9 (D.C.1977) (broken window has some value); *Paige v. United States*, 183 A.2d 759 (D.C.Mun.App.1962) (vent fastener for auto window had some value); *Wills v. United States*, 147 A.3d 761, 775 n. 12 (D.C. 2016) (keys had some value). The revised definition of value in RCC 22E-2001 does not affect such cases' determination that the objects at issue had some value.

[20] In *Eldridge v. United States*, the DCCA noted that first degree theft under the 1982 Theft Act is the "rough equivalent" to the former statutory offense of grand larceny and adopted "*in toto*" for first degree theft "the proof requirements on the issue of value" established in pre-1982 case law for grand larceny. *Eldridge v. United States*, 492 A.2d 879, 881-82. *Eldridge* lists the following cases and citations as representative of this body of case law, although the list is not exclusive: *Malloy v. United States*, 483 A.2d 678, 680-81 (D.C. 1984); *Moore v. United States*, 388 A.2d 889 (D.C. 1978); *Williams v. United States*, 376 A.2d 442 (D.C. 1977); *Wilson v. United States*, 358 A.2d 324 (D.C. 1976); *Boone v. United States*, 296 A.2d 449 (D.C. 1972); *United States v. Thweatt*, 140 U.S. App. D.C. 120, 433 F.2d 1226 (1970).

degree theft cases on "value" decided after the 1982 Theft Act[21]—except as to payment cards.

[21] *See, e.g.*, *Zellers v. United States*, 682 A.2d 1118 (D.C. 1996); *Hebron v. United States*, 837 A.2d 910 (D.C. 2003); *Chappelle v. United States*, 736 A.2d 212 (D.C. 1999); *Terrell v. United States*, 721 A.2d 957 (D.C. 1988); *Foreman v. United States*, 988 A.2d 505 (D.C. 2010).

"Vehicle identification number" means a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for identification.

Explanatory Note. The RCC definition of "vehicle identification number" is taken verbatim from the current altering or removing motor vehicle identification numbers statute in D.C. Code § 22-3233(c)(1),[1] and is intended to have the same meaning as under current law. The RCC definition of "vehicle identification number" replaces the definition of "identification number" in D.C. Code § 22-3233(c)(1). The RCC definition of "vehicle identification number" is used in the revised offense of alteration of a motor vehicle identification number.[2]

Relation to Current District Law. The RCC definition of "vehicle identification number" does not change current District law.

[1] D.C. Code § 22-3233.

[2] RCC § 22E-2403.

"Vulnerable adult" means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impairs the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.

Explanatory Note. The RCC definition of "vulnerable adult" specifies the requirements for proving a person is a "vulnerable adult" in the revised offenses against persons. Under this definition, the mental or physical limitation must substantially impair that person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Minor impairments, e.g. imperfect vision that can be remedied with prescription glasses, will not suffice.

The term "vulnerable adult" is currently statutorily defined in D.C. Code § 22-932(5)[1] for offenses and provisions concerning abuse and neglect of vulnerable adults. The RCC definition of "vulnerable adult" is used in the revised definition of "protected person,"[2] in the revised offenses of sexual assault,[3] criminal abuse of a vulnerable adult or elderly person,[4] criminal neglect of a vulnerable adult or elderly person,[5] and financial exploitation of a vulnerable adult or elderly person,[6] and in the revised financial exploitation of a vulnerable adult or elderly person civil provisions.[7]

Relation to Current District Law. The RCC definition of "vulnerable adult" is identical to the current definition of "vulnerable adult" in D.C. Code § 22-932.

The RCC "vulnerable adult" definition does not itself change current District law, but may result in changes of law as applied to particular offenses. For example, the RCC robbery and assault gradations are based in part on whether the victim was a "protected person,"[8] and a "vulnerable adult" is defined as one kind of "protected person."[9] Consequently, the RCC provides enhanced penalties for assaults and robberies of vulnerable adults whereas, under current law, committing robbery or assault against a vulnerable adult does not change the grade of either offense, or otherwise authorize more severe penalties. Inclusion of vulnerable adults in the same category as seniors, minors, and others improves the proportionality of the revised offenses against persons and removes a gap in current District law.

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[1] D.C. Code § 22-932(5) ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests.").
[2] RCC § 22E-701.
[3] RCC § 22E-1301.
[4] RCC § 22E-1503.
[5] RCC § 22E-1504.
[6] RCC § 22E-2208.
[7] RCC § 22E-2209.
[8] RCC §§ 22E-1201, 1202.
[9] RCC § 22E-701.

"Written instrument" includes any:

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

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

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

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

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

(F) Other instrument commonly called a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.

Explanatory Note. "Written instrument" is currently defined in D.C. Code § 22-3241(a)(3)[1] for the forgery offense. The RCC definition of "written instrument" replaces the current definition of "written instrument" in D.C. Code § 22-3241(a)(3). The RCC definition is used in the revised definitions of "check"[2] and "value,"[3] as well as in the revised offense of forgery.[4]

Relation to Current District Law. The revised definition of "written instrument" is consistent with current District law. The revised definition differs slightly by explicitly including "a will, contract, deed, or any other document purporting to have legal or evidentiary significance." However, including these documents in the definition of "written instrument" does not change current law, as the list of documents in the definition of "written instrument" in the current D.C. Code is also non-exhaustive.

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[1] D.C. Code § 22-3241(a)(3) ("'Written instrument' includes, but is not limited to, any: (A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28; (B) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity; (C) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profitsharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items; (D) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or (E) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Official Code.").

[2] RCC § 22E-701.

[3] RCC § 22E-701.

[4] RCC § 22E-2204.

COMMENTARY:
SUBTITLE II. OFFENSES AGAINST PERSONS

RCC § 22E-1101. Murder.

Explanatory Note. *This section establishes the first degree and second degree murder offenses for the Revised Criminal Code (RCC). The revised first degree murder offense criminalizes purposely, with premeditation and deliberation, causing the death of another person. The RCC's murder statute replaces the current first degree and second degree murder statutes,[1] the special form of first degree murder by obstruction of a railroad, D.C. Code § 22-2102, and the special form of first degree murder of a law enforcement officer, D.C. Code § 22-2106. The revised first degree murder statute also replaces penalty provisions and penalty enhancements authorized under §§ 21-2104, 22-2104.01 and 24-403.01(b-2). An actor who knowingly causes the death of another under aggravating circumstances is subject to the enhanced penalty provision under subsection (c). In addition, insofar as they are applicable to current first degree murder offense, the revised first degree murder statute also partly replaces the protection of District public officials statute[2] and six penalty enhancements: the enhancement for committing an offense while armed;[3] the enhancement for senior citizens;[4] the enhancement for citizen patrols;[5] the enhancement for minors;[6] the enhancement for taxicab drivers;[7] and the enhancement for transit operators and Metrorail station managers.[8]*

The revised second degree murder offense specifically criminalizes three forms of murder: 1) knowingly causing the death of another person; 2) recklessly, under circumstances manifesting extreme indifference to human life, causing the death of another person (commonly known as "depraved heart murder"), or 3) negligently causing the death of another person in the course of, and in furtherance of, certain[9] serious crimes (commonly known as "felony murder"). The RCC's second degree murder statute replaces several types of murder criminalized under the current first

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[1] D.C. Code § 22-2101, 2103. Under current law, first degree murder criminalizes three types of murder: (1) purposely causing the death of another with premeditation and deliberation; (2) purposely causing the death of another while committing or attempting to commit any felony; or (3) causing the death of another, with or without purpose, while committing or attempting to commit first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, kidnaping, burglary while armed with or using a dangerous weapon, or any felony involving a controlled substance. Currently, second degree murder criminalizes three different versions of murder: (1) knowingly causing the death of another without premeditation and deliberation; (2) causing the death of another with intent to cause serious bodily injury; and (3) causing the death of another with extreme recklessness, also known as acting with a "depraved heart." The RCC first degree murder offense replaces: purposely causing the death of another with premeditation and deliberation form of murder.

[2] D.C. Code § 22-851.

[3] D.C. Code § 22-4502.

[4] D.C. Code § 22-3601.

[5] D.C. Code § 22-3602.

[6] D.C. Code § 22-3611.

[7] D.C. Code §§ 22-3751; 22-3752.

[8] D.C. Code §§ 22-3751.01; 22-3752.

[9] The specified felonies are: First or second degree arson as defined in RCC § 22E-2501; First degree sexual assault as defined in RCC § 22E-1301; First degree sexual abuse of a minor as defined in RCC § 22E-1302; First degree burglary as defined in RCC § 22E-2701, when committed while possessing a dangerous weapon on his or her person; First and second degree robbery as defined in RCC § 22E-1201; or First or second degree kidnapping as defined in RCC § 22E-1401.

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

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

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

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

[11] D.C. Code § 22-851.

[12] D.C. Code § 22-4502.

[13] D.C. Code § 22-3601.

[14] D.C. Code § 22-3602.

[15] D.C. Code § 22-3611.

[16] D.C. Code §§ 22-3751; 22-3752.

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

[18] D.C. Code § 22-2102.

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

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

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

Subsection (b) specifies three forms of second degree murder. Paragraph (b)(1) specifies that an actor commits second degree murder if the actor knowingly causes the death of another person. Paragraph (b)(1) specifies that the culpable mental state "knowingly" applies, a term defined at RCC § 22E-206 to mean that the actor must have been aware or believed to a practical certainty that he or she would cause the death of another person.

Paragraph (b)(2) specifies that an actor commits second degree murder if the actor recklessly, with extreme indifference to human life, causes the death of another person. This paragraph requires a "reckless" culpable mental state, a term defined at RCC § 22E-206, which here means that the actor consciously disregarded a substantial risk of causing death of another, and the risk is of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the actor is aware of, its disregard is a gross deviation from the ordinary standard of conduct. However, recklessness alone is insufficient. The actor must also act "with extreme indifference to human life." This language is intended to codify current DCCA case law defining what is commonly known as "depraved heart murder."[22] In contrast to the "substantial" risks required for ordinary recklessness, depraved heart murder requires that the actor consciously disregarded an "*extreme* risk of causing death or serious bodily injury."[23] For example, the DCCA has recognized there to be an extreme indifference to human life when a person caused the death of another by: driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[24]; firing ten bullets towards an area where people were gathered[25]; and providing a weapon to another person, knowing that person would use it to injure a third person.[26] Although it is not possible to specifically define the degree and nature of risk that is "extreme," it need not be more likely than not that death or serious bodily injury would occur.[27] The "extreme indifference" language in paragraph (b)(2) codifies DCCA case law that recognizes those types of unintentional homicides that warrant criminalization as second degree murder.

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

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

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

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

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

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

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

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

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

Paragraph (b)(3) specifies that an actor commits second degree murder if the actor negligently causes the death of another person, other than an accomplice,[31] while committing or attempting to commit any of the enumerated felonies listed in subparagraphs (b)(3)(A)-(H). In addition, the actor must have committed the lethal act.[32] A person may not be convicted under paragraph (b)(3) for lethal acts committed by another person, including a fellow participant in the predicate felony, an intended victim of the predicate felony, or other third party. The statute specifies that a culpable mental state of "negligently" applies, a term defined at RCC § 22E-206 that here means that the actor should have been aware of a substantial risk that death would result from his or her conduct, and considering the motivation for the person's conduct and the circumstances the person is aware of, the person's failure to perceive the risk is a gross deviation from the care a reasonable person would take.[33] The negligently culpable mental state does

[28] See Commentary to RCC § 22E-206.

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

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

[31] For example, if in the course of an armed robbery, the accused accidentally fires his gun, striking and killing his accomplice who was acting as a lookout, felony murder liability would not apply.

[32] For example, if during a robbery, police arrive at the scene and in an ensuing shootout the police fatally shoot a bystander, there would be no felony murder liability. However, this rule does not limit liability under any other form of homicide. If the person committing the robbery cause the death of the bystander in a manner that constituted recklessness with extreme indifference to human life, he may still be convicted of murder under a depraved heart theory, as specified in paragraph (b)(2).

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

not, however, apply to the enumerated felonies in paragraph (b)(3). The defined term "in fact" indicates that there is no additional culpable mental state requirement for the enumerated felonies in paragraph (b)(3); each has its own culpable mental state requirements which must be proven.

It is not sufficient that a death happened to occur during the commission or attempted commission of the felony. A "mere coincidence in time" between the underlying felony and death is insufficient for felony murder liability.[34] There also must be "some causal connection between the homicide and the underlying felony."[35] The death must have been caused by an act "in furtherance" of the underlying felony.[36] The revised statute codifies this case law by requiring that the death be "in the course of and in furtherance of committing, or attempting to commit" an enumerated offense.[37]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[38] However, as discussed above, extreme indifference to human life in paragraph (b)(2) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The term "self-induced intoxication" has the meaning specified in RCC § 22E-209,[39] and the definition specifies certain culpable mental states that must be proven. The use of "in fact" in subsection (c) indicates that no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor was unaware of the risk, but would have been aware of the risk had the actor been sober.

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

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

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

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

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

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

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

person acted with extreme indifference to human life.[40] In these cases, although the awareness of risk may be imputed, the person could still be acquitted of second degree murder. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[41], provided that his or her conduct was gross deviation from the ordinary standard of conduct.

Subsection (d) establishes the penalties for first and second degree murder. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (d)(3) provides enhanced penalties for both first and second degree murder. If the government proves the presence of at least one aggravating factor listed under paragraph (d)(3), the penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class. These penalty enhancements may be applied in addition to any penalty enhancements authorized by RCC Chapter 6.

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

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

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

[41] RCC § 22E-1102.

aware of, its disregard is a gross deviation from the ordinary standard of conduct. The term "protected person" is defined in RCC § 22E-701.

Subparagraph (d)(3)(B) specifies that causing the death of another "with the purpose" of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[42] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[43] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to cause the death of a person of such a status.

Subparagraph (d)(3)(C) specifies that murder committed with intent to avoid or prevent a lawful arrest or effect an escape from "official custody" is an aggravating circumstance. "Official custody" is a defined term in RCC § 22E-701 that means "full submission after an arrest or substantial physical restraint after an arrest." This aggravating circumstance requires that the accused acted with "intent" a term defined at RCC § 22E-206, which means that the actor must consciously desire or be practically certain that the actor will avoid or prevent a lawful arrest, or escape from "official custody," as that term is defined in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with intent" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the actor actually avoided or prevented a lawful arrest or effected an escape from "official custody," only that the actor consciously desired or was practically certain the actor would avoid or prevent lawful arrest, or effect an escape from "official custody."

Subparagraph (d)(3)(D) specifies that murder committed for hire is an aggravating circumstance. This aggravating circumstance is satisfied if the actor received anything of pecuniary value from another person in exchange for causing the death. This subparagraph also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the

[42] While the RCC § 22E-701 definitions of "law enforcement officer" and "public safety employee" refer to some persons only when on-duty (e.g., a campus officer), this provision on committing the offense with the purpose of harming the complainant because of their status as a law enforcement officer or public safety employee applies to committing the offense against an off-duty person based on their on-duty role. For example, a defendant who murders an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing murder with the purpose of harming the decedent due to his status as a law enforcement officer.

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

actor must have been practically certain that he or she would receive anything of value in exchange for causing the death of another.

Subparagraph (d)(3)(E) specifies that the infliction of extreme physical pain or mental suffering for a prolonged period of time immediately prior to the decedent's death is an aggravating circumstance.[44] This subparagraph also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must have been practically certain that his or her conduct would cause extreme physical pain or mental suffering for a prolonged period of time prior to the decedent's death.

Subparagraph (d)(3)(F) specifies that mutilating or desecrating the decedent's body is an aggravating circumstance.[45] This subsection also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must be practically certain that he or she mutilated or desecrated the body after death.

Subparagraph (d)(3)(G) specifies that substantial planning is an aggravating circumstance. Substantial planning requires more than mere premeditation and deliberation. The term "substantial planning" is intended to have the same meaning as under current law.[46] Although substantial planning does not require an intricate plot, the accused must have formed the intent to kill a substantial amount of time before committing the murder.[47] This subparagraph uses the term "in fact," which specifies that no culpable mental state applies to this aggravating circumstance.

Subparagraph (d)(3)(H) specifies that committing a murder by shooting from a vehicle that is being driven at the time of the shooting is an aggravating circumstance. This aggravating factor requires that the murder was committed by shooting from a car that is being driven, either by the shooter or a third party. This aggravating factor does not include shootings committed from a vehicle that is not being operated or driven at the time of the shooting. This subparagraph also specifies that the culpable mental state required for this aggravating circumstance is "knowingly," a term defined under RCC § 22E-206 to mean that the actor must be practically certain that he or she committed the murder by shooting from a vehicle being drive at the time.

Subparagraph (d)(3)(I) specifies that committing a murder with the purpose of harming the decedent because he was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding is an aggravating circumstance. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that

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

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

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

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

the complainant had actually been a witness or provided assistance in a criminal investigation or judicial proceeding, only that the actor consciously desired to harm a person who was or had been a witness, or who was capable of providing, or had provided, information in any criminal investigation or judicial proceeding.

Subsection (e) provides for a bifurcated proceeding when a person is charged with penalty enhancements under subparagraphs (d)(3)(E) or (d)(3)(F). In the first stage of the proceeding, the fact finder shall only consider evidence relevant to determining whether the accused committed either first or second degree murder. Evidence that is relevant to determining whether aggravating factors under subparagraphs (d)(3)(E) or (d)(3)(F) are not admissible at this stage, unless it is relevant to determining whether the accused committed either first or second degree murder. In the second stage of the proceeding, the fact finder may consider evidence relevant to determining whether aggravating factors under subparagraphs (d)(3)(E) or (d)(3)(F). This bifurcated procedure limits the admissibility of unfairly prejudicial evidence during the first stage. This subsection also specifies that the same jury or fact finder will serve at both stages of the proceeding.

Subsection (f) defines defenses applicable to first and second degree murder. Paragraph (f)(1) provides that in addition to any other defenses otherwise applicable to the accused's conduct, the presence of mitigating circumstances is a defense to prosecution for first degree murder, or second degree depraved heart murder. This paragraph provides a non-exhaustive definition of mitigating circumstances.[48]

Subparagraph (f)(1)(A) first defines mitigating circumstances as acting under the influence of extreme emotional disturbance for which there was a reasonable cause. "Extreme emotional disturbance" refers to emotions such as "rage," "fear or any violent and intense emotion sufficient to dethrone reason."[49] Subparagraph (e)(1)(A) further specifies that the reasonableness of the cause of the disturbance shall be determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be. The "actor's situation" includes some of the actor's personal traits, such as physical disabilities[50], or temporary emotional states,[51] which should be taken into account in determining reasonableness. However, the actor's idiosyncratic values or moral judgments are irrelevant.[52] Subparagraph (e)(1)(A) also specifies that reasonableness shall be determined from the accused's situation "as the actor believed them to be." This language clarifies that the actor's *factual* beliefs, even if inaccurate, must be taken into account in determining whether the cause of the extreme

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

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

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

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

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

emotional disturbance was reasonable.[53] The fact finder must determine in each case whether the provoking circumstance was a reasonable cause of the extreme emotional disturbance, such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[54]

Subparagraph (f)(1)(B) defines mitigating circumstances to include acting under an unreasonable belief that the use of deadly force was necessary to prevent imminent death or serious bodily injury under the circumstances. This form of mitigation may arise in the context of imperfect self-defense or the defense of others.[55] A person is justified in using deadly force if he reasonably believes he, or another person, is in imminent danger of serious bodily harm or death, and that the use of deadly force was necessary to prevent the infliction of that harm.[56] Use of deadly force with such a reasonable belief is a complete defense to liability.[57] If the actor genuinely believes these circumstances exist, but that belief in either circumstance is unreasonable, subparagraph (e)(1)(B) clarifies that the actor is not guilty of murder, but is guilty of voluntary manslaughter.[58]

Subparagraph (f)(1)(C) further defines mitigating circumstances to broadly include any other legally-recognized partial defense to murder. For example, an unreasonable belief in any circumstance that would provide a legal justification for the use of lethal force, apart from self-defense or defense of others, may constitute a mitigating circumstance.[59]

Paragraph (f)(2) specifies the effect of the mitigation defense in a murder prosecution. If evidence of mitigation has been presented at trial and the government fails to meet its burden of proving that mitigating circumstance were absent, but proves

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

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

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

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

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

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

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

all other elements of murder, then the accused is not guilty of murder but is guilty of voluntary manslaughter.[60]

Subsection (g) provides that a person cannot be held liable as an accomplice to felony murder, as defined in paragraph (b)(3).[61] This subsection does not limit application of any other form of homicide liability.[62]

Subsection (h) specifies that, while a person may be convicted of second degree murder under paragraph (b)(3) and a predicate felony listed in subparagraphs (b)(3)(A) - (b)(3)(H), the convictions for second degree murder and the predicate felony merge when arising from the same act or course of conduct. The court must follow the procedures in RCC § 22E-214 (b) and (c) to effect such a merger. However, convictions for a predicate felony listed in subparagraphs (b)(3)(A) - (b)(3)(H) and for first degree murder, or second degree murder under paragraphs (b)(1) or (b)(2), do not merge under subsection (h). Subject to the general merger rules provided in RCC § 22E-214, multiple convictions for a predicate felony listed in subparagraphs (b)(3)(A) - (b)(3)(H) and for first degree murder, or second degree murder under paragraphs (b)(1) or (b)(2) are permitted and, as usual, sentences may run concurrently or consecutively as prescribed by the sentencing judge.

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

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

First, under the revised murder statute, felony murder is graded as second degree murder. Under the current first degree murder statute, a person may be convicted if he or she unintentionally causes the death of another while committing or attempting to commit a specified felony.[63] Unintentional felony murder is currently punished more severely than an intentional, but non-premeditated killing (which currently constitutes second degree murder), subjecting the defendant to a life sentence if the government can prove that at least one aggravating circumstance was present.[64] Moreover, aggravating circumstances that enhances penalties for first degree felony murder include that the killing occurred while the accused was committing or attempting to commit

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

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

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

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

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

"kidnapping,"[65] or "a robbery, arson, rape, or a sexual offense,"[66] and the DCCA has held that the predicate felony for felony murder can also serve as an aggravating circumstance.[67] Consequently, under current law, an unintentional homicide that occurs during a robbery, arson, sexual offense, or kidnapping is subject to a more severe maximum sentence than even a premeditated, purposeful killing (which currently constitutes first degree murder absent aggravating circumstances). By contrast, under the RCC, unintentionally causing the death of another while committing an enumerated felony constitutes second degree murder. This change improves the proportionality of penalties under the RCC by treating killings committed with a lower culpable mental state less severely.

Second, the revised murder statute eliminates as a distinct form of first degree murder purposely causing the death of another while "perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary."[68] The DCCA has held that an "offense punishable by imprisonment in the penitentiary refers to any felony.[69] Under the RCC, the grading with respect to general felony conduct is simplified, such that purposely causing the death of another person with premeditation and deliberation is first degree murder, while purposeful killing without premeditation or deliberation will still be covered by the second degree murder offense. This change improves the clarity and proportionality of the revised criminal code.

Third, the revised first degree murder statute eliminates as a distinct form of murder D.C. Code § 22-2102, which requires that the accused "maliciously places an obstruction upon a railroad or street railroad . . . and thereby occasions the death of another."[70] In contrast, the RCC treats killings caused by obstructing railroads the same as any other killings, with charges dependent on the accused's culpable mental state, and the presence of aggravating or mitigating circumstances. The fact that a killing occurs by means of obstructing a railroad no longer, by itself, renders the killing first degree murder. This change improves the proportionality of the revised homicide statutes by ensuring that the accused's culpable mental state remains the primary grading factor, instead of the specific means of placing obstructions upon a railroad or street railroad.

Fourth, the revised second degree murder statute changes the specified felonies that may serve as a predicate offense for "felony murder" in five ways.[71] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled

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[65] D.C. Code § 22-2104.01 (b)(1).
[66] D.C. Code § 22-2104.01 (b)(8).
[67] *Page v. United States*, 715 A.2d 890, 891 (D.C. 1998).
[68] D.C. Code § 22-2101.
[69] *Lee v. United States*, 112 F.2d 46, 49 (D.C. Cir. 1940) (noting that the phrase "punishable by imprisonment in the penitentiary" was a codification of a "common law concept of felony" and that "offenses punishable by imprisonment in a penitentiary" are those offenses with a possible sentence greater than one year).
[70] D.C. Code § 22-2101. The statute also includes displacing or injuring "anything appertaining" to a railroad or street railroad, or "any other act with intent to endanger the passage of any locomotive or car[.]"
[71] In addition to felony murder under the revised second degree murder statute, the revised aggravated arson statute provides an alternate means of criminalizing certain homicides. The revised aggravated arson offense criminalizes committing arson when the defendant knows the building is a dwelling, with recklessness as to the dwelling being occupied, and in fact, death or serious bodily injury results.

substance;"[72] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[73] By contrast, the RCC clarifies, and in several respects reduces, the conduct that is a predicate for felony murder. First, the revised statute states that first and second degree robbery are predicates for felony murder, but does not include the RCC's third degree robbery as a predicate offense, or pickpocketing-type conduct that is treated as theft from a person[74] in the RCC. Eliminating such conduct as predicates for felony murder improves the statute's proportionality because such conduct does not involve infliction of significant bodily injury or the use of a weapon, and lacks the inherent dangerousness of first and second degree robbery.[75] Second, the revised second degree murder offense includes the RCC's first degree criminal abuse of a minor offense, but only when the actor knowingly caused serious bodily injury. Under the current D.C. Code, first degree child cruelty is included as predicate offense for felony murder, but appears to require only recklessness and harms less than serious bodily injury.[76] As first degree criminal abuse of a minor in RCC § 22E-1501(a) requires recklessness as to serious bodily injury, simply making RCC § 22E-1501(a) a predicate to felony murder would effectively provide murder liability for recklessly causing death. Requiring that the actor knowingly causes serious bodily injury in order for first degree criminal abuse of a minor to serve as a predicate offense improves the proportionality of the statute. Third, the revised second degree murder offense does not include felonies involving a controlled substance as predicates for felony murder. Omitting controlled substance offenses from the enumerated offenses improves the proportionality of the felony murder rule, as controlled substance offenses do not present the same inherent, direct risk of physical

[72] D.C. Code §22-2101.

[73] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the burglar entered an occupied dwelling. However, the DCCA has held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

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

[75] Third degree robbery requires that the defendant took property from the immediate actual possession of another by means of either: 1) causing bodily injury to any one present; 2) communicating that any person will immediately cause bodily injury, a sexual act, a sexual contact, confinement, or death; 3) applying physical force that moves or immobilizes another; or 4) by removing property from the arms or hands of the complainant.

[76] *See* D.C. Code § 22–1101(a) ("A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby causes bodily injury.").

harm to others as compared to the other enumerated felonies.[77] Lastly, the revised second degree murder offense replaces the phrase "any housebreaking while possessing a dangerous weapon" with "enhanced first degree burglary." Under current law, only first degree burglary while armed may serve as a predicate offense,[78] and the current first degree burglary offense requires that the accused entered an occupied dwelling. This largely corresponds to the RCC's enhanced first degree burglary offense, with only minor changes to current law.[79] These changes to the enumerated predicate offenses improve the clarity of the code.

Fifth, the revised second degree murder offense requires that, for felony murder, the accused must have caused the death of another while acting "in furtherance" of the predicate felony. The current statute does not specify that the accused cause the death of another "in furtherance" of the underlying felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[80] However, while there is no "in furtherance" requirement under current law,[81] the DCCA has held that "[m]ere temporal and locational coincidence"[82] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the killing can be said to have occurred *as a part of the perpetration of the crime*."[83] By contrast, the revised statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection.[84] Practically, this change in law

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

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

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

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

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

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

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

[84] Courts in other states have disagreed about the meaning of "in furtherance" language that is common in felony murder statutes. Some courts have held that "in furtherance" requires that the act that caused the death must have advanced or facilitated commission of the underlying crime. *E.g.*, *State v. Arias*, 641 P.2d 1285, 1287 (Ariz. 1982); *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005) (the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a

may have little impact, as most cases in which the actor causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk-creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[85]

Sixth, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[86]

The current murder statutes are silent as to the effect of self-induced intoxication, but the DCCA has held that, although evidence of self-induced intoxication may negate a finding that the defendant acted with premeditation as required for first degree murder, it "may not reduce murder to voluntary manslaughter, nor permit an acquittal of [second degree] murder."[87] The DCCA further clarified that evidence of voluntary intoxication "is not admissible to disprove [the element of] malice' integral to the crime of murder."[88] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the proportionality of the revised offense.

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

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

[86] *Infra*, at 40.

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

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

In addition, to the extent that the self-induced intoxication provision changes current law with respect to any of the predicate offenses for felony murder, the provision also changes current law as to felony murder.[89] If self-induced intoxication negates the requisite culpable mental state required for a predicate offense, there can be no felony murder liability based on that offense.[90] These changes improve the clarity, completeness, and proportionality of the revised offense.

Seventh, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was committed in the course of kidnapping or abduction, or attempt to kidnap or abduct. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed in the course of a kidnapping, abduction, or attempted kidnapping or abduction.[91] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which a person commits murder while committing or attempting to commit kidnapping, the person may be convicted and separately sentenced for kidnapping or attempted kidnapping[92], which substantially increases the maximum allowable punishment beyond a murder not committed in the course of a kidnapping or attempted kidnapping. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[93] and improves the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the kidnapping offense.

Eighth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was committed while committing or attempting to commit a robbery, arson, rape, or sexual offense. The current first degree murder statute is subject to a penalty enhancement where it is proven that the murder was committed "while committing or attempting to commit a robbery, arson, rape, or sexual offense."[94] The terms "rape" and "sexual offense" are undefined by the current statute, and there is no case law on point.[95] By contrast, the penalty enhancement under subsection (d) omits this

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

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

[91] D.C. Code § 22-2104.1(b)(1).

[92] An exception is if the person commits felony murder predicated on kidnapping. In this case the convictions for second degree murder and the underlying kidnapping would merge.

[93] It is unclear whether under current District law, a defendant may be sentenced under the kidnapping aggravating circumstance and be separately convicted and sentenced for the kidnapping itself. It is possible that when kidnapping is used as an aggravating circumstance to enhance the maximum penalty for murder, the conviction for kidnaping merges with the murder conviction. If so, there is no overlap issue. No case law exists on point.

[94] D.C. Code § 22-2104.01(b)(8).

[95] Arguably, "rape, or sexual offense" at least includes first, second, and third degree sexual abuse, child sexual abuse, and some other offenses currently described in Chapter 30 of Title 22 of the D.C. Code. However, many other offenses are included in the definition of a "registration offense" for purposes of the District's sex offender registry. D.C. Code § 22-4001(8). It is unclear whether these constitute a "sexual

aggravating circumstance as unnecessary. Even with the omission of this aggravating circumstance, the accused may still be separately convicted and sentenced for the robbery, arson, rape, or other sexual offense, which substantially increases the maximum allowable punishment beyond a murder not committed in the course of robbery, arson, rape, or another sexual offense. Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[96] and improves the clarity and proportionality of the revised statute by preventing both an enhanced penalty for the murder and a separate conviction and sentence for the other felony offense.

Ninth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that there was more than one first degree murder arising out of one incident. The current first degree murder statute is subject to a penalty enhancement when there was more than one offense of murder in the first degree arising out of one "incident."[97] The term "incident" is not defined by the statute, and there is no case law on point. By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. In any case in which the accused commits more than one murder, that person may be convicted and sentenced for multiple counts of murder, which allows for punishment proportionate to the conduct.[98] Eliminating this aggravating circumstance reduces unnecessary overlap between offenses,[99] and improves the clarity and proportionality of the revised statute by preventing both enhanced penalty for each murder and a separate conviction and sentence for the additional murders.

Tenth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was a drive-by or random shooting. The current first degree murder statute is subject to a penalty enhancement when the murder "involved a drive-by or random shooting."[100] There is no District case law on the meaning of "random." By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance because the circumstance is vague and drive-by or random shootings are not sufficiently distinguishable from other murders to justify a more severe sentence. It is unclear both what connection would suffice to establish that a murder

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offense" for purposes of the current first degree murder aggravating circumstance. District case law has not established the scope of this language.

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

[97] D.C. Code § 22-2104.1(b)(6).

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

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

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

"involved" a drive-by or random shooting, and what the meaning of "random" is in this context[101]. In addition, murders committing by random or drive-by shootings do not categorically inflict greater suffering on the victim, nor are they significantly more culpable than murders committed by other means.[102] Eliminating this aggravating circumstance improves the clarity and proportionality of the revised statute by preventing enhanced penalties for murders that are not categorically more heinous or culpable than other types of murder.

Eleventh, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the murder was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression. The current first degree murder statute is subject to a penalty enhancement when the murder was "committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression[.]"[103] A separate bias-related crime penalty enhancement in current D.C. Code § 22-3703 increases the maximum punishment for any murder by one and a half times when the murder "demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, …sexual orientation, gender identity or expression…."[104] By contrast, the penalty enhancements under subsection (d) omit this aggravating circumstance as unnecessary because bias motivated murders will be subject to a general penalty enhancement under RCC § 22E-607. Omitting this aggravating circumstance reduces unnecessary overlap between statutes[105] and improves the proportionality of the offense by precluding bias motivations from enhancing penalties twice, both as an aggravating circumstance and under the separate bias enhancement.

Twelfth, the penalty enhancements under paragraph (d)(3) omit as an aggravating circumstance that the accused had previously been convicted of murder, manslaughter, or other enumerated violent offenses. The current first degree murder statute is subject to a penalty enhancement when the accused had previously been convicted of certain violent offenses.[106] Separate repeat offender penalty enhancements in current D.C. Code §§ 22-

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

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

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

[104] D.C. Code §§ 22-3701, 22-3703.

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

[106] D.C. Code § 22-2104.01(b)(12) (these offenses are: "murder, (B) manslaughter, (C) any attempt, solicitation, or conspiracy to commit murder, (D) assault with intent to kill, (E) assault with intent to

1804 and 22-1804a potentially increases the maximum punishment for any murder committed by a person with one or two prior convictions for certain offenses (including those currently as aggravating circumstances for first degree murder.)[107] By contrast, the penalty enhancement under subsection (d) omits this aggravating circumstance as unnecessary. The general penalty enhancement for recidivist conduct under RCC § 22E-606 provides for enhanced penalties.[108] Omitting this aggravating circumstance reduces unnecessary overlap between criminal statutes[109] and improves the proportionality of the offense by precluding prior convictions from enhancing penalties twice, both as an aggravating circumstance and under the separate recidivist enhancement.

Thirteenth, the penalty enhancements under paragraph (d)(3) include as an aggravating circumstance that the murder was committed for the purpose of harming the victim because of the victim's status as a law enforcement officer or public safety employee, or District official. Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[110] Under current law, an accused who knowingly causes the death of a law enforcement officer or public safety employee, with knowledge or reason to know that the victim was an on-duty law enforcement officer or public safety employee, or "on account of performance"[111] of the officer's or employee's official duties is guilty of a separate murder of a law enforcement officer offense. A separate penalty enhancement in current D.C. Code § 22-3602 increases the maximum punishment for any murder by one and a half times when the murder is of "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol."[112] A separate offense criminalizes harming District officials or employees and their family members.[113] By contrast, penalty enhancements under subsection (d) include as an aggravating circumstance that the murder was committed with the purpose of harming the victim because of the victim's status as a law enforcement officer, public safety employee, or District official. Inclusion of this this aggravating circumstance replaces the murder of a law enforcement officer offense that exists under current law.[114] Use of the RCC's "law enforcement officer" definition also

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murder, or (F) at least twice, for any offense or offenses, described in § 22-4501(f) [now § 22-1331(4)] whether committed in the District of Columbia or any other state, or the United States.").

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

[108] The repeat offender penalty enhancement under RCC § 22E-606 requires that the actor committed a prior felony within ten years of commission of the second felony. In contrast, the repeat offender enhancement for murder under D.C. Code § 22-2104.01 does not require that the murder be committed within ten years of the prior felony.

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

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

[111] D.C. Code § 22-2106.

[112] D.C. Code § 22-3602(b).

[113] D.C. Code §22-851.

[114] D.C. Code § 22-2106.

changes current law by including certain types of officers that are not included under the current murder of a law enforcement officer statute.[115] This aggravating circumstance covers only a subset of District employees—District officials—and does not include citizen patrol members, consistent with other provisions in the RCC.[116] Including this aggravating circumstance, and eliminating the separate murder of a law enforcement officer, reduces unnecessary overlap between criminal statutes and improves the clarity and consistency of the revised code.

Fourteenth, the penalty enhancements under paragraph (d)(3) include as an aggravating circumstance that the accused was reckless as to the victim's status as a "protected person," a term defined under RCC § 22E-701, which includes "a law enforcement officer, while in the course of official duties", "public safety employee, while in the course of official duties," "transportation worker, while in the course of official duties," or a "District official, while in the course of official duties." Under current law, the aggravating circumstances that authorize a life sentence for murder do not include the victim's status as an on duty law enforcement officer, public safety employee, transportation worker, District official or employee, or citizen patrol member. However, separate statutes authorize enhanced penalties based on the victim's status as a specified transportation worker,[117] or status as a citizen patrol member.[118] Separate statutes also criminalize murder of a law enforcement officer engaged in official duties,[119] and harming District officials or employees and their family members as separate offenses.[120] By contrast, the penalty enhancements under subsection (d) include as an aggravating circumstance that the victim was a "protected person."[121] This term is defined to include persons vulnerable due to youth or old age, a specified transportation worker, or a law enforcement officer engaged in official duties, and replaces the current D.C. Code's separate penalty enhancements, and the murder of a law enforcement officer offense. Under the revised term, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced murder penalty. Including recklessness as to victim being a protected person as an aggravating circumstance, and eliminating the separate penalty enhancements, and the separate murder of a law enforcement officer improves the clarity and consistency of the revised code.

Fifteenth, the penalty enhancements under paragraph (d)(3), through use of the term "protected person," change the range of victims' ages that qualify as an aggravating

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[115] The RCC's "law enforcement officer" definition includes; "any…reserve officer, or designated civilian employee of the Metropolitan Police Department;" "any licensed special police officer"; and "any officer or employee…of the Social Services Division of the Superior Court…charged with intake, assessment, or community supervision." These types of officers are not included in the definition of "law enforcement officer" in the current murder of a law enforcement officer statute.

[116] For more information on the RCC definition of "District official," see commentary to RCC § 22E-701.

[117] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).

[118] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).

[119] The current murder of a law enforcement officer offense criminalizes causing the death of an on-duty law enforcement officer or public safety employee "with knowledge or reason to know the victim is a law enforcement officer or public safety employee." D.C Code § 22-2106.

[120] D.C. Code §22-851.

[121] For more information on the RCC definition of "protected person," see commentary to RCC § 22E-701.

circumstance. Under current law, three separate statutory provisions authorize heightened penalties for murder based on the age of the victim. Both first and second degree murder are punishable by a lifetime sentence if the victim was less than 12 years old or more than 60 years old.[122] Separate statutes allow for penalty enhancements of one and one half times the maximum authorized punishment for murder if the victim was 65 years of age or older[123], or less than 18 years of age if the perpetrator was at least 18 years of age and at least two years older than the victim.[124] By contrast, the penalty enhancements under subsection (d), through use of the term "protected person," include as aggravating circumstances that the victim was less than 18 years old—if the actor is at least 18 years old and at least 4 years older than the complainant—or the victim was 65 years or older—when the actor is under the age of 65 and at least 10 years younger than the complainant.[125] This aggravating circumstance replaces both the age based aggravating circumstances under current law, and the separate statutory penalty enhancements based on the victim's age, insofar as they apply to murder. This change in law improves the consistency of the current and revised code.

Sixteenth, the revised murder statute does not provide enhanced penalties for committing murder while armed with a dangerous weapon. Under current law, murder is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[126] In contrast, under the revised statute, committing murder while armed does not increase the severity of penalties. As a practical matter, nearly all murders involve a dangerous weapon, and raising the gradation of murder in all instances using a dangerous weapon would increase liability significantly compared to the current murder statute. Moreover, as a practical matter, it is unclear whether the current code's separate weapon enhancement significantly affect sentences for murder. This change improves the proportionality of the revised code, as murder while armed does not inflict greater harm than unarmed murder, and therefore does not warrant heightened penalty.

Seventeenth, the penalty enhancements under paragraph (d)(3) do not require separate written notice and a separate hearing as is required under D.C. Code § 22-2104.01(a), or a separate written notice prior as is required under § 22-403.01(b-2)(A). Under current law, § 22-2104(a) requires that the government notify the accused in writing at least 30 days prior to trial if intends to seek a sentence of life imprisonment without release.[127] When the government alleges that aggravating circumstances enumerated under § 22-2104.01 were present, a separate sentencing proceeding must be held "as soon as practicable after the trial has been completed to determine whether to impose a sentence of more than 60 years[.]"[128] Following the hearing, if the sentencing court wishes to impose a sentence greater than 60 years, a finding in writing must state whether, beyond a reasonable doubt, one or more aggravating circumstances exist.[129] In

[122] D.C. Code § 24-403.01 (b-2)(2)(G).
[123] D.C. Code §22-3601.
[124] D.C. Code § 22-3611.
[125] RCC § 22E-701.
[126] D.C. Code § 22-4502.
[127] D.C. Code § 22-2104.
[128] D.C. Code § 22-2104.01.
[129] D.C. Code § 22-2104.01(c).

addition, if the government intends to rely on the aggravating circumstances listed under § 24-403.01(b-2) it must file an indictment or information at least thirty days prior to trial or a guilty plea that states in "writing one or more aggravating circumstances to be relied upon."[130] D.C. Code §24-403.01(b-2) does not specify whether a separate sentencing hearing must be held. By contrast, the revised murder statute eliminates the special requirements under D.C. Code § 22-2104.01(a), (c) and § 24-403.01(b-2)(A) that relate to sentences for murder.[131] Under the revised murder statute, proof of at least one aggravating circumstance is still an element which must be alleged in the indictment[132] and proven beyond a reasonable doubt at trial.[133] The factfinder is not required to separately produce a written finding that at least one aggravating circumstance was proven beyond a reasonable doubt, however, nor is the hearing described in current law required.[134] However, eliminating the statutory notice and hearing requirements applicable to the current District murder statutes does not change applicable Sixth Amendment law which, since the District adopted its statutory notice requirements, has expanded to require proof beyond a reasonable doubt of facts that subject a person to a higher statutory penalty.[135] This change improves the clarity of the criminal code.

The revised murder statute does not specifically address the effect of an appellate determination that the burden of proof was not met with respect to an aggravating circumstance that was the basis for the conviction. Current D.C. Code § 22-2104.01(d) provides that if a trial court is reversed on appeal due to "an error only in the separate sentencing procedure, any new proceeding before the trial court shall only pertain to the issue of sentencing."[136] However, this provision is unnecessary as the revised murder statute does not require any separate sentencing proceeding. If a conviction for murder with a sentencing enhancement is reversed on appeal on grounds that only relate to one of the aggravating circumstances, the appellate court may order entry of judgment as to first degree or second degree murder.[137]

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[130] D.C. Code § 22-403.01 (b-2)(1)(A).

[131] D.C. Code § 24.403.01 includes sentencing procedures for other offenses. The statutory language of § 24.403.01 will only change insofar as it is relevant to sentencing for murder.

[132] D.C. Super. Ct. R. Crim. P. 7.

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

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

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

[136] D.C. Code § 22-2104.01 (d).

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

Eighteenth, the revised murder statute bars accomplice liability for felony murder.[138] Under current District case law, "[a]ccomplices also are liable for felony murder if the killing . . . [is] a natural and probable consequence of acts done in the perpetration of the felony."[139] In contrast, under the revised murder statute, a person may not be convicted as an accomplice to felony murder as defined in paragraph (b)(3). Absent this rule, an accomplice to the predicate felony who does not intend or know that anyone will be killed, could be convicted as an accomplice to murder based on a killing perpetrated by a co-felon. This change improves the proportionality of the revised offense by matching the actor's liability to the actor's true degree of culpability.

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

First, the revised murder statute recognizes that acting under an "extreme emotional disturbance for which there is a reasonable cause" constitutes a mitigating circumstance, and serves as a partial defense to murder. Although current District murder statutes make no mention of mitigating circumstances, the DCCA has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances.[140] The DCCA has not clearly defined what constitutes a "mitigating

[138] At least one state bars application of felony murder when the defendant did not commit the lethal act. *E.g.*, Cal. Penal Code § 189 (e) ("A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: (1) The person was the actual killer. (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."). Other states provide affirmative defenses in cases where the defendant did not commit the lethal act; Wash. Rev. Code Ann. § 9A.32.030 ("Except that in any prosecution under [for felony murder] in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant: (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."). California's murder statute includes two exceptions to the rule that felony murder requires that the defendant was the "actual killer." Felony murder liability may apply if the defendant either 1) had intent to kill, aided and abetted the actual killer in the commission of the murder; or 2) was a "major participant in the underlying felony and acted with reckless indifference to human life." The revised murder statute does not include these exceptions to the general rule that felony murder requires that the accused must commit the lethal act. However, a defendant in either of these cases could still be liable for murder under alternate theories. If a defendant acts with intent to kill, and aids and abets another person in committing the lethal act, the defendant may still be liable for murder as an accomplice under the rules set forth in RCC § 22E-210. Alternatively, if a defendant who acts with extreme indifference to human life may still be liable for second degree murder under a depraved heart theory.

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

[140] *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990). Furthermore, in a murder prosecution, if evidence of mitigating circumstances is presented at trial, the government must prove beyond a reasonable doubt that mitigating circumstances were not present. If the government fails to meet this burden, but proves all other elements of murder, the defendant may only be found guilty of voluntary manslaughter.

circumstance," but has held that mitigating circumstances include an accused "act[ing] in the heat of passion caused by adequate provocation."[141] Under common law, cases interpreting what constituted adequate provocation came to recognize "fixed categories of conduct"[142] that "the law recognized as sufficiently provocative to mitigate"[143] murder to the lesser offense of manslaughter.[144]

In contrast, the RCC's murder statute states that acting under "extreme emotional disturbance" is a mitigating circumstance, thereby adopting the modern approach to provocation, which is more flexible in determining which circumstances are sufficient to mitigate murder to manslaughter.[145] This modern approach "does not provide specific categories of acceptable or unacceptable provocatory conduct."[146] Instead of being limited to the "fixed categories" that have been previously recognized by courts, the modern approach more generally inquires whether the "provocation is that which would cause . . . a reasonable man . . . to become so aroused as to kill another"[147] such that "the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[148] Consistent with this modern approach, under subsection (f) of the revised murder statute, it is possible to mitigate homicides from murder to manslaughter even under circumstances that have not been traditionally recognized at common law.[149]

One notable change from the common law of provocation is that an "extreme emotional disturbance" need not have been caused wholly or in part by the decedent in order to be adequate.[150] For example, consider a case in which the accused discovers that his neighbor has killed the accused's spouse, and in a fit of rage, the accused kills a third person who attempted to protect the neighbor. Under the traditional common law approach, since the third party was not responsible for provoking the accused, mitigation

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See Harris v. United States, 373 A.2d 590, 592-93 (D.C. 1977) ("The defendant is entitled to a manslaughter instruction if there is 'some evidence' to show adequate provocation or lack of malice aforethought.")

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

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

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

[144] *See*, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011) ("The law came to recognize four distinct-and exhaustive-categories of provocative conduct considered "sufficiently grave to warrant the reduction from murder to manslaughter of a hot-blooded intentional killing." The categories were: (1) a grossly insultive assault; (2) witnessing an attack upon a friend or relative; (3) seeing an Englishman unlawfully deprived of his liberty; and (4) witnessing one's wife in the act of adultery."); Lafave, Wayne. 2 Subst. Crim. L. § 15.2 (3d ed.) ("There has been a tendency for the law to jell concerning what conduct does or does not constitute a reasonable provocation for purposes of voluntary manslaughter.").

[145] Commentary to MPC § 210.3 at 49.

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

[147] *Id*. at 542.

[148] Commentary to MPC § 210.3 at 63.

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

[150] Commentary to MPC § 210.3 at 49.

would be unavailable. Under the "extreme emotional disturbance" rule however, it is at least possible that the homicide could be mitigated downwards to manslaughter. Despite its differences, the modern approach in many ways is similar to the common law approach. Under both approaches, the accused must have acted with an emotional state that would cause a person to become so "aroused as to kill another"[151] or that would "naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection."[152] Further, under both approaches, the reasonableness of the accused's reaction to the provoking circumstance is determined from the accused's view of the facts.[153]

It is unclear whether adopting the modern "extreme emotional disturbance" approach changes current District law.[154] Although the DCCA has long used the traditional "adequate provocation" formulation[155], the Court has also noted that while under the common law, "there grew up a process of pigeon-holing provocative conduct . . . [o]ur own law of provocation in the District of Columbia began with a general formulation similar to the modern view[.]"[156] Instead of being bound by common law precedent defining specific fact patterns that constitute adequate provocation, the District may already embrace the more flexible modern approach that "does not provide specific categories of acceptable or unacceptable provocatory conduct."[157] Ultimately the DCCA has not fully reconciled its "recognition (or non-recognition) of the Model Penal Code"[158] approach to provocation, and so it is unclear how adopting the modern approach changes current law.[159]

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

Second, the revised murder statute recognizes that "acting with an unreasonable belief that the use of deadly force was necessary to prevent a *person* from unlawfully

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[151] *High v. United States*, 972 A.2d 829, 833-34 (D.C. 2009).
[152] *Brown,* 584 A.2d at 543 n. 17.
[153] *See, High*, 972 A.2d at 834 (stating that instruction on voluntary manslaughter mitigation would be appropriate if "a reasonable man would have been induced to lose self-control . . . because he *believed* that his friend engaged in sexual relations with his adult step-sister" with on regard to whether this belief was factually accurate).
[154] *See, Comber*, 584 A.2d at 41 ("The mitigation principle is predicated on the legal system's recognition of the 'weaknesses' or 'infirmity' of human nature, R. Perkins & R. Boyce, supra, at 84; Bradford, supra, 344 A.2d at 214 (citation omitted), as well as a belief that those who kill under "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" are less 'morally blameworth[y]' than those who kill in the absence of such influences. Model Penal Code, supra, § 210.3 comment 5").
[155] *E.g.*, *High*, 972 A.2d at 833.
[156] *Brown*, 584 A.2d at 542.
[157] *Id*.
[158] *Simpson v. United States*, 632 A.2d 374, 377 (D.C. 1993).
[159] For example, the DCCA has explicitly declined to decide whether the decedent must have provided the provoking circumstance.

causing death or serious bodily injury" constitutes a mitigating circumstance. Under this language, the actor need not have believed that the *decedent* would unlawfully cause death or serious bodily injury.[160] There is no DCCA case law on point as to whether mitigation applies if the actor believed that the use of lethal force was necessary to prevent someone other than the decedent from causing death or serious bodily injury.[161] The revised statute clarifies that mitigation applies in these circumstances.

Third, the revised murder offense may change current District law by explicitly including any other legally-recognized partial defenses, apart from imperfect self-defense, or defense of others, as a mitigating circumstance.[162] While the District's murder statutes are silent as to the relevance or definition of mitigating circumstances, DCCA case law has recognized that mitigating circumstances may be found in situations besides imperfect self-defense or defense of others.[163] However, the DCCA has not specified when the use of deadly force is justified in other circumstances,[164] and whether mitigation would be available for mistakes as to those justifications. By contrast, the RCC specifically recognizes that any other legally-recognized partial defense which substantially diminishes either the accused's culpability or the wrongfulness of the accused's conduct constitute mitigating circumstances. For example, if lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance.[165] The RCC's recognition of mitigation in situations besides imperfect self-defense or defense of others clarifies the revised murder statutes while leaving to courts the precise contours of such mitigating circumstances. Explicitly recognizing these partial defenses as mitigating circumstances improves the proportionality of the offense, by allowing courts to recognize mitigation when appropriate to reflect the accused's reduced culpability.

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

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

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

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

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

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

Fourth, in the revised second degree murder offense, felony murder requires that the accused negligently cause the death of another. While the current statute is clear that intent to cause death is not required, DCCA case law has not clearly stated whether strict liability as to death is sufficient. Some case law suggests no culpable mental state is necessary,[166] while at least one *en banc* decision suggests that a mental state of negligence is required.[167] The RCC second degree murder statute clarifies this ambiguity by requiring negligence as to causing death of another. To the extent that requiring negligence may change current District case law, this change would improve the proportionality of the statute by ensuring a person who was not even negligent as to the death of another could not be punished for murder.[168] A person who was not even negligent as to death does not share the relatively high culpability that justifies murder liability for unintentionally causing the death of another while committing a specified felony.

Fifth, under the revised second degree murder offense, felony murder liability does not exist if the person killed was an accomplice to the predicate felony.[169] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when the decedent was an accomplice to the predicate felony.[170] The RCC second degree murder statute resolves this ambiguity under current law, and, to the extent it may change law, improves the proportionality of the offense. Under the revised offense, felony murder would provide greater punishment only for victims of the predicate offense or other innocent bystanders who are killed during the commission or attempted commission of an enumerated felony. When the decedent was an accomplice to the underlying offense, he or she assumed the risk in taking part in an inherently

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

[167] The *en banc* court in *Wilson-Bey* stated that the felony murder doctrine applies "in the case of a *reasonably foreseeable* killing, without a showing that the defendant intended to kill the decedent, if the homicide was committed in the course of one of several enumerated felonies." *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006). Other statements in the *Wilson-Bey* decision strongly suggest that "reasonably foreseeable" is the practical equivalent of criminal negligence. The opinion quotes the Model Penal Code, "To say that the accomplice is liable if the offense . . . is 'reasonably foreseeable' or the 'probable consequence' of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust."

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

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

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

dangerous felony, and the negligent death of such a person does not warrant as severe a punishment.

Sixth, under the revised second degree murder statute, felony murder requires that the lethal act be committed by the accused.[171] Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when someone other than the accused committed the lethal act, although case law suggests that a person may not be convicted as a principal to felony murder if that person did not actually commit the lethal act.[172] The revised second degree murder offense resolves this ambiguity under current law by requiring the actor commit the lethal act for felony murder liability. It is disproportionately severe to punish a person for murder when another person commits the lethal act (assuming the person does not satisfy the requirements for accomplice liability with respect to a form of murder that requires a greater degree of culpability).[173] This change improves the proportionality of the revised statutes.

Seventh, the revised second degree murder offense does not criminalize unintentionally causing the death of another while committing or attempting to commit a felony that is not specified in the statute. Although the current first degree murder statute's felony murder provisions do not specifically provide for such liability, the DCCA has stated that it is unclear if second degree murder liability applies to a non-purposeful killing that occurs during the commission of a non-enumerated felony.[174] The revised second degree murder statute resolves this ambiguity by clarifying that unintentionally causing the death of another person while committing or attempting to

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[171] For example, if in the course of robbery, the intended robbery victim lawfully defends himself by firing shots at the robber and accidentally hits and kills a bystander, the robber himself cannot be convicted of felony murder based on the death of that bystander. Further, if the use of force by the intended robbery victim was unlawful, the robber's liability for that unlawful use of force is governed by RCC § 22E-1201. However, this limitation of the felony murder rule does not preclude murder liability anytime a non-participant's voluntary act contributes to the death of another. See *Bonhart v. United States*, 691 A.2d 160 (D.C. 1997) (affirming felony murder conviction when defendant committed arson, and victim ran back into burning building to rescue his property).

[172] *Lee v. United States*, 699 A.2d 373, 384 (D.C. 1997) ("Since he was not the actual triggerman, he must be deemed an aider and abettor in order to be convicted.").

[173] Three states have gone further and entirely abolished the felony murder rule. Hawaii and Kentucky have abolished the felony murder rule by statute. Haw. Rev. Stat. Ann. § 707-701; Ky. Rev. Stat. Ann. § 507.020. The Michigan Supreme Court abolished the doctrine. *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980) ("We believe that it is no longer acceptable to equate the intent to commit a felony with the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm."). In addition, other states that have retained the felony murder rule require a higher degree of culpability than required under the RCC. For example, New Hampshire's first degree murder offense requires that the defendant *knowingly* caused the death of another while committing or enumerated felony. N.H. Rev. Stat. Ann. § 630:1-a. Alternatively, New Hampshire's second degree murder statute creates a presumption that the defendant acted recklessly with extreme indifference to human life if "the actor causes death by the use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit any class A felony." N.H. Rev. Stat. Ann. § 630:1-b.

[174] In *Comber v. United States*, the DCCA noted that "[w]hat remains unclear in the District of Columbia is the status of one who commits a non-purposeful killing in the course of a [felony not enumerated in the first degree murder statute]."[174]

commit any unspecified felony is not criminalized as murder under the RCC.[175] To the extent that it may change current law, eliminating second degree murder liability for non-purposeful felony murder predicated on any felony offense also improves the proportionality of the RCC. Punishing unintentionally causing death of another while committing or attempting to commit any felony as murder, regardless of the inherent dangerousness of the felony would be disproportionately severe.[176]

Eighth, the enhanced penalty provisions recognize as aggravating circumstances that that the accused knowingly subjected the decedent to extreme physical pain or mental suffering prior to the victim's death, or mutilated or desecrated the decedent's body. Under current law, first degree murder is subject to enhanced penalties if the murder "was especially heinous, atrocious, or cruel."[177] The phrase "especially heinous, atrocious, or cruel" (EHAC) is not statutorily defined and case law is unclear as to its meaning.[178] The DCCA has held that a murder may be EHAC if it involves inflicting substantial physical pain or mental anguish prior to death,[179] but substantial physical or mental suffering may not be necessary. The Court has recognized that EHAC does "not focus exclusively upon the sensations of the victim before death."[180] For example, the DCCA has recognized that a murder involving mutilation of body parts, regardless of whether this inflicted additional suffering on the victim, can render a murder EHAC.[181] The DCCA also has stated that a murder may be EHAC if the killing is unprovoked,[182] if the accused did not deny his role in the killing,[183] if the murder involved a violation of trust,[184] if the accused's motive for the murder was to avoid returning to prison,[185] or if the murder was committed "for the fun of it."[186] However, although the DCCA has

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

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

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

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

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

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

[181] *Id*, at 1355 (affirming finding that murder was EHAC when defendant slashed victim's testicles and ankles despite evidence indicating that at the time victim was unconscious and unable to feel pain).

[182] *Parker*, 692 A.2d at 917 n.6.

[183] *Id.*

[184] *Henderson v. United States*, 678 A.2d 20, 24 (D.C. 1996).

[185] *Id. at* 24.

[186] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014) (noting that the legislative history of D.C. Code § 22-2104.01 indicates that murders committed "just for the fun of it" may

recognized these circumstances as relevant to determining whether a murder is EHAC, the DCCA has never held that these circumstances alone render a murder EHAC. In these cases, the murder also involved infliction of substantial physical or mental suffering, or both.[187]

The RCC enhanced penalty provision more clearly identifies murders involving extreme and prolonged physical or mental suffering prior to death, or mutilation or desecration of the body, as subject to heightened penalties. Other circumstances referenced in DCCA descriptions of EHAC that do not involve substantial physical or mental suffering, or mutilation or desecration of the body do not increase penalties for murder unless they satisfy another enumerated aggravating circumstance. Specifying that inflicting extreme physical pain or mental suffering, or mutilating or desecrating the body are aggravating circumstances improves the clarity of the code, and, to the extent it may change current law, helps to ensure proportionate penalties. The current EHAC formulation is vague, and creates the possibility of arbitrariness in sentencing. As the DCCA has noted, all murders "are to some degree heinous, atrocious, and cruel"[188] and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[189] By omitting the vague EHAC formulation, the enhanced penalty provision improves penalty proportionality by more clearly defining the class of murders that warrant heightened punishment.

Ninth, through reference to the term "protected person," the RCC enhanced penalty provision applies recklessness as to whether the decedent is a law enforcement officer or public safety employee engaged in the course of his or her official duties. The current murder of a law enforcement statute[190] criminalizes intentionally causing the death of another "with knowledge or reason to know that the victim is a law enforcement officer or public safety employee" while that officer or employee is "engaged in . . . performance of such officer's or employee's official duties[.]"[191] Although the DCCA has clearly held that actual knowledge that the victim was a law enforcement officer or public safety employee is not required[192], the DCCA has not further specified the mental state as to whether the officer or employee was engaged in performance of official duties. RCC subparagraph (c)(3)(A) of the revised murder statute resolves this ambiguity and requires that the accused caused the death of another with recklessness as to whether the

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be deemed especially heinous, atrocious, or cruel). Committee Report on the "First Degree Murder Amendment Act of 1992", Bill 9-118, at 2.

[187] *Parker*, 692 A.2d 913 (D.C. 1996) (victim experienced prolonged and excruciating pain, including mental suffering, and was stalked prior to the killing making her aware of the possibility of violence); *Henderson*, 678 A.2d 20 (D.C. 1996) (victim was alive when defendant stabbed her, severed her windpipe, and then strangled her, and her death was "a form of torture").

[188] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) ("If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.").

[189] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words "outrageously or wantonly vile, horrible and inhuman" in the Georgia criminal code do not create "any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

[190] D.C. Code § 22-2106.

[191] D.C. Code § 22-2106 (emphasis added).

[192] *Dean v. United States*, 938 A.2d 751, 762 (D.C. 2007).

decedent was a law enforcement officer or public safety employee in the course of his or her official duties. Specifying a recklessness mental state improves the clarity of the criminal code by resolving this ambiguity under current District law, and is consistent with the culpable mental state requirement for other offenses in the RCC based on the decedent being a protected person.[193]

Tenth, through the definition of "protected person" the revised statute recognizes as an aggravating circumstance that the accused was reckless as to the victim being a "vulnerable adult." Under current law, it is an aggravating circumstance to first degree murder (but not second degree) that the victim is a "especially vulnerable due to age or a mental or physical infirmity."[194] Similarly, it is an aggravating circumstance to second degree murder (but not first degree) that the victim is "vulnerable because of mental or physical infirmity."[195] No current statute, nor DCCA case law, however, clarifies what types of mental or physical infirmities are required to be proven per this language. The relevant statutes are silent and there is no case law on what, if any, culpable mental state is required as to these circumstances under current District law. However, in the RCC murder statutes the penalty enhancements under subsection (c) include as an aggravating circumstance to both first and second degree murder that the victim a "vulnerable adult."[196] This change improves the consistency and proportionality of the RCC, by reflecting the special status these individuals have elsewhere in current District law,[197] and by making enhancement for murder consistent with enhancements for RCC offenses.[198]

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

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

Second, the revised statute eliminates any statutory reference to the accused being "of sound memory and discretion." Current District statutory language states that "[w]hoever, being of sound memory and discretion" kills another with the requisite mens rea is "guilty of murder in the first degree."[199] Yet, under current law, it is not an element

[193] *E.g.*, RCC § 22E-1202.
[194] D.C. Code § 22-2104.01
[195] D.C. Code § 24-403.01 (b-2)(2)(G).
[196] RCC § 22E-701 ("'Vulnerable adult' means a person who is 18 years of age or older and has one or more physical or mental limitations that substantially impair the person's ability to independently provide for their daily needs or safeguard their person, property, or legal interests.").
[197] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.
[198] See, e.g., RCC § 22E-1202.
[199] D.C. Code § 22-2101.

of first degree murder that the accused was "of sound memory and discretion."[200] Rather, the words "of sound memory and discretion" only refers to the basic requirement of legal sanity.[201] Under the RCC this statutory language is superfluous. The accused's sanity remains a general defense to all crimes, not just first degree murder. This change improves the clarity of the revised murder statute.

Third, the revised second degree murder offense explicitly codifies causing the death of another knowingly, or recklessly with extreme indifference to human life (commonly called "depraved heart murder"). The current second degree murder statute only defines the offense as killing another person "with malice aforethought."[202] However, the DCCA has recognized that "malice aforethought" is a common law term of art that encompasses multiple distinct mental states, including intentionally causing the death of another, and depraved heart malice.[203] The revised statute abandons this archaic legal term of art and instead specifies that causing the death of another knowingly, or recklessly with extreme indifference to human life constitutes second degree murder. This language is not intended to change any current DCCA case law with respect to "depraved heart murder."

Fourth, the revised second degree murder offense does not specifically criminalize acting with intent to cause serious bodily harm, and thereby causing the death of another. Under current District case law, a person commits second degree murder if he causes the death of another without intent to cause death, but with intent to cause "serious bodily harm."[204] However, under the revised second degree murder offense, causing death by engaging in conduct with intent to commit serious bodily injury is still criminalized as second degree murder because it constitutes depraved heart murder under paragraph (b)(2). The current second degree murder statute's reference to acting with intent to cause serious bodily harm and thereby killing a person is superfluous to the revised second degree murder offense and its elimination clarifies the statute.

Fifth, the revised second degree murder statute includes first degree assault as a predicate offense for felony murder. The current first degree murder statute includes

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[200] *Hill v. United States*, 22 App. D.C. 395, 409-10 (D.C. Cir. 1903); *Shanahan v. United States*, 354 A.2d 524, 526 (D.C. 1976) (in prosecuting first degree murder, government was not required to affirmatively prove that defendant was of sound memory and discretion).
The formulation of murder requiring that the defendant be of "sound memory and discretion" dates at least as far back as 17th century England. Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35, 39 (2001) (noting that William Blackstone defined murder in the 18th relying on Sir Edward Coke's 17th century formulation, which required that the defendant be "a man of sound memory, and of the age of discretion[.]"). American courts dating back to the 19th century have interpreted the words "sound memory and discretion" as referring to the basic requirement of legal sanity. *E.g.*, *Davis v. United States*, 160 U.S. 469, 484 (1895) ("All this is implied in the accepted definition of murder, for it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion[.]' . . . Such was the view of the court below, which took care in its charge to say that the crime of murder could only be committed by a sane being[.]"

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

[202] D.C. Code § 22-2103.

[203] *Comber v. United States*, 584 A.2d 26, 38–39 (D.C. 1990).

[204] *Comber v. United States*, 584 A.2d 26, 38–39 (D.C. 1990).

"mayhem" as a predicate offense for felony murder. The RCC's first degree assault statute is analogous to "mayhem" under the D.C. Code. Replacing "mayhem" with first degree assault as a predicate offense for felony murder is not intended to change current District law.

Sixth, subsection (h) of the revised murder statute specifies that convictions for felony second degree murder under paragraph (b)(3) and a predicate felony listed under subparagraphs (b)(3)(A) – (b)(3)(H) merge. This clarification is consistent with current District law.[205] Subsection (h) does not otherwise address merger. Subject to the general merger provision in RCC § 22E-214, an actor may be convicted of another type of murder (e.g. first degree or second degree under paragraph (b)(1) or (b)(2)) and a predicate felony listed under subparagraphs (b)(3)(A) – (b)(3)(H) arising from a single act or course of conduct.

[205] *Lee v. United States*, 699 A.2d 373, 382 (D.C. 1997).

RCC § 22E-1102. Manslaughter.

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

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

Subsection (a) specifies three forms of voluntary manslaughter. Paragraph (a)(1) specifies that an actor commits voluntary manslaughter if the actor knowingly causes the death of another person. Paragraph (a)(1) specifies that the culpable mental state "knowingly" applies, a term defined at RCC § 22E-206 to mean that the accused must have been aware or believed to a practical certainty that he or she would cause the death of another person.

Paragraph (a)(2) specifies that a person commits voluntary manslaughter if that person recklessly, with extreme indifference for human life, causes the death of another. This subsection requires a "reckless" culpable mental state, a term defined at RCC § 22E-

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

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

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

Specifically, the same factors that determine whether an actor's conscious disregard of a substantial risk is "a gross deviation" as required for ordinary recklessness[16] also bear on the determination of whether an actor's conscious disregard of an extreme risk of death or serious bodily injury manifests extreme indifference to human

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

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

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

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

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

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

[16] See Commentary to RCC § 22E-206.

life. These factors are: (1) the extent to which the actor's disregard of the risk was intended to further any legitimate social objectives[17]; and (2) any individual or situational factors beyond the actor's control[18] that precluded his or her ability to exercise a reasonable level of concern for legally protected interests. In cases where these factors negate a finding that the actor exhibited extreme indifference to human life, a fact finder may nonetheless find that the actor behaved recklessly, provided that the actor's conduct was a gross deviation from the ordinary standard of conduct.

Paragraph (a)(3) specifies that a person commits voluntary manslaughter if he or she negligently causes the death of another person, other than an accomplice,[19] while committing or attempting to commit one of the enumerated felonies. This form of voluntary manslaughter is identical to the felony murder version of second degree murder,[20] although the presence of mitigating circumstances is a defense to this form of murder. The statute specifies that a culpable mental state of "negligently" applies, a term defined at RCC § 22E-206 that here means that the actor should have been aware of a substantial risk that death would result from his or her conduct, and the risk is of such a nature and degree, that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's failure to perceive that risk is a gross deviation from the standard of care a reasonable person would take.[21] The negligently culpable mental state does not, however, apply to the enumerated felonies in subparagraphs (a)(3)(A)-(H). The defined term "in fact" indicates that there is no additional culpable mental state requirement for the enumerated felonies in paragraph (a)(3); each has its own culpable mental state requirements which must be proven. Also, it is not sufficient that a death happened to occur during the commission or attempted commission of the felony. The "mere coincidence in time" between the underlying felony and death is insufficient for felony murder liability.[22] There also must be "some causal connection between the homicide and the underlying felony."[23] The death must have been caused by an act "in furtherance" of the underlying felony.[24] The revised statute codifies this case law by requiring that the death be "in the course of and in

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

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

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

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

[21] RCC 22E-206(d).

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

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

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

furtherance of committing, or attempting to commit" an enumerated offense.[25] In addition, the lethal act must have been committed by the accused.[26] A person may not be convicted under paragraph (b)(3) for lethal acts committed by another person.

Subsection (b) specifies that a person commits involuntary manslaughter if he or she recklessly causes the death of another. The culpable mental state of recklessness, a term defined at RCC § 22E-206, requires that the accused was consciously aware of a substantial risk of causing death, and that the risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, its disregard is a gross deviation from the ordinary standard of conduct.[27]

Subsection (c) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[28] However, as discussed above, extreme indifference to human life in paragraph (a)(1) of the RCC murder statute requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The term "self-induced intoxication" has the meaning specified in RCC § 22E-209,[29] and the definition specifies certain culpable mental states that must be proven. The use of "in fact" in subsection (c) indicates that no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor was unaware of the risk, but would have been aware of the risk had the actor been sober.

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a

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

[26] For example, if during a robbery, police arrive at the scene and in an ensuing shootout the police fatally shoot a bystander, there would be no felony murder liability. However, this rule does not limit liability under any other form of homicide. If the person committing the robbery cause the death of the bystander in a manner that constituted recklessness with extreme indifference to human life, he may still be convicted of murder under a depraved heart theory, as specified in paragraph (b)(2).

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

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

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

person's self-induced intoxication is non-culpable, and weighs against finding that the person acted with extreme indifference to human life.[30] In these cases, although the awareness of risk may be imputed, the person could still be acquitted of voluntary manslaughter. However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for involuntary manslaughter[31], provided that his or her conduct was a gross deviation from the ordinary standard of conduct.

Subsection (d) establishes the penalties for voluntary and involuntary manslaughter. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

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

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

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

[31] RCC § 22E-1102.

enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.[32]

Subparagraph (d)(3)(A) specifies that recklessness as to whether the decedent is a protected person is an aggravating circumstance. Recklessness is defined at RCC § 22E-206, and requires that the accused was aware of a substantial risk that the decedent was a protected person, and that the risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, its disregard is a gross deviation from the ordinary standard of conduct. The term "protected person" is defined in RCC § 22E-701.

Subparagraph (d)(3)(B) specifies that causing the death of another with the purpose of harming the decedent because of his or her status as a law enforcement officer, public safety employee, or district official is an aggravating circumstance. This aggravating circumstance requires that the accused acted with "purpose" a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[33] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[34] "Law enforcement officer," "public safety employee," and "District official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to harm a person of such a status.

Subsection (e) provides that a person cannot be held liable as an accomplice to felony murder, as defined in paragraph (a)(3).[35] This subsection does not limit application of any other form of homicide liability.[36]

Subsection (f) specifies that, while a person may be convicted of voluntary manslaughter under paragraph (a)(3) and a predicate felony listed in subparagraphs

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[32] If general penalty enhancements under RCC §22E-606 or §22E-607 apply to this offense, the penalty for RCC §22E-606 and §22E-607 shall be based on the classification of the relevant unenhanced gradation of this offense.

[33] While the RCC § 22E-701 definitions of "law enforcement officer" and "public safety employee" refer to some persons only when on-duty (e.g., a campus officer), this provision on committing the offense with the purpose of harming the complainant because of their status as a law enforcement officer or public safety employee applies to committing the offense against an off-duty person based on their on-duty role. For example, a defendant who kills an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing manslaughter with the purpose of harming the decedent due to his status as a law enforcement officer.

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

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

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

(a)(3)(A) - (a)(3)(H), the convictions for voluntary manslaughter and the predicate felony merge when arising from the same act or course of conduct. The court must follow the procedures in RCC § 22E-214 (b) and (c) to effect such a merger. However, convictions for a predicate felony listed in subparagraphs (a)(3)(A) - (a)(3)(H) and for involuntary manslaughter or voluntary manslaughter under paragraphs (a)(1) or (a)(2), do not merge under subsection (f). Subject to the general merger rules provided in RCC § 22E-214, multiple convictions for a predicate felony listed in subparagraphs (a)(3)(A) - (a)(3)(H) and for involuntary manslaughter or voluntary manslaughter under paragraphs (a)(1) or (a)(2) are permitted and, as usual, sentences may run concurrently or consecutively as prescribed by the sentencing judge.

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

Relation to Current District Law. *The revised manslaughter statute changes current law in six main ways, three of which track changes in the RCC murder statutes.*[37]

First, the revised involuntary manslaughter offense replaces the "misdemeanor manslaughter" type of manslaughter liability with a requirement that requires that the accused recklessly caused the death of another. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. However, the DCCA has held that one way a person commits involuntary manslaughter is if he or she causes the death of another person while committing or attempting to commit any offense that is "dangerous in and of itself,"[38] which requires that the offense creates "an inherent danger of physical injury[.]"[39] The DCCA has further required that the offense be committed "in a way which is dangerous under the particular circumstances of the case,"[40] meaning "the manner of its commission entails a reasonably foreseeable risk of appreciable injury."[41] In practice, this form of involuntary manslaughter in the current D.C. Code is called "misdemeanor manslaughter." By contrast, under the revised manslaughter statute there is no requirement that the accused committed or attempted to commit any other "dangerous" offense, only that the accused recklessly caused the death of another. Recklessness is defined under RCC § 22E-206, and requires that the accused

[37] Under current law and the RCC, causing the death of another in a manner that constitutes murder also constitutes voluntary manslaughter, a lesser-included offense. Consequently, some RCC changes in the scope of murder liability accordingly change the scope of voluntary manslaughter.
[38] *Walker*, 380 A.2d at 1391.
[39] *Comber*, 584 A.2d at 50.
[40] *Id.* at 51. This additional restriction was adopted to avoid injustice in cases where the underlying offense is inherently dangerous in the abstract, but can be committed in non-violent ways. For example, simple assault may generally be deemed "dangerous in and of itself," but under current law a person can commit simple assault by making non-violent but unwanted physical contact with another person. Such a non-violent assault would not be committed "in a way which is dangerous under the particular circumstances of the case," and death resulting from a non-violent simple assault would not constitute misdemeanor manslaughter.
[41] *Donaldson v. United States*, 856 A.2d 1068, 1076 (D.C. 2004) (citing *Comber*, 584 A.2d at 49 n. 33). This requirement is intended to prevent injustice when "death freakishly results" from conduct that constitutes an inherently dangerous offense, such as simple assault, that can be committed in ways that do not create a foreseeable risk of appreciably injury. *Comber*, A.2d at 50.

consciously disregarded a substantial risk of death, and that the risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, its disregard is a gross deviation from the ordinary standard of conduct. This change improves the clarity and consistency of the criminal code by codifying a culpable mental state requirement using defined terms, and improves the proportionality of the homicide statutes by creating an intermediate offense between negligent and depraved heart killings.

Second, the revised involuntary manslaughter offense eliminates the "criminal negligence" type of involuntary manslaughter liability. The current District manslaughter statute, D.C. Code §22-2105, does not distinguish degrees of manslaughter or otherwise specify the elements of the offense, including the culpable mental state required. However, the DCCA, relying on common law precedent, has held that a second way a person commits involuntary manslaughter is if that person causes the death of another by engaging in conduct that creates an "extreme risk of death . . . under circumstances in which the actor should have been aware of the risk."[42] The DCCA has explained that "the only difference between risk-creating activity sufficient to sustain a 'depraved heart' murder conviction and [an involuntary manslaughter] conviction 'lies in the quality of [the actor's] awareness of the risk.'"[43] Whereas depraved heart murder requires that the accused consciously disregard the risk, negligent manslaughter only requires that the accused should have been aware of the risk.[44] By contrast, the revised manslaughter statute requires that the accused consciously disregarded a substantial, though not necessarily extreme, risk of death. In addition, the risk must be of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, its disregard is a gross deviation from the ordinary standard of conduct. However, it is not required that the accused acted with extreme indifference to human life. Negligently causing the death of another continues to be criminalized as negligent homicide, per RCC § 22E-1103. This change improves the proportionality of the revised homicide statutes by more finely grading the offense. Actors who are genuinely unaware of the risk they create, even extreme risks, are less culpable than those who are consciously aware of the risk they create.

Third, applying the general culpability principles for self-induced intoxication in RCC § 22E-209 allows a defendant to claim that due to intoxication, he or she did not form the awareness of risk required to act "recklessly, with extreme indifference to human life." However, subsection (c) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. Although self-induced intoxication is generally culpable, and weighs in favor of finding that the person acted with extreme indifference to human life, it is possible, however unlikely, that self-induced intoxication reduces the blameworthiness, and negates finding that the person acted with extreme indifference to human life.[45]

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[42] *Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996).
[43] *Comber*, 584 A.2d at 49 (quoting *Dixon v. United States*, 419 F.2d 288, 293 (D.C. Cir. 1969)).
[44] *Id.* at 48-49.
[45] *Infra*, at 241.

Although the current manslaughter statute is silent as to the effect of self-induced intoxication, the DCCA has held that voluntary intoxication "is not a defense to voluntary manslaughter."[46] By contrast, although subsection (c) allows for imputation of the awareness of risk, in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for voluntary manslaughter. This change improves the proportionality of the revised offense.

Fourth, the revised manslaughter statute includes multiple penalty enhancements based on the status of the decedent. The current District manslaughter statute, D.C. Code § 22-2105, does not itself provide for any enhanced penalties. However, various separate statutes in the current D.C. Code authorize enhanced penalties for manslaughter based on the victim's status, as a minor,[47] as an elderly adult[48], as a specified transportation worker,[49] or as a citizen patrol member.[50] A separate protection of District public officials offense also criminalizes harming a District official, or family member, while official is engaged in official duties, or on account of those duties.[51] By contrast, the RCC manslaughter offense incorporates penalty enhancements based on the status of the decedent. If a person commits voluntary or involuntary manslaughter, and was either reckless as to the victim being a "protected person," or had purpose to harm the victim because of the victim's status as a public safety employee or District official, the penalty classification for either offense may be increased by one penalty class. The term "protected person" is defined under RCC § 22E-701, and differs in scope in various respects from current law.[52] For example, a victim's status as a member of a "citizen patrol" no longer is sufficient for an enhanced manslaughter penalty. Because the various types of victim-specific enhancements applicable to manslaughter are all included in the penalty enhancement provision, it is not possible to "stack" enhancements based on the status of the victim. This improves the revised penalty's proportionality by ensuring the main offense elements and gradations are the primary determinants of penalties rather than stacked enhancements. Incorporating these various enhancements, and the offense for harming a District employee or official, into a single penalty enhancement provision also reduces unnecessary overlap and improves the clarity of the code.

Fifth, through the definition of "protected person," the revised manslaughter statute provides heightened penalties if the accused was reckless as to the decedent being a law enforcement officer or public safety employee engaged in the course of official

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[46] *Davidson v. United States*, 137 A.3d 973, 975 (D.C. 2016).
[47] 22-3611 (enhancement for specified crimes committed against minors).
[48] D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens);
[49] D.C. Code § 22-3751 (enhancement for specified crimes committed against taxicab drivers); D.C. Code § 22- 3751.01 (enhancement for specified crimes committed against transit operator or Metrorail station manager).
[50] D.C. Code § 22-3602 (enhancement for specified crimes committed against citizen patrol members).
[51] D.C. Code §22-851. Specifically, the offense criminalizes intimidating, impeding, interfering with, retaliating against, stalking, assaulting, kidnapping, injuring a District official or employee or family member of an official or employee, or damages or vandalizes the property of a District official or employee or family member of an official or employee.
[52] *See* Commentary to RCC § 22E-1101 (describing differences in the relative ages of victims and perpetrators under the RCC as compared to current District penalty enhancements).

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

Sixth, the revised manslaughter statute does not provide enhanced penalties for committing manslaughter while armed with a dangerous weapon. Under current law, manslaughter is subject to heightened penalties if the accused committed the offense "while armed" or "having readily available" a dangerous weapon.[54] In contrast, under the revised statute, committing manslaughter while armed does not increase the severity of penalties. This change improves the proportionality of the revised code, as manslaughter while armed does not inflict greater harm than unarmed manslaughter, and therefore does not warrant heightened penalty.

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

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

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[53] The term "protected person" includes law enforcement officers and public safety employees engaged in the course of official duties. RCC § 22E-701.
[54] D.C. Code § 22-4502.
[55] *Comber*, 584 A.2d at 37 (emphasis added).
[56] The *Comber* court explicitly declined to decide whether accidentally causing the death of another while committing or attempting to commit any *non-enumerated* felony constitutes second degree murder.
[57] *West v. United States*, 499 A.2d 860, 864 (D.C. 1985).

Second, the revised manslaughter statute incorporates the revised second degree murder statute's changes to felony murder liability by requiring that the accused cause the death of another while acting "in furtherance" of the predicate felony.[58] Under current law felony murder does not require that the killing be "in furtherance" of the predicate felony, and the DCCA has held that "[t]here is no requirement in the law . . . that the government prove the killing was done in furtherance of the felony in order to convict the actual killer of felony murder."[59] However, while there is no "in furtherance" requirement under current law,[60] the DCCA has held that "[m]ere temporal and locational coincidence"[61] between the underlying felony and the death are not enough. There must have been an "actual legal relation between the killing and the crime . . . [such] that the killing can be said to have occurred *as a part of the perpetration of the crime*."[62] By contrast, the revised manslaughter statute, through use of the "in furtherance" phrase, requires that the accused's conduct that caused the death of another in some way facilitated the commission or attempted commission of the offense, including avoiding apprehension or detection of the offense or attempted offense.[63] Practically, this change in law may have little impact, as most cases in which the accused causes the death of another as "part of perpetration of the crime," he or she would also have been acting in furtherance of the crime. However, this change improves the proportionality of the offense insofar as a person whose risk-creating behavior is not in furtherance of the felony is not as culpable as a person who otherwise negligently kills someone in the course of committing a specified felony.[64] This change to the revised statute also

[58] *See* Commentary to RCC § 22E-1101.
[59] *Butler v. United States*, 614 A.2d 875, 887 (D.C. 1992).
[60] However, the DCCA has clearly held that when one party to the underlying felony causes the death of another, an aider and abettor to the underlying felony may only be convicted of felony murder if the "killing takes place in furtherance of the underlying felony." *Butler v. United States*, 614 A.2d 875 (D.C. 1992).
[61] *Johnson v. United States*, 671 A.2d 428, 433 (D.C. 1995).
[62] *Id.* 433 (emphasis original).
[63] Courts in other states have disagreed about the meaning of "in furtherance" language that is common in felony murder statutes. Some courts have held that "in furtherance" requires that the act that caused the death must have advanced or facilitated commission of the underlying crime. *State v. Arias*, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982); *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005) (the death must occur either "in the course of" or "in furtherance of" immediate flight, so that a defendant commits felony murder only if a death is caused during a participant's immediate flight or while a person is acting to promote immediate flight from the predicate"). However, other states have interpreted "in furtherance" to only require a "logical nexus" between the underlying crime and death, to "exclude those deaths which are so far outside the ambit of the plan of the felony and its execution as to be unrelated to them." *State v. Young*, 469 A.2d 1189, 1192–93 (Conn. 1983); see also, *Noble v. State*, 516 S.W.3d 727, 731 (Ark. 2017) (rejecting appellant's argument that "in furtherance" requires that lethal act facilitated the underlying crime, but noting that a burglary committed with intent to kill cannot serve as a predicate offense to felony murder when the defendant completes the murder, because the murder was not committed in furtherance of the burglary); *People v. Henderson*, 35 N.E.3d 840, 845 (N.Y. 2015) ("[Appellant] asserts that the statutory language "in furtherance of" requires that the death be caused in order to advance or promote the underlying felony. We have not interpreted "in furtherance of" so narrowly."). The RCC tracks the former approach, requiring the death to have advanced or facilitated the commission of the underlying crime.
[64] For example, if in the course of committing a kidnapping, the defendant binds and gags the victim to prevent him from escaping, and the defendant suffocates as a result, felony murder liability would be appropriate. If however, the defendant leaves the kidnapping victim to go on an unrelated errand, and

maintains the revised manslaughter offense as a lesser-included offense of the revised murder offenses.

Third, the revised manslaughter statute incorporates the revised second degree murder statute's requirement for felony murder that the actor commit the lethal act. Current statutory language and DCCA case law do not clarify whether a person can be convicted of felony murder when someone other than the accused committed the lethal act, although case law suggests that a person may not be convicted as a principal to felony murder if that person did not actually commit the lethal act.[65] The revised manslaughter resolves this ambiguity and improves the proportionality of the offense insofar as it is disproportionately severe to punish a person for manslaughter when another person commits the lethal act.[66]

Fourth, the revised manslaughter statute incorporates the revised second degree murder statute's five changes to the specified felonies that can serve as a predicate to felony murder.[67] The current felony murder predicates include: (1) all conduct constituting "robbery," currently an ungraded offense; (2) first degree child cruelty; (3) any "felony involving a controlled substance;"[68] (4) mayhem; and (5) "any housebreaking while armed with or using a dangerous weapon," although it is unclear which specific crimes constitute such "housebreaking."[69] By contrast, the revised manslaughter statute changes current law by clarifying or limiting these predicate crimes

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while doing so causes the death of another by driving negligently, felony murder liability would not be appropriate.

[65] *Lee v. United States*, 699 A.2d 373, 384 (D.C. 1997) ("Since he was not the actual triggerman, he must be deemed an aider and abettor in order to be convicted.").

[66] Three states have gone further and entirely abolished the felony murder rule. Hawaii and Kentucky have abolished the felony murder rule by statute. Haw. Rev. Stat. Ann. § 707-701; Ky. Rev. Stat. Ann. § 507.020. The Michigan Supreme Court abolished the doctrine. *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980) ("We believe that it is no longer acceptable to equate the intent to commit a felony with the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm."). In addition, other states that have retained the felony murder rule require a higher degree of culpability than required under the RCC. For example, New Hampshire's first degree murder offense requires that the defendant *knowingly* caused the death of another while committing or enumerated felony. N.H. Rev. Stat. Ann. § 630:1-a. Alternatively, New Hampshire's second degree murder statute creates a presumption that the defendant acted recklessly with extreme indifference to human life if "the actor causes death by the use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit any class A felony." N.H. Rev. Stat. Ann. § 630:1-b.

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

[68] D.C. Code §22-2101.

[69] Under current law, burglary is divided into two grades, both of which appear to be included in the felony murder statutory reference to "housebreaking." The original 1901 Code codified the offense now known as burglary, but called it "housebreaking." The original "housebreaking" offense only had one grade, and criminalized entry of *any building* with intent to commit a crime therein. In 1940, Congress amended the first degree murder statute and included an enumerated list of felonies, which included housebreaking, for felony murder. See H.R. Rep. Doc. No. 76-1821, at 1 (1940) (Conf. Rep). In 1967, Congress relabeled "housebreaking" as "second degree burglary," and created first degree burglary, which required that the burglar entered an occupied dwelling. However, the DCCA has held that only the current first degree burglary offense may serve as a predicate to non-purposeful felony murder. *Robinson v. United States*, 100 A.3d 95, 109 (D.C. 2014).

to match liability as described in the revised second degree murder statute.[70] This change to the manslaughter offense improves the proportionality and consistency of the criminal code, by ensuring that the punishment is proportionate to the accused's culpability, and maintaining manslaughter as a lesser-included offense of murder offenses.

Fifth, the revised manslaughter statute incorporates the murder statute's bar on accomplice liability for felony murder. Under current District case law, "[a]ccomplices also are liable for felony murder if the killing . . . [is] a natural and probable consequence of acts done in the perpetration of the felony."[71] However, since it is unclear whether under current law voluntary manslaughter includes felony murder, it is unclear whether barring accomplice liability for the "felony murder" version of voluntary manslaughter changes current law.

Four other changes to felony murder liability provided in the revised second degree murder offense may constitute substantive changes to the current law of manslaughter: 1) requiring a negligence mental state as to causing death for felony murder; 2) barring felony murder liability when the decedent was an accomplice to the underlying felony; 3) requiring that the actor committed the lethal act; and 4) barring accomplice liability for voluntary manslaughter under paragraph (a)(3). These four changes limit the scope of felony murder to ensure that the doctrine is only applied when warranted by the accused's culpability, and when innocent bystanders are killed.[72] To the extent that these revisions change the scope of felony murder, they also change the scope of voluntary manslaughter. These possible changes to current law improve the proportionality and consistency of the criminal code. They ensure that the punishment is proportionate to the accused's culpability and maintaining manslaughter as a lesser-included offense of murder offenses.

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

[70] *See,* Commentary to RCC § 22E-1101 for a detailed description of the RCC felony murder predicates as compared to current District law.
[71] *In re D.N.*, 65 A.3d 88, 94 (D.C. 2013).
[72] *See,* Commentary to RCC § 22E-1101.

RCC § 22E-1103. Negligent Homicide.

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

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

Subsection (b) specifies the penalties for negligent homicide. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

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

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

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

[1] See Commentary to RCC § 22E-206.

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

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

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

[5] At times, District courts simply assert that conduct was "negligent" without actually discussing the relevant standard of care, and whether the defendant deviated from it. *E.g.*, *Sanderson v. United States*, 125 A.2d 70, 73 (D.C. 1956) ("Defendant admitted that he did not see the lady pedestrian until he was even

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

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

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

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with the south curb-line of P Street, when she was 3 to 5 feet away, and that he could not account for his failure to see her sooner. This was clearly negligence.").

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

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

[8] Commentary to RCC § 22E-206.

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

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

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

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

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

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

RCC § 22E-1201. Robbery.

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

Subsection (a) specifies the elements of first degree robbery. Paragraph (a)(1) specifies that the defendant must take, or exercise control over property of another.[12] The term "property of another" is defined under RCC § 22E-701 as property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property.[13] Paragraph (a)(1) also specifies that the

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[1] D.C. Code § 22-2801, and 22-2802.
[2] D.C. Code § 22-2803.
[3] D.C. Code § 24-403.01(b-2) (authorizing penalties of more than 30 years for armed carjacking); (e) (statutory minimum of 2 year imprisonment sentence for adults committing armed robbery in violation of D.C. Code § 22-4502 if a prior conviction for crime of violence); D.C. Code 22-2802 Attempt to commit robbery.
[4] D.C. Code § 22-851.
[5] D.C. Code § 22-4502.
[6] D.C. Code § 22-3601.
[7] D.C. Code § 22-3602.
[8] D.C. Code § 22-3611.
[9] D.C. Code §§ 22-3751; 22-3752.
[10] D.C. Code §§ 22-3751.01; 22-3752.
[11] D.C. Code § 24-403.01(b-2).
[12] The conduct described by the phrase "takes, or exercises control over" is the same as the conduct described by identical language in the RCC § 22E-2102 theft and other property offenses.
[13] Generally, this element bars robbery liability if a person uses force or threats to take his or her own property. A person who uses force to take his own property could potentially be found guilty of criminal threats or assault, though a defense of property could be available depending on the facts of the case. *See*, *Gatlin v. United States*, 833 A.2d 995, 1008 (D.C. 2003) ("It is well settled that a person may use as much force as is reasonably necessary to eject a trespasser from his property, and that if he uses more force than

culpable mental state for (a)(1) is knowledge, a term defined at RCC § 22E-206 to mean that the accused must have been aware to a practical certainty that he would take or exercise control over property. Paragraph (a)(1) specifies that a "knowingly" mental state applies to the "property of another" element, requiring that the actor was practically certain that the actor was taking or exercising control over property, and that the property is "property of another."

Paragraph (a)(1) also specifies that the actor must take or exercise control over property within the complainant's "immediate physical control[.]" The phrase "immediate physical control" is intended to follow current District case law defining "immediate actual" possession. Property is within a person's "immediate physical control" when the property is in an "area within which the victim can reasonably be expected to exercise some physical control over the property."[14] Property also is in a person's immediate physical control when that person is able to exercise control over it at the time of the alleged crime, even it is located far enough from that person that he or she cannot exercise physical control over it,[15] or if the property is intangible and is therefore not located in any specific place.[16] Paragraph (a)(1) specifies that a "knowingly" mental state applies to this element, requiring that the actor was aware to a practical certainty that the property was within the complainant's immediate physical control.

Paragraph (a)(2) requires that the actor takes property by one of the means specified in subparagraphs (a)(2)(A)-(D). The alternatives listed under (a)(2)(A)-(D) must play a causal role in the taking, or exercise of control over the property. Temporally, it is not required that when the defendant caused bodily injury, made threats, or used force, he or she had already formed an intent to take or exercise control over property.[17] The causal relationship is satisfied if the use of force or threats to repel an immediate attempt by the owner to re-obtain property taken by the accused,[18] or to keep

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

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

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

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

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

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

property permanently after the other person consented to an initial temporary taking.[19] Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that the means listed in subparagraphs (a)(2)(A)-(D) play a causal role in taking or exercising control over property.[20]

Subparagraph (a)(2)(A) specifies that robbery includes taking property by causing bodily injury to the complainant or anyone else physically present. "Bodily injury" is a term defined under RCC § 22E-701, and requires "physical pain, illness, or any impairment of physical condition." Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that the actor is causing bodily injury.

Subparagraph (a)(2)(B) specifies that robbery includes taking property by communicating, explicitly or implicitly, that the actor immediately will cause another person to suffer a bodily injury, sexual act, sexual contact, confinement, or death. The communication may be verbal or non-verbal.[21] The communication must be about immediate harm; communication of harm that will occur farther into the future do not constitute robbery.[22] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[23] The verb "communicates" is intended to be broadly construed, encompassing all speech[24] and other messages,[25] that are received and understood by another person. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that he or she is explicitly or implicitly communicating a threat that the complainant will suffer bodily injury, a sexual contact, confinement, or death.

Subparagraph (a)(2)(C) specifies that robbery includes taking property by applying physical force that moves or immobilizes another person present. This form of robbery does not require that the force cause bodily injury, but includes shoves or grasps that move or immobilize the complainant. Incidental touching or jostling is insufficient

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

[20] *See*, *Gray v. United States*, 155 A.3d 377 (D.C. 2017) (robbery requires a "conscious of the connection between his assaultive conduct and theft").

[21] For example, a raised fist may implicitly communicate that the actor will punch the complainant unless the complainant hands over property.

[22] Obtaining property by threats of non-immediate harm may constitute extortion under RCC § 22E-2301.

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

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

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

to satisfy this element.[26] Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that he or she is applying force that moves or immobilizes another person.

Subparagraph (a)(2)(D) specifies that robbery includes removing property from the hands or arms of the complainant. Under this form of robbery, no bodily injury, physical force, or threats are required. However, this element is not satisfied if the property is taken from the complainant's immediate possession, but not from the complainant's hands or arms.[27] Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state from paragraph (a)(1) also applies to this element. The actor must be practically certain that he or she is taking property from the complainant's hands or arms.

Paragraph (a)(3) requires that the actor acted "with intent to" deprive the owner of property.[28] "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(4) requires that in the course of committing the robbery, the actor recklessly causes serious bodily injury to another person, other than an accomplice. "Reckless" is a defined term in RCC § 22E-206, which here means that the actor consciously disregarded a substantial risk of causing serious bodily injury. The term "serious bodily injury" is defined in RCC § 22-701 as an injury "that involves: a substantial risk of death; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member or organ." Although the defendant must knowingly use physical force, cause bodily injury, or make threats, recklessness as to causing serious bodily injury suffices.[29]

Subsection (b) specifies three alternate means of committing second degree robbery. First, the actor must satisfy the elements under paragraphs (b)(1), (b)(2), and (b)(3). The elements under paragraphs (b)(1)-(b)(3) are identical to those under (a)(1), (a)(2), and (a)(3) discussed above. In addition to the elements under paragraphs (b)(1)-(b)(3), the actor must satisfy the elements under paragraph (b)(4). Under subparagraph (b)(4)(A) a person commits second degree robbery when, in the course of committing the

[26] For example, if a pickpocket takes another person's wallet, and incidentally jostles the person, this element is not satisfied.

[27] For example, taking a person's wallet from his pocket does not satisfy this element.

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

[29] For example, if a defendant commits robbery by intentionally shoving a person, which inadvertently causes the person to fall down a flight of stairs and suffer serious bodily injury, the defendant may be convicted of first degree robbery even if the defendant did not intend to cause serious bodily injury.

robbery, the actor recklessly causes significant bodily injury to someone physically present, other than an accomplice. "Significant bodily injury" is a term defined under RCC § 22E-701, as an injury that "to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer."[30] The actor must have *knowingly* using physical force, causing bodily injury, or communicated harm. However, it is sufficient if the actor was merely *reckless* as to causing *significant* bodily injury.[31] This requires that the actor consciously disregarded a substantial risk of causing significant bodily injury.

Subparagraph (b)(4)(B) specifies two additional means of committing second degree robbery, based on whether the property is a motor vehicle and the value of the property. Under sub-subparagraph (b)(4)(B)(i), a person commits second degree robbery when the property taken is a motor vehicle. The term "motor vehicle" is defined in RCC § 22E-701. Under sub-subparagraph (b)(4)(B)(ii), a person commits second degree robbery if the property has a value of $5,000 or more. Subparagraph (b)(3)(B) uses the term "in fact," which specifies that strict liability applies to sub-subparagraphs (b)(3)(B)(i) and (ii); there is no culpable mental state as to whether the property is a motor vehicle, or to the property's value.

Subsection (c) specifies the elements of third degree robbery. The elements of third degree robbery, which are specified in paragraphs (c)(1) and (c)(2) are identical to paragraphs (a)(1) and (a)(2) discussed above.

Subsection (d) provides an affirmative defense to robbery if the defendant reasonably believes[32] that the owner of the property, which may not necessarily be the person from whom the property was taken, gives effective consent to the actor taking or exercising control over the property. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[33] RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Even if the defense applies and there is no liability

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

[31] For example, the culpable mental state requirements as to subparagraph (b)(3)(A) may be satisfied when the actor knowingly causes bodily injury by shoving a person to the ground, and in doing so accidentally breaks the person's arm. Although the actor did not intend to break the person's arm, the actor was reckless as to that degree of injury, second degree robbery liability may apply.

[32] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[33] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

under this section, depending on the facts of the case a defendant may still be liable for assault,[34] offensive physical contact[35], or criminal threats.[36]

Subsection (e) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (e)(4) provides two penalty enhancements for first degree robbery. If the government proves the presence of at least one element listed under paragraph (e)(4), the penalty classification for first degree robbery may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6.[37]

Subparagraph (e)(4)(A) specifies as a penalty enhancement that the actor was reckless as to whether the complainant is a protected person. Reckless is defined at RCC § 22E-206, and requires that the actor was aware of a substantial risk that the complainant was a protected person, and that the risk is of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the actor is aware of, its disregard is a gross deviation from the ordinary standard of conduct. The term "protected person" is defined in RCC § 22E-701.

Subparagraph (e)(4)(B) specifies as a penalty enhancement that the actor committed robbery by using or displaying a dangerous weapon or imitation dangerous weapon. This requires that the actor consciously disregarded a substantial risk of displaying or using a dangerous weapon[38] or imitation weapon.[39] The words "displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch.[40] The terms "dangerous weapon" and "imitation dangerous weapon" are defined under RCC § 22E-701. The word "by" requires that the weapon or imitation weapon must have facilitated the robbery. This enhancement does not apply if the actor merely possessed a weapon or imitation weapon in manner that did not facilitate the robbery. Subparagraph (e)(4)(B) uses the term "in fact," which specifies that strict liability applies, and there is no culpable mental state as to whether the item used in the robbery was a dangerous weapon or imitation dangerous weapon. This penalty enhancement requires that the actor used or displayed the weapon or imitation weapon, but does not require that the weapon actually caused injury to the complainant.

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[34] RCC § 22E-1202.
[35] RCC § 22E-1205.
[36] RCC § 22E-1204.
[37] If general penalty enhancements under RCC §22E-606 or §22E-607 apply to this offense, the penalty for RCC § 22E-606 and § 22E-607 shall be based on the classification of the relevant unenhanced gradation of this offense.
[38] Under subsection (F) of the RCC definition of "dangerous weapon," an "imitation dangerous weapon" can qualify as a "dangerous weapon" if the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person. If, for example, a defendant beats a complainant with a fake gun, that fake gun may constitute a "dangerous weapon" if the manner of its actual use is likely to cause death or serious bodily injury.
[39] In many cases, the actor may knowingly or purposely use or display a dangerous weapon or imitation dangerous weapon. Under RCC § 22E-206, either of these culpable mental states satisfies the recklessness requirement for this element.
[40] For example, displaying or using rearranging one's coat to provide a momentary glimpse of part of a knife; holding a sharp object to someone's back; audibly cocking a firearm; or shooting a firearm in the air.

Paragraph (e)(5) provides two penalty enhancements for second and third degree robbery that are the same as under paragraph (e)(4), except that there are more severe penalties for committing the robbery by inflicting a bodily injury or significant bodily injury by recklessly displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. To receive the higher (two penalty class) enhancement the dangerous weapon must directly or indirectly[41] cause the bodily injury or significant bodily injury to the complainant. If the government proves the presence of at least one element listed under paragraph (e)(5)(A), the penalty classification for second and third degree robbery may be increased in severity by one penalty class. If the government proves the presence of the element listed under paragraph (e)(5)(B), the penalty classification for second and third degree robbery may be increased in severity by two penalty classes. The increased penalty reflects the greater risk of more serious injury when actually using a dangerous weapon against another person.[42] These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6. [43]

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

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

First, the revised robbery offense does not criminalize non-violent pickpocketing or taking or exercising control over property without the use of bodily injury, overpowering physical force, or threats to cause bodily injury or to engage in a sexual act or sexual contact, or by taking property from a person's hands or arms. The current robbery and carjacking statutes criminalize all pickpocketing and other takings of property from the person or from the immediate physical control of another by sudden or stealthy seizure, or snatching, even when the complainant did not know the property was taken (and so was not menaced, let alone injured).[44] By contrast, under the RCC, such

[41] For example, if a defendant displays a gun during a robbery and the gun's display causes a complainant to step back, trip, fall, and suffer an injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot.

[42] Similarly, a more severe penalty enhancement is provided for assault by recklessly displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. RCC § 22E-1202(h)(6).

[43] If general penalty enhancements under RCC §22E-606 or §22E-607 apply to this offense, the penalty for RCC §22E-606 and §22E-607 shall be based on the classification of the relevant unenhanced gradation of this offense.

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

non-violent pickpocketing from the person are criminalized as theft[45] instead of robbery, unless the property is taken from the person's hands or arms. Taking an object from the person or from the immediate physical control of another person without his or her knowledge,[46] or with only minor touching that does not cause bodily injury or physical force merits less severe punishment than takings that involve physical harm. This change improves the proportionality of the robbery statute.

Second, the revised robbery statute divides the offense into three penalty grades based on the severity of injury caused during the robbery, and on the value and type of property taken. The current robbery statute consists of a single grade that does not distinguish between crimes in which the defendant went entirely unnoticed by the complainant (e.g., pickpocketing) and those where the defendant inflicted serious bodily injury. By contrast, the revised statute provides three penalty grades, chiefly determined by the severity of injury caused during the robbery. The revised robbery statute largely follows existing District law in conceptualizing robbery as a composite offense involving a theft from a person and an assault. All grades of the revised robbery statute require that the defendant took or exercised control over property from the person or from the immediate physical control of another by causing bodily injury, threatening to immediately kill, kidnap, inflict bodily injury, or commit a sexual act, or using overpowering physical force. The chief variation in the three grades of robbery correspond to the main distinctions under the current and revised assault statute — threats, movement, confinement, and bodily injury; significant bodily injury; and serious bodily injury. The taking of a motor vehicle, accounting for the current carjacking offense, or property value is also integrated into the revised robbery gradations. The revised robbery offense's new grading scheme creates consistency with the revised

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

[45] *See* D.C. Code § 22E-2101.

[46] The DCCA has defined "immediate actual possession" under the robbery statute "refers to the area within which the victim can reasonably be expected to exercise some physical control over the property." *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010). *See also*, *Beaner v. United States*, 845 A.2d 525, 532-33 (D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).

assault offenses, and improves the proportionality of punishment by matching more severe penalties to those robberies that inflict greater harms.

Third, the revised robbery statute includes a penalty enhancement for using or displaying a dangerous weapon or imitation dangerous weapon, and replaces the enhanced penalties authorized under current D.C. Code § 22-4502, when committing robbery "while armed" or "having readily available" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing robbery (and other specified offenses) "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon".[47] Existing District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the defendant either had "actual physical possession of [a weapon]";[48] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[49] provided that the defendant also constructively possessed the weapon.[50] There is no further requirement under current law that the defendant actually used the weapon or caused any injury.[51] By contrast, in the RCC robbery offense the defendant must actually "use or display" a dangerous weapon or imitation dangerous weapon to receive the penalty enhancement. Where the actor inflicts a bodily injury or significant bodily injury by "use or display" of a dangerous weapon, the revised statute provides a more serious (two class) penalty enhancement than when the use or display of the dangerous weapon is otherwise involved in the offense.[52] Merely being armed with or having readily available, a dangerous weapon or imitation dangerous weapon would not be sufficient for the penalty enhancement under the revised statute.[53] Including an enhancement for using or displaying a dangerous weapon or imitation dangerous weapon improves the proportionality of punishment both by matching more severe penalties to those robberies in which a weapon is actually displayed or used, and tailoring the effects of the weapon enhancement instead of relying on a separate statute that generally enhances multiple offenses and levels of robbery with the same penalty.

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[47] D.C. Code § 22-4502.

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

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

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

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

[52] For example, committing the robbery by brandishing a dangerous weapon (but not using it to inflict a bodily injury or significant bodily injury) results in only a one-class enhancement.

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

Fourth, the revised robbery statute's penalty enhancement based on the complainant's status as a "protected person," creates new penalty enhancements for harms to several groups of persons, reduces penalty enhancements for some persons, and creates more proportionate penalties for harms to other groups of persons. Current District statutes provide additional liability for robbery committed against certain groups of persons. The District's protection of District public officials statute penalizes various actions, including robberies, against a District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee.[54] The District also has penalty enhancements for robbery or carjacking of: minors;[55] senior citizens;[56] taxicab drivers;[57] and transit operators and Metrorail station managers.[58] Robbery and assault with intent to rob a member of a citizen patrol[59] are also subject to enhanced penalties.

In contrast with current law, the RCC robbery statute, through its reference "protected person," extends a new penalty enhancement to groups recognized elsewhere in the current D.C. Code as meriting special treatment: non-District government law enforcement and public safety employees in the course of their duties;[60] operators of private-vehicles-for hire in the course of their duties;[61] vulnerable adults.[62] Unlike current law, the RCC robbery statute, however, does not provide a penalty enhancement for: persons robbed because of their participation in a citizen patrol (but not while on duty);[63] persons robbed because of their status as District employees who do not qualify as District officials (but not while on duty);[64] and persons robbed because of their familial relationship to a District official or employee;[65] persons under the age of 18 (unless the defendant is 18 years of age or older, and at least 4 years older than the complainant);[66] or persons more than 65 years of age when the defendant is less than 10 years younger than

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

[55] D.C. Code § 22-3611.

[56] D.C. Code § 22-3601.

[57] D.C. Code §§ 22-3751; 22-3752.

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

[59] D.C. Code § 22-3602.

[60] See commentary to RCC § 22E-701 regarding the definition of a law enforcement officer.

[61] While taxicab drivers are currently the subject of a separate enhancement in § 22-3751, the enhancement was enacted in 2001, well before the ubiquity of private vehicles-for-hire. The Council recently amended certain laws applicable to taxicabs and taxicab drivers to include private vehicles-for-hire. Vehicle-for-Hire Accessibility Amendment Act of 2016.

[62] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.

[63] D.C. Code § 22-3602(b).

[64] D.C. Code § 22-851.

[65] D.C. Code § 22-851.

[66] D.C. Code § 22-3611 authorizes heightened penalties for robbery when the complainant is under the age of 18, and the actor is at least 2 years older than the complainant.

the complainant.[67] The RCC robbery statute also applies the penalty enhancements across multiple gradations, rather than the one robbery and one carjacking gradation in current law, creating a more proportionate application of all these penalty enhancements.[68] The RCC robbery statute also limits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the display or use of a weapon.[69]

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

Fifth, the revised robbery offense provides distinct liability for carjacking in its gradations and requires a person to act knowingly with respect to taking or exercising control over a motor vehicle. Under current law carjacking is a legally distinct offense and only requires that the person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle. However, there is no clear basis for requiring a lower culpable mental state for carjacking as compared to robbery generally, and it is not clear from legislative history that the Council intended such a difference.[70] By contrast, requiring a knowing culpable mental state is consistent with the current D.C. Court of Appeal's (DCCA) requirement of knowledge as to the lack of effective consent in the District's unauthorized use of a motor vehicle (UUV) statute[71] and in the revised UUV statute. Requiring a knowing culpable mental state also makes the revised robbery

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[67] D.C. Code § 22-3601 authorizes heightened penalties for robbery when the complainant is 65 years of age or older, but does not require that the defendant be at least 10 years younger than the complainant.

[68] The District's current penalty enhancements for minors, senior citizens, taxicab drivers, transit operators, and citizen patrol members increase the maximum term of imprisonment by 1 ½ times the amount otherwise authorized. Robbery currently has a 2-15 year imprisonment penalty (3-22.5 years with one enhancement) and carjacking has a 7-21 year imprisonment penalty (10.5-31.5 years with one enhancement).

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

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

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

offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[72] Including carjacking as a form of robbery also improves the proportionality of punishment by prohibiting convictions for both robbery and carjacking based on a single act or course of conduct.[73] In addition, including carjacking by using or displaying a dangerous weapon or imitation dangerous weapon as a gradation of robbery also replaces the portion of current D.C. Code § 24-403.01(b-2) that authorizes heightened penalties for committing carjacking while armed.[74] Replacing this portion of the current statute improves the clarity and proportionality of the revised offense.

Sixth, the revised robbery statute punishes attempted robbery the same as most other criminal attempts.[75] Current District law provides a specific penalty for attempted robbery, apart from the general penalty for attempted crimes.[76] There is no clear rationale for such special attempt penalties in robbery as compared to other offenses. In contrast, under the revised robbery statute, the general part's attempt provisions[77] will establish penalties for attempted robbery (including robbery of a motor vehicle) consistent with other offenses. This change improves the consistency of the revised robbery statute with other offenses.

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

First, the revised robbery statute requires that the defendant knowingly takes or exercises control over property. The current robbery statute does not specify a culpable mental state for this element and no case law exists directly on point. However, the DCCA has stated that robbery requires a "felonious taking,"[78] suggesting that a culpable mental state similar to that of theft should be applied. As a "knowing" culpable mental state applies to the revised theft statute,[79] an identical culpable mental state is provided for robbery. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[80] Requiring a knowing culpable mental state also makes the

[72] *See, e.g.*, RCC § 22E-2101.
[73] *Bryant v. United States*, 859 A.2d 1093, 1108 (D.C. 2004) (noting that armed carjacking and armed robbery convictions do not merge) (citing *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997)).
[74] D.C. Code § 22-403.01 (b-2) (enumerating aggravating circumstances that authorize a maximum penalty of more than 30 years for armed carjacking).
[75] To clarify, attempted robbery is distinguished from completed robbery that involves an attempted theft. Completed robbery still requires that the defendant actually used physical force, caused bodily injury, or committed criminal menace. Attempted robbery does not necessarily require that the defendant actually satisfied any of those elements.
[76] D.C. Code § 22-2802.
[77] RCC § 22E-301.
[78] *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996).
[79] RCC § 22E-2101.
[80] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[81]

Second, the revised robbery statute requires that the property be "of another." The current statute does not explicitly require that the property taken be "of another." However, as noted above, the DCCA has held that the current robbery statute incorporates the elements of "larceny,"[82] which requires that property be of another.[83] Moreover, DCCA case law and current District practice suggests that carjacking liability similarly requires the property to be of another.[84] Requiring that the property be "of another" would codify this element suggested in District case law, and would bar a robbery conviction in cases in which the defendant took his or her own property.[85] This change clarifies existing law and improves penalty proportionality by limiting the more severe robbery penalties to conduct that involves an illegal taking, exercise of control, or attempted taking or exercise of control over another's property.

Third, the revised robbery statute's penalty enhancements incorporate statutory provisions that increase penalties based on the complainant's age, the status of the complainant as a vulnerable adult, a law enforcement officer, public safety employee, District official or transportation worker acting in the course of his or her duties, requiring recklessness as to the complainant's status. The current robbery statute does not itself provide for any additional penalties based on the status of the victim. However, multiple separate statutory provisions apply to robbery in existing law, and are captured by the language in the revised robbery statute.[86] The language of these statutes is silent as to the culpable mental state, and there is virtually no case law construing these statutory enhancements.[87] However, while none of the statutes specify a culpable mental state, it is notable that D.C. Code § 22-3601 and D.C. Code § 22-3602 have affirmative defenses that exculpate where the defendant "reasonably believed" the victim was not a

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[81] *See, e.g.*, RCC § 22E-2101.

[82] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements.").

[83] At common law larceny required an intent to deprive the owner of the property, which is not possible if the property belongs to the person who takes it. Wayne, Lafave. § 20.3.Robbery, 3 Subst. Crim. L. § 20.3 ("Robbery consists of all six elements of larceny—a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or presence of the other and (8) that the taking be accomplished b means of force or putting in fear.").

[84] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").

[85] Depending on the facts, prosecutions for criminal menace or assault nonetheless may be warranted where a person takes back one's own property by criminal menace, overpowering physical force, or bodily injury.

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

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

senior or minor. Such affirmative defenses suggest that strict liability does not apply, at least to those penalty enhancements, and suggest that some subjective awareness is necessary. Accordingly, the revised robbery statute requires a reckless culpable mental state as to the relevant circumstances of age, occupation, etc. This change clarifies the requisite culpable mental state requirements.

Fourth, the revised robbery statute can be satisfied if the defendant "takes or exercises control over" property. In contrast, the current robbery statute requires that the defendant "takes" property, but does not use the words "exercise control over" property. However, it is not clear that these words substantively alter the scope of the offense. The DCCA has held that robbery incorporates the elements of larceny, and both the revised and current theft statutes include "taking" and "exercising control over" property.[88] Including "exercises control over" in the revised robbery statute would ensure that various means of conduct constituting theft would suffice for robbery even if there was no "taking."[89] Including "exercises control over" also is consistent with current law with respect to carjacking. The DCCA has stated that a person may be convicted of carjacking "by burning the vehicle (or, perhaps stripping it) without taking, using, operating or removing it from its location."[90] The revised robbery statute more clearly and consistently tracks the theft-type conduct recognized in current law.

Fifth, the revised robbery statute requires that the defendant knowingly caused bodily injury; communicated that the actor will immediately cause a person to suffer bodily injury, a sexual act, sexual contact, confinement, or death; moved or immobilized another person; or took property from the hands or arms of the complainant. If a defendant is only reckless as to these elements, he or she cannot be convicted of robbery, even if he or she recklessly caused force or injury that facilitates taking property. The current District robbery and carjacking statutes are silent as to what, if any culpable mental state applies to such conduct, and District case law has not clarified the issue.[91] The lack of clarity on this issue is perhaps not surprising, given that the current robbery offense only requires that the defendant took property from the from the person or from the immediate physical control of a person, and provides that the force requirement can be satisfied by moving the property to the slightest degree. Under current law, a defendant who injures another, and then intentionally takes property from that person's immediate possession would be guilty of robbery, regardless of whether he caused the injury knowingly or recklessly.[92] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a

[88] D.C. Code § 22E-2101; D.C. Code §22-3211(a)(1).
[89] For example, if a defendant used threat of force to compel a person to relinquish property and give it to a third person, the defendant could still be convicted of robbery even though he himself did not take the property.
[90] *Allen v. United States*, 697 A.2d 1, 2 (D.C. 1997).
[91] *See*, *Gray*, 155 A.3d at 396 (J. McCleese dissenting) ("Our cases leave me uncertain as to whether a defendant must laws have intentionally deployed force or violence in order to be guilty of robbery").
[92] *But see*, *Gray*, 155 A.3d at 386 ("We are not persuaded by the dissent's argument that *Leak* stands for the proposition that 'any taking' from the 'immediate actual possession' of the victim 'is a robbery—not simple larceny.'").

well-established practice in American jurisprudence.[93] Requiring a knowing culpable mental state also makes the revised robbery statute consistent with offenses like theft, which generally require that the defendant act knowingly with respect to the elements of the offense.[94]

Sixth, under the revised robbery statute the defendant not only must have taken or exercised control over property, by causing bodily injury, communicating threats, or by applying physical force—the defendant also must know that the bodily injury, communication, or physical force in some way facilitated taking or exercising control over the property. The current robbery and carjacking statutes are silent as to what culpability may be required as to whether the use of force, etc. facilitated taking or exercising control over the property. Current District case law holds that a person can commit robbery if he or she "takes advantage of a situation which he created by use of force," and that "it is hard to see how that is done without some *awareness* of the opportunity being exploited."[95] The DCCA does not specify, however, what degree of awareness is required under the current robbery statute. The revised statute requires knowledge, which is consistent with the DCCA's current holding, and reflects longstanding recognition that the conduct constituting a case generally must be known by the defendant.[96]

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

[93] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[94] *See, e.g.*, RCC § 22E-2101.
[95] *Gray*, 155 A.3d at 383 (emphasis added).
[96] *See Elonis*, 135 S. Ct. at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)"). The causal relationship between the use of overpowering force, bodily injury, or menace and the taking or exercising control over property is at the heart of robbery as a composite offense comprised of assault and theft-type conduct.

RCC § 22E-1202. Assault.

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

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[1] As is discussed in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205) criminalize this conduct and should also be considered to replace many of these current D.C. Code "assault" offenses although they are generally not discussed in this commentary.

[2] D.C. Code § 22-401.

[3] D.C. Code § 22-401.

[4] D.C. Code § 22-401.

[5] D.C. Code § 22-401.

[6] D.C. Code § 22-401.

[7] D.C. Code § 22-401.

[8] D.C. Code § 22-401.

[9] D.C. Code § 22-402.

[10] D.C. Code § 22-403.

[11] D.C. Code § 22-404(a)(1).

[12] D.C. Code § 22-401(a)(2).

[13] D.C. Code § 22-404.01.

[14] D.C. Code § 22-404.02.

[15] D.C. Code § 22-404.03.

[16] D.C. Code § 22-405.

[17] D.C. Code § 22-405.

[18] D.C. Code § 22-406.

[19] D.C. Code § 22-406.

[20] D.C. Code § 22-851.

[21] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f)(1) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been

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

Subsection (a) specifies the two types of prohibited conduct for first degree assault, the highest grade of the revised assault offense. Paragraph (a)(1) specifies one type of prohibited conduct—causing serious and permanent disfigurement to the complainant. Paragraph (a)(2) specifies the second type of prohibited conduct—destroying, amputating, or permanently disabling a member or organ of the complainant's body. Subsection (a) specifies a culpable mental state of "purposely." Per the rules of construction in RCC § 22E-207, the "purposely" culpable mental state in subsection (a) applies to the elements in paragraph (a)(1) and paragraph (a)(2). "Purposely" is a defined term in RCC § 22E-206 that here means that the accused must consciously desire that he or she causes serious and permanent disfigurement to the complainant or destroys, amputates, or permanently disables a member or organ of the complainant's body.

Subsection (b) specifies the prohibited conduct for second degree assault—causing "serious bodily injury" to the complainant. "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted unconsciousness, or protracted loss or impairment of the function of a bodily member or organ. Subsection (b) specifies a culpable mental state of "recklessly, with extreme indifference to human life." A "recklessly" culpable mental state is a defined term in RCC § 22E-206 that here means that the accused consciously disregarded a substantial risk of causing serious bodily injury to the complainant, and the risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, its disregard is a gross deviation from the ordinary standard of conduct. However, recklessness alone is insufficient for the culpable mental state of "recklessly, with extreme difference to human life," that is required in subsection (b). The accused must also act "with extreme indifference to human life." This language is intended to codify the same standard used in current D.C. Court of Appeals (DCCA) case law defining what is commonly known as "depraved heart murder."[28] In contrast to the

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convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[22] D.C. Code § 22-4502.

[23] D.C. Code § 22-3601.

[24] D.C. Code § 22-3602.

[25] D.C. Code § 22-3611.

[26] D.C. Code §§ 22-3751; 22-3752.

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

[28] *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011) (Farrell, J. concurring). *See also Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (noting that examples of depraved heart murder include firing a bullet into a room occupied, as the defendant knows, by several people; starting a fire at the front door of an occupied dwelling; shooting into . . . a moving automobile, necessarily occupied by human beings . . . .; playing a game of 'Russian roulette' with another person [.]"); *Jennings v. United States*, 993 A.2d 1077, 1078 (D.C. 2010) (depraved heart murder when defendant fired a gun at across a street towards a group of people, hitting and killing one of them); *Powell v. United States*, 485 A.2d 596 (D.C. 1984)

"substantial" risks required for ordinary recklessness, the depraved heart murder standard requires that the accused consciously disregarded an "*extreme* risk of causing serious bodily injury."[29] For example, the DCCA has recognized extreme indifference to human life when a person caused the death of another by driving at speeds in excess of 90 miles per hour, and turning onto a crowded onramp in an effort to escape police[30]; firing ten bullets towards an area where people were gathered[31]; and providing a weapon to another person, knowing that person would use it to injure a third person.[32] Although it is not possible to specifically define the degree and nature of risk that is "extreme," the "extreme indifference" language codifies all DCCA case law regarding "depraved heart" murder, which is also applicable to the current aggravated assault statute.

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

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

Subsection (e) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. An actor does not commit an offense under the revised assault statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (e) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[33]

(defendant guilty of depraved heart murder when he led police on a high speed chase, drove at speeds of up to 90 miles per hour, turned onto a congested ramp and caused a fatal car crash).

[29] *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (en banc) (emphasis added).

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

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

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

[33] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

Subsection (f) codifies two defenses for the assault statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (f)(1) codifies a defense for first degree (subsection (a)) and second degree (subsection (b)) of the revised assault statute—causing serious and permanent disfigurement to the complainant, destroying, amputating, or permanently disabling the complainant, and causing "serious bodily injury" to the complainant, as that term is defined in RCC § 22E-701.

Paragraph (f)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (f)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. First, per subparagraph (f)(1)(A), the injury must be caused by a "lawful cosmetic or medical procedure." The "lawful" requirement applies both to a cosmetic procedure and a medical procedure. As specified by use of "in fact" in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is part of a lawful cosmetic or medical procedure. A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they are otherwise legal under District or federal law. Cosmetic procedures that are legal[34] also are within the scope of the defense. Unlike the effective consent defense to third degree and fourth degree of the revised assault statute under paragraph (f)(2), the defense under paragraph (f)(1) applies to serious injuries, such as permanent disfigurement, and injuries that entail a substantial risk of death or otherwise satisfy the RCC definition of "serious bodily injury" in RCC § 22E-701,[35] as long as they are part of a lawful cosmetic or medical procedure.

Subparagraph (f)(1)(B) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under 18 years of age, RCC § 22E-701 defines a "person with legal authority over the complainant" as "a parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent under civil law" and "effective consent" also are defined terms in RCC § 22E-701. When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "a court-appointed guardian to the complainant, or someone acting

[34] *See,* e.g., D.C. Code § 47–2853.81. Scope of practice for cosmetologists.

[35] RCC § 22E-701 defines "serious bodily injury" as "a bodily injury or significant bodily injury that involves: (A) A substantial risk of death; (B) Protracted and obvious disfigurement; (C) Protracted loss or impairment of the function of a bodily member or organ; or (D) Protracted loss of consciousness."

with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of subparagraph (f)(1)(B) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense[36] to first degree or second degree assault. However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[37]

Subparagraph (f)(1)(C) and its sub-subparagraphs specify the individuals from whom an actor must receive "effective consent" in order for the defense to apply. Each sub-subparagraph will be discussed separately, but general principles that apply to each sub-subparagraph will be discussed first.

Subparagraph (f)(1)(C) requires that the actor "reasonably believes"[38] that the specified individuals in the following sub-subparagraphs—either the complainant or a "person with legal authority over the complainant" acting consistent with that authority—give "effective consent" to the actor to cause the injury. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (f)(1)(C) and its sub-subparagraphs permit complainants under the age of 18 years to give effective consent in certain situations, the defendant's belief that a very young person gave "consent" may not be reasonable, and the defense would not apply.

The "in fact" specified in paragraph (f)(1) applies to subparagraph (f)(1)(C) and the requirements in the following sub-subparagraphs. No culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(1)(C) or the following sub-subparagraphs. It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. [39] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[40] There is no effective

[36] The defense under paragraph (f)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[37] These defenses have different requirements than the effective consent defense in paragraph (f)(1). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[38] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[39] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[40] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the

consent defense under subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Subparagraph (f)(1)(C) further requires that the actor "reasonably believes" that the complainant and the actor meet various age requirements in the following sub-subparagraphs. As is discussed above, due to the "in fact" specified in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(1)(C) or the following sub-subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[41] that the actor and the complainant satisfy the age requirements in the sub-subparagraphs under subparagraph (f)(1)(C). There is no effective consent defense under subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the required age of the complainant or required age of the actor.

Finally, subparagraph (f)(1)(C) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in paragraph (f)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(1)(C) or the following sub-subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[42] that there is effective consent to cause the injury. There is no effective consent defense under

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situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[41] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[42] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

subparagraph (f)(1)(C) when the actor makes an unreasonable mistake as to the type of injury to which effective consent is given.[43]

Having discussed the general principles that apply to the defense requirements in subparagraph (f)(1)(C) and its sub-subparagraphs, each sub-subparagraph will now be discussed.

Under subparagraph (f)(1)(C) and sub-subparagraph (f)(1)(C)(i), the actor must reasonably believe that the complainant is 18 years of age or older and that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to cause the injury. As is discussed above, "effective consent" and "person with legal authority over the complainant" are defined terms in RCC § 22E-701. The provision in sub-subparagraph (f)(1)(C)(i) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of incompetent adults giving effective consent to the actor.

Second, and in the alternative, under subparagraph (f)(1)(C) and sub-subparagraph (f)(1)(C)(ii), the actor must reasonably believe that the complainant is under 18 years of age, the actor is 18 years of age or older, and that a "person with legal authority over the complainant" gives "effective consent" to the actor to cause the injury. Given the seriousness of the injury under subsections (a) and (b) of the revised assault statute, an actor over the age of 18 years must have the consent of a parent or other "person with legal authority over the complainant" before causing the injury to a minor complainant.

Finally, and in the alternative, under subparagraph (f)(1)(C) and sub-subparagraph (f)(1)(C)(iii), the actor must reasonably believe that the complainant is under 18 years of age, the actor is under 18 years of age, and the complainant gives "effective consent" to the actor to cause the injury. An actor that is under the age of 18 years will generally not perform any lawful cosmetic or medical procedures on another minor, but there may be extraordinary or unusual situations such as emergency first aid or administration of an over-the-counter skin treatment where the requirements of the defense are met.

Paragraph (f)(2) codifies a defense for third degree (subsection (c)) and fourth degree (subsection (d)) of the revised assault statute—causing "significant bodily injury" or "bodily injury" to the complainant, as those terms are defined in RCC § 22E-701.

Paragraph (f)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (f)(2) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

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[43] For example, if, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor unreasonably believes that the complainant gives effective consent to cause "serious bodily injury," the effective consent defense does not apply, and the actor is still guilty of second degree of the revised assault statute. However, the inverse is also true. If, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor *reasonably* believes that the complainant gives effective consent to "serious bodily injury," the effective consent defense does apply, and the actor is not guilty of second degree of the revised assault statute.

There are several requirements to the defense. The requirement in subparagraph (f)(2)(A) that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, is identical to the requirement in subparagraph (f)(1)(B), discussed above.

Subparagraph (f)(2)(B) and its sub-subparagraphs specify the individuals from whom an actor must receive "effective consent" in order for the defense to apply. Each sub-subparagraph will be discussed separately, but general principles that apply to each sub-subparagraph will be discussed first.

Subparagraph (f)(2)(B) requires that the actor "reasonably believes"[44] that the specified individuals in the following sub-subparagraphs—either the complainant or a "person with legal authority over the complainant" acting consistent with that authority—give "effective consent" to the actor to cause the injury. "Effective consent" is a defined term in RCC § 22E-701 and is defined to incorporate the RCC definition of "consent." These terms, and their applicability to the defense in paragraph (f)(1) for first degree and second degree assault, are discussed above. This discussion also applies to the defense to third degree and fourth degree assault under subparagraph (f)(2)(B).

The "in fact" specified in paragraph (f)(2) applies to subparagraph (f)(2)(B) and the requirements in the following sub-subparagraphs. No culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(2)(B) or the following sub-subparagraphs. It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[45] There is no effective consent defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Subparagraph (f)(2)(B) further requires that the actor "reasonably believes"[46] that the complainant and the actor meet various age requirements in the following sub-subparagraphs. As is discussed above, due to the "in fact" specified in paragraph (f)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(2)(B) or the following sub-subparagraphs. However, the actor must subjectively believe, and

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[44] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[45] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[46] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

that belief must be reasonable[47] that the actor and the complainant satisfy the age requirements in the sub-subparagraphs under subparagraph (f)(2)(B). There is no effective consent defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the required age of the complainant, the required age of the actor, or any required age gap.

Finally, subparagraph (f)(2)(B) requires that the actor "reasonably believes"[48] that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in paragraph (f)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (f)(2)(B) or the following sub-subparagraphs. However the actor must subjectively believe, and that belief must be reasonable[49] that there is effective consent to cause the injury. There is no effective consent defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the type of injury to which effective consent is given.

Having discussed the general principles that apply to the defense requirements in subparagraph (f)(2)(B) and its sub-subparagraphs, each sub-subparagraph will now be discussed.

Under subparagraph (f)(2)(B) and sub-subparagraph (f)(2)(B)(i), the actor must reasonably believe that the complainant is 18 years of age or older and that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to either cause the injury, or to engage in a lawful sport, occupation, or other concerted activity.[50] As is discussed above, "effective consent" and "person with legal authority over the complainant" are defined terms in RCC § 22E-701. The provision in sub-subparagraph (f)(2)(B)(i) for a "person

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[47] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[48] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[49] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[50] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of incompetent adults giving effective consent to the actor. If the injury occurs during a lawful sport, occupation, or other concerted activity, the defense is applicable when the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in paragraph (f)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's infliction of the injury is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the injury is not a reasonably foreseeable hazard.

Second, and in the alternative, under subparagraph (f)(2)(B) and sub-subparagraph (f)(2)(B)(ii), the actor must reasonably believe that the complainant is under 18 years of age and the actor is 18 years of age or older and more than four years older than the complainant (sub-sub-subparagraph (f)(2)(B)(ii)(I)). In addition, the actor must reasonably believe that a "person with legal authority over the complainant" gives "effective consent" to the actor to either cause the injury, or to engage in a lawful sport, occupation, or other concerted activity,[51] where the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (f)(2)(B)(i) applies here to sub-sub-subparagraph (f)(2)(B)(ii)(II).

Finally, and in the alternative, under subparagraph (f)(2)(B) and sub-subparagraph (f)(2)(B)(iii), the actor must reasonably believe that the complainant is under 18 years of age, and that the actor is either under years of age or over 18 years of age and not more than four years older (sub-sub-subparagraph (f)(2)(B)(iii)(I)). Subparagraph (f)(2)(B) and sub-sub-subparagraph (f)(2)(B)(iii)(II) further require that the actor must reasonably believe that the complainant gives "effective consent" to the actor to cause the injury, or to engage in a lawful sport, occupation, or other concerted activity,[52] where the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (f)(2)(B)(i) applies here to sub-sub-subparagraph (f)(2)(B)(iii)(II).

Subsection (g) specifies rules for imputing a conscious disregard of the risk required to prove that the person acted with extreme indifference to human life. Under the principles of liability governing intoxication under RCC § 22E-209, when an offense requires recklessness as to a result or circumstance, that culpable mental state may be imputed even if the person lacked actual awareness of a substantial risk due to his or her self-induced intoxication.[53] However, as discussed above, extreme indifference to human life in subsection (b) requires that the person consciously disregarded an *extreme* risk of death or serious bodily injury, a greater degree of risk than is required for recklessness alone. While RCC § 22E-209 does not authorize fact finders to impute awareness of an

[51] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[52] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

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

extreme risk, this subsection specifies that a person shall be deemed to have been aware of an extreme risk required to prove that the person acted with extreme indifference to human life when the person was unaware of that risk due to self-induced intoxication, but would have been aware of the risk had the person been sober. The term "self-induced intoxication" has the meaning specified in RCC § 22E-209,[54] and the definition specifies certain culpable mental states that must be proven. The use of "in fact" in subsection (g) indicates that no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor was unaware of the risk, but would have been aware of the risk had the actor been sober.

Even when a person's conscious disregard of an extreme risk of death or serious bodily injury is imputed under this subsection, in some instances the person may still not have acted with extreme indifference to human life. It is possible, though unlikely, that a person's self-induced intoxication is non-culpable, and negates finding that the person acted with extreme indifference to human life.[55] In these cases, although the awareness of risk may be imputed, the person could still be acquitted under subsection (b). However, finding that the person did not act with extreme indifference to human life does not preclude finding that the person acted recklessly as required for other forms of assault, provided that his or her conduct was a gross deviation from the ordinary standard of conduct.

Subsection (h) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (h)(5) codifies several penalty enhancements for second degree of the revised assault statute. If any of the specified enhancements apply, the penalty classification for second degree assault is increased by one class.

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

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

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

Subparagraph (h)(5)(A) codifies a penalty enhancement for second degree of the revised assault statute if the actor commits the offense and is reckless as to the fact that the complainant is a "protected person." "Protected person" is a defined term in RCC § 22E-701 that includes individuals such as a law enforcement officer in the course of his or her duties. "Reckless," a term defined at RCC § 22E-206, here means the accused must be aware of a substantial risk that the complainant is a "protected person" as that term is defined in RCC § 22E-701.

Subparagraph (h)(5)(B) codifies a penalty enhancement for second degree of the revised assault statute if the actor commits the offense by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon. The words "displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch.[56] The imitation dangerous weapon or dangerous weapon must directly or indirectly[57] cause the required serious bodily injury. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (h)(5)(A) applies to the elements in subparagraph (h)(5)(B) until "in fact" is specified. "Recklessly" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that the accused committed the offense by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (h)(5)(C) codifies a penalty enhancement if the actor commits the offense with the "purpose" of harming the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official" as those terms are defined in RCC § 22E-701. "Purpose" is a defined term in RCC § 22E-206 that here means that the actor must consciously desire to harm the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official."[58] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes. Per RCC § 22E-205, the object of the phrase "has the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

The penalty enhancements for third degree and fourth degree of the revised assault statute will be discussed in detail, but first a note regarding the gradation scheme.

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

[57] For example, if a defendant displays a gun and the gun's display causes a complainant to step back, trip, fall, and suffer serious bodily injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot.

[58] While the RCC § 22E-701 definitions of "law enforcement officer" and "public safety employee" refer to some persons only when on-duty (e.g., a campus officer), this provision on committing the offense with the purpose of harming the complainant because of their status as a law enforcement officer or public safety employee applies to committing the offense against an off-duty person based on their on-duty role.

Third degree and fourth degree of the revised assault statute are subject to the same penalty enhancements with the same penalty increases as second degree assault with one exception. The display or use of a dangerous weapon to commit third degree assault receives a penalty increase of two classes, and in fourth degree assault, a penalty increase of three classes. This is in contrast to second degree assault where the display or use of a dangerous weapon receives a penalty increase of one class. The different penalty increases in third degree and fourth degree account for the discrepancy between a low-level actual harm and a potentially very serious harm that might have occurred through use of the dangerous weapon. This discrepancy is greatest for the lowest gradation of the offense, fourth degree assault, which requires only bodily injury," and third degree assault, which requires "significant bodily injury." This approach is consistent with current District law.[59] When the offense is committed by the display or use of an imitation dangerous weapon, however, second degree, third degree, and fourth degree of the revised statute consistently receive a penalty increase of one class because there is a lower likelihood of serious harm.

Paragraph (h)(6) codifies several penalty enhancements for third degree of the revised assault statute. Per subparagraph (h)(6)(A), the penalty classification of third degree assault is increased by one class if the penalty enhancements in sub-subparagraphs (h)(6)(A)(i) through (h)(6)(A)(iii) apply. The penalty enhancements in sub-subparagraphs (h)(6)(A)(i) through (h)(6)(A)(iii) are the same as the penalty enhancements in subparagraphs (h)(5)(A) through (h)(5)(C), discussed above, except that sub-subparagraph (h)(6)(A)(ii) is limited to an "imitation dangerous weapon."

Subparagraph (h)(6)(B) specifies that the penalty classification for third degree assault is increased by two classes if the actor commits the offense by recklessly displaying or using what, in fact, is a dangerous weapon. The words "displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch.[60] The dangerous weapon[61] must directly or indirectly[62] cause the required significant bodily injury. "Recklessly" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that the accused committed the offense by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here

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[59] *See* D.C. Code § 22–402, Assault with intent to commit mayhem or with dangerous weapon (providing up to a ten year penalty for assault with a dangerous weapon, regardless of the resulting harm, a penalty equal to that for actually inflicting serious bodily injury under the current D.C. Code aggravated assault statute, D.C. Code § 22-404.01).

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

[61] Under subsection (F) of the RCC definition of "dangerous weapon," an "imitation dangerous weapon" can qualify as a "dangerous weapon" if the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person. If, for example, a defendant beats a complainant with a fake gun, that fake gun may constitute a "dangerous weapon" if the manner of its actual use is likely to cause death or serious bodily injury.

[62] For example, if a defendant displays a gun and the gun's display causes a complainant to step back, trip, fall, and suffer significant bodily injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot.

whether the item displayed or used is a "dangerous weapon" as that term is defined in RCC § 22E-701.

Paragraph (h)(7) codifies several penalty enhancements for fourth degree of the revised assault statute. Per subparagraph (h)(7)(A), the penalty classification of fourth degree assault is increased by one class if the penalty enhancements in sub-subparagraphs (h)(7)(A)(i) through (h)(7)(A)(iii) apply. The penalty enhancements in sub-subparagraphs (h)(7)(A)(i) through (h)(7)(A)(iii) are the same as the penalty enhancements in subparagraph (h)(5)(A) and (h)(5)(C), discussed above, except that sub-subparagraph (h)(6)(A)(ii) is limited to an "imitation dangerous weapon."

Subparagraph (h)(7)(B) specifies that the penalty classification for fourth degree assault is increased by three classes if the actor recklessly commits the offense by displaying or using what, in fact, is a dangerous weapon. The words "displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch.[63] The dangerous weapon[64] must directly or indirectly[65] cause the required bodily injury. "Recklessly" is a defined term in RCC § 22E-206 that here means being aware of a substantial risk that the accused committed the offense by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a given element, here whether the item displayed or used is a "dangerous weapon" as that term is defined in RCC § 22E-701.

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

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

First, the revised assault statute does not criminalize as a completed offense conduct that falls short of inflicting "bodily injury," as that term is defined in RCC § 22E-701. Under current District law, an assault[66] includes: 1) intent-to-frighten assaults that do not result in physical contact with the complainant's body;[67] 2) non-violent sexual

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

[64] Under subsection (F) of the RCC definition of "dangerous weapon," an "imitation dangerous weapon" can qualify as a "dangerous weapon" if the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person. If, for example, a defendant beats a complainant with a fake gun, that fake gun may constitute a "dangerous weapon" if the manner of its actual use is likely to cause death or serious bodily injury.

[65] For example, if a defendant displays a gun and the gun's display causes a complainant to step back, trip, fall, and suffer bodily injury from the fall, the weapon penalty enhancement would be satisfied even though there was no gunshot.

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

[67] *See, e.g.*, *Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006) ("To establish intent-to-frighten assault, the government must prove: (1) that the defendant committed a threatening act that reasonably would create in another person the fear of immediate injury; (2) that, when he/she committed the act, the defendant had the apparent present ability to injure that person; and (3) that the defendant committed the act voluntarily, on purpose, and not by accident or mistake."). The DCCA has made it clear that in intent-to frighten assaults, the accused must have the intent to cause fear in the complaining witness. *See, e.g.*, *Sousa v. United States*, 400 A.2d 1036, 1044 (D.C. 1979) ("Our attention is focused "upon the menacing

touching[68] that causes no pain or impairment to the complainant's body; and 3) any completed battery where the accused inflicts an unwanted touching on the complainant that causes no pain or impairment to the complainant's body.[69] However, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient.[70] In contrast, the revised assault statute is limited to causing three types of bodily injury—"serious bodily injury," "significant bodily injury," and "bodily injury"—as those terms are defined in RCC § 22E-701—as well as serious and permanent disfigurement and injuries. Depending on the facts of a case, conduct that falls short of inflicting "bodily injury" may be criminalized as attempted assault under the general attempt provision (RCC § 22E-301) or other RCC offenses such as offensive physical contact (RCC § 22E-1205),[71] criminal threats (RCC § 22E-1204), or weapons offenses. This change improves the clarity, consistency, and proportionality of the revised statutes.

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conduct of the accused and his purposeful design either to engender fear in or do violence to his victim."); *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986) ("Intent-to-frighten assault, on the other hand, requires proof that the defendant intended either to cause injury or to create apprehension in the victim by engaging in some threatening conduct; an actual battery need not be attempted.") (citing W. LaFave & A. Scott, Handbook on Criminal Law § 82, at 610–612 (1972)).

[68] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)); *see also Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

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

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

[71] The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting "bodily injury." Offensive physical contact that satisfies the RCC offensive physical contact offense may be sexual in nature. However, depending on the facts of the case, other offenses in the RCC may provide more serious liability for offensive touching that is sexual in nature such as other RCC Chapter 12 offenses, RCC weapons offenses, or RCC sex offenses in Chapter 13. The RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law. *See, e.g.*, *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020).

Second, the RCC no longer criminalizes as separate offenses assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery, assault with intent to commit mayhem, and assault with intent to commit any other felony. Current District law criminalizes this conduct as separate offenses[72] collectively referred to as the "assault with intent to" or "AWI" offenses. In contrast, in the RCC, liability for the conduct criminalized by the current AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[73] The *actus reus*[74] and the required culpable mental state[75] of an attempt in the RCC provide for liability that is at least as expansive as that afforded by the current AWI offenses. This change improves the clarity of the revised assault statute, eliminates unnecessary overlap between the AWI offenses and general attempt liability

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

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

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

[75] Under current District law, both AWI offenses and criminal attempts require proof of a "specific intent" to commit the target offense. For District authority on the specific intent requirement in the context of AWI offenses, *see Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999); *Riddick v. United States*, 806 A.2d 631, 639 (D.C. 2002); *Di Snowden v. United States*, 52 A.3d 858, 868 (D.C. 2012); *Robinson v. United States*, 50 A.3d 508, 533 (D.C. 2012). For District authority on the specific intent requirement in the context of criminal attempts, see Judge Beckwith's concurring opinion in *Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015) (discussing, among other cases, *Sellers v. United States*, 131 A.2d 300 (D.C.1957); *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987); and *Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975)).
Notably, the DCCA has never clearly defined the meaning of the phrase "specific intent"—indeed, as one DCCA judge has observed, the phrase itself is little more than a "rote incantation[]" of "dubious value" which obscures "the different *mens rea* elements of a wide array of criminal offenses." *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring). Ambiguities aside, however, it seems relatively clear from District authority in the context of both AWI and attempt offenses that, first, the *mens rea* applicable to both categories of offenses—the intent to commit the ulterior or target offense—is the same. *Compare* D.C. Crim. Jur. Instr. § 4.110-12 (jury instructions on AWI offenses) *with* D.C. Crim. Jur. Instr. § 7.101 (jury instruction on criminal attempts). And second, it seems clear that this *mens rea* roughly translates to acting purposely or knowingly. *See* Second Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code—Basic Requirements of Offense Liability, pgs. 5-8 (May 5, 2017); First Draft of Report No. 7, Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Attempt, pgs. 8-11 (June 7, 2017).

for assault-type offenses, and improves the proportionality of the revised statutes by applying a consistent attempt penalty.

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. The D.C. Code currently specifies penalties for the crimes of mayhem and malicious disfigurement,[76] although the elements of these offenses are established wholly by case law. The DCCA has said that malicious disfigurement requires proof that a person caused a permanent disfigurement[77] and mayhem requires proof that someone caused a permanently disabling injury.[78] Both offenses require a mental state of malice[79] and proof of the absence of mitigating circumstances,[80] although the DCCA has said that malicious disfigurement requires a specific intent to injure that mayhem does not.[81] Yet, while such requirements are similar to, and for some fact patterns more demanding than, the current aggravated assault statute,[82] mayhem and malicious disfigurement have the same ten-year maximum penalty

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

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

[78] *Edwards v. United States*, 583 A.2d at 668 & n.12 ("The elements of mayhem are: (1) that the defendant caused permanent disabling injury to another; (2) that he had the general intent to do the injurious act; and (3) that he did so willfully and maliciously.") (citing *Wynn v. United States*, 538 A.2d 1139, 1145 (D.C. 1988)); *see also Peoples v. United States*, 640 A.2d 1047, 1054 (D.C. 1994) ("The court has stated that '[t]he mayhem statute seeks to protect the preservation of the human body in its normal functioning and the and the integrity of the victim's person from permanent injury or disfigurement.'" (quoting *McFadden v. United States*, 395 A.2d 14, 18 (D.C. 1978)).

[79] *See, e.g.*, *Edwards v. United States*, 583 A.2d 661, 668-669 (D.C. 1990) (stating that the "elements of malicious disfigurement are . . . that the defendant was acting with malice" and that the "elements of mayhem are . . . that he [caused the permanent disabling injury] willfully and maliciously.") (internal citations omitted).

[80] *Burton v. United States*, 818 A.2d 198, 200 (D.C. 2003) (approving a jury instruction for malicious disfigurement that, instead of using the term "malice," listed the requirements of the mental state, including that "there were no mitigating circumstances."); *see also Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("In other non-homicide areas of the law," including malicious disfigurement, "we have defined malice as intentional conduct done without provocation, justification, or excuse . . . Therefore, provocation would be a defense to charges in these areas of the law as well.") (citations and quotations omitted); D.C. Crim. Jur. Instr. §§ 4.104 and 4.105 (requiring as an element of mayhem and of malicious disfigurement that "there were no mitigating circumstances.").

[81] *See, e.g.*, *Edwards v. United States*, 583 A.2d 661, 668 ("The elements of malicious disfigurement are . . . (3) that the defendant specifically intended to disfigure the victim."); *Perkins v. United States*, 446 A.2d 19, 23 (D.C. 1982) ("We conclude that the crime of malicious disfigurement requires proof of specific intent . . .").

[82] Unlike mayhem and malicious disfigurement, the current aggravated assault offense in D.C. Code § 22-404.01 does not require proof of the absence of mitigating circumstances. D.C. Code § 22-404.01(a)(1),

as the current aggravated assault statute. In contrast, the revised assault statute has two new gradations in paragraph (a)(1) and paragraph (a)(2) that require purposeful, permanent injuries. These new gradations cover conduct currently prohibited by mayhem and malicious disfigurement. The culpable mental state of "malice" no longer applies to conduct currently prohibited by mayhem and maliciously disfiguring, nor does the special mitigating circumstances defense[83] that accompanies malice. Conduct currently prohibited by mayhem and malicious disfigurement that does not satisfy the purposely culpable mental state or required injuries in paragraph (a)(1) or paragraph (a)(2) of the revised assault offense is covered by second degree assault. This change clarifies and reduces unnecessary overlap in the current D.C. Code.

Fourth, the RCC does not codify a separate assault with a dangerous weapon (ADW) offense. Under current D.C. Code § 22-402, ADW is a separate offense with a ten-year maximum penalty.[84] ADW prohibits engaging in any conduct that constitutes a simple assault, including intent-to-frighten assaults and offensive physical contact, "with" a dangerous weapon.[85] In contrast, the revised assault statute has specific penalty enhancements for causing different types of bodily injury "by displaying or using" a

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(a)(2) (subsection (a)(1) requiring "knowingly or purposely causes serious bodily injury to another person" and subsection (a)(2) requiring "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). In addition, while mayhem and malicious disfigurement require permanent injuries, "serious bodily injury" in the current aggravated assault statute, as defined in DCCA case law, requires only "protracted and obvious disfigurement." *See, e.g.*, *Jackson v. United States*, 940 A.2d 981, 986 (D.C. 2008) (stating that the definition of "serious bodily injury" as interpreted by the DCCA includes "protracted and obvious disfigurement.").

[83] *Burton v. United States*, 818 A.2d 198, 200 (D.C. 2003) (approving a jury instruction for malicious disfigurement that, instead of using the term "malice," listed the requirements of the mental state, including that "there were no mitigating circumstances."); *see also Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("In other non-homicide areas of the law," including malicious disfigurement, "we have defined malice as intentional conduct done without provocation, justification, or excuse . . . Therefore, provocation would be a defense to charges in these areas of the law as well.") (citations and quotations omitted); D.C. Crim. Jur. Instr. §§ 4.104 and 4.105 (requiring as an element of mayhem and of malicious disfigurement that "there were no mitigating circumstances.").

[84] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").
The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

[85] The current ADW statute merely requires "an assault with a dangerous weapon," D.C. Code § 22-402, and DCCA case law establishes that the ADW statute requires "the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon." *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011). Thus, the broad range of conduct included under "assault" is subject to a weapons enhancement under the current ADW statute. *See, e.g.*, *Frye v. United States*, 926 A.2d 1085, 1094 (D.C. 2005) (finding that the evidence was sufficient for ADW when "appellant intended to and did try to injure or frighten [the complaining witness] by using his van as a weapon in a manner likely to cause [the complaining witness] to have a car accident" and listing as an element of ADW that there "was an attempt, with force or violence, to injure another person, or a menacing threat, which may or may not be accompanied by a specific intent to injure.").

"dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-701. The dangerous weapon or imitation dangerous weapon must, directly or indirectly cause the resulting bodily injury.[86] The use or display of a dangerous weapon or imitation dangerous weapon that falls short of causing the required types of bodily injury is no longer criminalized as assault. Instead, such threatening acts or offensive physical contact are prohibited by the criminal threats statute and its weapon enhancement (RCC § 22E-1204).[87] In addition, the use or display of objects that the complaining witness incorrectly perceives to be a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701, no longer receives an assault enhanced penalty as they do under current District law.[88] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a deadly or dangerous weapon was used.[89] This change reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing assaults committed with a weapon and improves the proportionality of the revised offense.[90]

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[86] If an individual merely possesses a dangerous weapon during an assault, or uses or displays such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for an attempt to commit a gradation of the revised assault statute requiring the harm be caused by "displaying or using" a dangerous weapon or imitation dangerous weapon, or possibly another RCC Chapter 12 offense.

[87] The RCC offensive physical contact statute (RCC § 22E-1205) does not provide a gradation for engaging in offensive physical contact with a dangerous weapon, but likely fact patterns would almost certainly constitute criminal threats.

[88] Current District case law establishes that "any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon," *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986), and that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm." *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975). Under the revised assault statute, the use or display of such an object receives an enhanced penalty only if it causes the required bodily injury and satisfies the definitions of "dangerous weapon" or "imitation dangerous weapon."

[89] *See, e.g.*, *In re M.M.S.*, 691 A.2d 136, 138 (D.C. 1997) ("Finally, without direct evidence, the government may prove the existence of a weapon by adequate circumstantial evidence.").

[90] Under current District law, simple assault involving the use of a deadly or dangerous weapon may be enhanced by three different, largely overlapping, provisions. First, the assault may be charged as ADW under D.C. Code § 22-402, which is a felony with a ten year maximum prison sentence. Second, ADW is subject to further enhancement under D.C. Code § 22-4502 as a "crime of violence" if the offense is committed "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-4502(a). ADW is not subject to the "while armed" enhancement under D.C. Code § 22-4501(a)(1), but the recidivist "while armed" enhancement does apply under D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Finally, if, while committing the assault, a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm," he or she is guilty of the additional offense of possession of a firearm during a crime of violence (PFCOV). PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, the offenses of ADW and PFCOV do not merge. *Freeman v. United States*, 600 A.2d 1070, 1070 (D.C. 1991).

Fifth, the revised assault statute is no longer subject to a separate penalty enhancement for committing assault-type crimes "while armed" or "having readily available" a dangerous weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[91] "while armed" with or "having readily available" a dangerous weapon.[92] In contrast, the revised assault statute requires an individual to cause the injury "by displaying or using" a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-701, resulting in several changes to current District law. First, merely being armed with or having the weapon readily available is not sufficient for an enhanced assault penalty.[93] The use or display of a

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The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous weapon or imitation dangerous weapon, including a "firearm" or "imitation firearm," as those terms are defined in RCC § 22E-701, that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an "imitation firearm" under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for an attempt to commit assault, either with an assault weapons enhancement or without, or possibly another RCC Chapter 12 offense.

[91] Assault-type offenses subject to the enhancement in D.C. Code § 22-4502 include: aggravated assault, the collective "assault with intent to" offenses, felony assault on a police officer, assault with a dangerous weapon, malicious disfigurement, and mayhem.

[92] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

[93] The dangerous weapon or imitation dangerous weapon must, directly or indirectly cause the resulting bodily injury. If an individual merely possesses a dangerous weapon during an assault, or uses or displays such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for an attempt to commit a gradation of the revised assault statute

dangerous weapon or imitation dangerous weapon that falls short of causing the required types of bodily injury is no longer criminalized as assault.[94] Second, through the definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701, the use or display of objects that the complaining witness incorrectly perceives to be a dangerous weapon or imitation dangerous weapon, no longer receives an enhanced penalty as they do under current District law.[95] Excluding these objects does not change District case law holding that circumstantial evidence may be sufficient to establish that a dangerous weapon was used.[96] Third, because the revised assault statute has specific penalty enhancements for the display or use of a dangerous weapon, it is no longer possible to enhance an assault with both a weapon enhancement and an enhancement based on the identity of the complainant,[97] or to double-stack different weapon penalties and offenses.[98] Fourth, the revised assault statute caps the maximum penalty for an

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requiring the harm be caused by "displaying or using" a dangerous weapon or imitation dangerous weapon, or possibly another RCC Chapter 12 offense.

[94] Instead, such threatening acts or offensive physical contact are prohibited by the criminal threats statute and its weapon enhancement (RCC § 22E-1204). The RCC offensive physical contact statute (RCC § 22E-1205) does not provide a gradation for engaging in offensive physical contact with a dangerous weapon, but likely fact patterns would almost certainly constitute criminal threats.

[95] Current District case law establishes that "any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon," *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986), and the current "while armed" enhancement specifically includes imitation firearms. D.C. Code § 22-4502(a). Under the revised assault statute, the use or display of such an object receives an enhanced penalty only if it causes the required bodily injury and satisfies the definitions of "dangerous weapon" or "imitation dangerous weapon."

[96] *See, e.g.*, *In re M.M.S.*, 691 A.2d 136, 138 (D.C. 1997) ("Finally, without direct evidence, the government may prove the existence of a weapon by adequate circumstantial evidence.").

[97] There are several penalty enhancements under current District law based upon the age or work status of the complaining witness. *See, e.g.*, D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drives); 22-3751.01 (enhancement for specified crimes committed against a transit operator or Metrorail station manager). Nothing in current District law appears to prohibit enhancing an assault with one or more of these separate enhancements based on age or work status, in addition to the weapon enhancement in current D.C. Code § 22-4502. Indeed, the facts as discussed in several DCCA cases indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[98] Under current District law, certain crimes are considered "crimes of violence" and are subject to enhanced penalties under several overlapping provisions. First, crimes of violence are subject to enhancement under D.C. Code § 22-4502 if a person commits them "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-402(a). A person so convicted with no prior convictions for certain armed crimes may be subjected to a significantly increased maximum term of imprisonment and "shall" receive a mandatory minimum prison sentence of five years if he or she committed the offense "while armed with any pistol or firearm." D.C. Code § 22-4501(a)(1). If the person has one or more prior convictions for armed offenses, he or she "shall" be subject to an increased maximum prison sentence as well as mandatory minimum sentences. D.C. Code § 22-4501(a)(2). ADW is a crime of violence, but it may not receive the "while armed" enhancement under D.C. Code § 22-4501(a)(1) because "the use of a dangerous weapon is already included as an element" of the offense. *Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000). ADW is subject to enhancement, however, under the recidivist while armed provision in D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C.

enhancement based on the display or use of a dangerous weapon or imitation dangerous weapon to never be greater than the most egregious type of physical harm that the revised assault statute prohibits—the purposeful infliction of a permanently disabling injury in paragraphs (a)(1) and (a)(2) of the revised assault statute. This change clarifies and reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon and improves the proportionality of the revised statute.[99]

Sixth, the revised assault statute's enhanced penalties for causing specified types of "bodily injury" to a law enforcement officer (LEO) partially replace[100] the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the

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1982). Second, crimes of violence are subject to the additional, separate offense of possession of a firearm during a crime of violence (PFCOV) if a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm" while committing the offense. PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, offenses enhanced with the "while armed" enhancement and PFCOV do not merge. *See Little v. United States*, 613 A.2d 880, 881 (D.C. 1992) (holding that a conviction for assault with intent to kill while armed does not merge with a conviction for PFCOV due to the holding in *Thomas v. United States*, 602 A2.d 647 (D.C. 1992)). Depending on the weapon at issue and the facts of a given case, additional offenses that may be charged include carrying dangerous weapons (D.C. Code § 22-4504) and possession of prohibited weapons (D.C. Code § 22-4514).

[99] Under current District law, simple assault involving the use of a deadly or dangerous weapon may be enhanced by three different, largely overlapping, provisions. First, the assault may be charged as ADW under D.C. Code § 22-402, which is a felony with a ten year maximum prison sentence. Second, ADW is subject to further enhancement under D.C. Code § 22-4502 as a "crime of violence" if the offense is committed "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-4502(a). ADW is not subject to the "while armed" enhancement under D.C. Code § 22-4501(a)(1), but the recidivist "while armed" enhancement does apply under D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Finally, if, while committing the assault, a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm," he or she is guilty of the additional offense of possession of a firearm during a crime of violence (PFCOV). PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, the offenses of ADW and PFCOV do not merge. *Freeman v. United States*, 600 A.2d 1070, 1070 (D.C. 1991).
The RCC removes the overlap between these multiple means of enhancing an armed assault and grades the offense according to the role of the weapon in the offense. In the RCC, the use or display of a dangerous weapon or imitation dangerous weapon, including a "firearm" or "imitation firearm," as those terms are defined in RCC § 22E-701, that causes the required bodily injury receives a single enhancement in the revised assault statute. If an individual merely possesses a dangerous weapon during an assault, or uses such a weapon, but the weapon does not cause the required bodily injury, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of an assault per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an "imitation firearm" under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon." A defendant may not, however, be convicted of both a gradation of assault based on the use of a dangerous weapon and RCC § 22E-4104. In addition, depending on the facts of a given case, the display of a dangerous weapon or imitation dangerous weapon may be sufficient to establish liability for an attempt to commit assault, either with an assault weapons enhancement or without, or possibly another RCC Chapter 12 offense.

[100] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses criminalize this conduct and should also be considered to replace the separate APO offenses even though they are generally not discussed in this entry.

performance of his or her official duties"[101] is a misdemeanor, with a maximum term of imprisonment of 6 months,[102] and an assault that causes "significant bodily injury" or "a violent act that creates a grave risk of causing significant bodily injury" carries a maximum penalty of ten years imprisonment.[103] In contrast, the revised assault statute provides enhanced penalties for injuries to LEOs for serious bodily injury, significant bodily injury, and bodily injury.

Codifying the LEO enhancement in the revised assault statute results in several changes to current District law. First, the LEO enhancement in the revised assault statute is limited to assaults that cause specified types of "bodily injury."[104] Conduct that fails to satisfy the revised assault statute, as well as "a violent act that creates a grave risk of significant bodily injury," may be criminalized elsewhere in the RCC.[105] Second, the revised assault statute provides substantial penalty enhancements for inflicting "serious bodily injury" on a LEO[106] and for causing "bodily injury" to a LEO,[107] both of which are absent in current District law. Third, the enhanced gradations of the revised assault offense require recklessness as to whether the LEO is a "protected person," rather than

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[101] D.C. Code § 22-405(b), (c).

[102] D.C. Code § 22-405(b).

[103] D.C. Code § 22-405(c).

[104] Limiting enhanced penalties for assaulting a LEO to causing specified physical injury is consistent with recent District legislation that amended the APO statute. Prior to June 30, 2016, in addition to an assault, the APO statute prohibited "resist[ing], oppos[ing], imped[ing], intimidate[ingt], or interfer[ing] with a law enforcement officer" in the course of his or her official duties or on account of those duties. D.C. Code § 22-405(b), (c) (repl.). On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107.
The Neighborhood Engagement Achieves Results Amendment Act of 2016 ("NEAR Act") amended the current APO statute by limiting it to "assault[s]" and created a new statute for resisting arrest (D.C. Code § 22-405.01). The Committee Report for this legislation cited the Office of the District of Columbia Auditor Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016).

[105] As is discussed elsewhere in this commentary, physical contacts that do not meet the revised definition of "bodily injury" in the RCC assault statute may be criminalized under other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205), or sex offenses under RCC Chapter 13. Some of these offenses have identical provisions for a "protected person" and harming a complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official.

[106] It is unclear why the current APO statute does not enhance an assault that causes "serious bodily injury" when it does enhance an assault that causes "significant bodily injury." The limited legislative history for the current APO statute does not address the matter and the lack of an enhancement for "serious bodily injury" is inconsistent with other current penalty enhancements that apply enhanced penalties to aggravated assaults committed against complainants with a special status. *See, e.g.*, D.C. Code §§ 22-3611(a), (c)(2) 23-1331(4) (penalty enhancement for crimes committed against minors applying to all "crime[s] of violence," which includes aggravated assault); 22-3751, 22-3751.01, 22-3752 (penalty enhancement for crimes committed against taxicab drivers, transit operators, and Metrorail station managers applying to aggravated assault).

[107] Under current District law, a simple assault against a police officer is punishable by 6 months maximum imprisonment, a trivial increase above the 180 day maximum penalty ordinarily applicable to a simple assault (D.C. Code § 22-404(a)(1).

negligence.[108] A culpable mental state of recklessness makes the enhanced LEO gradations of the revised assault statute consistent with the other enhancements in the revised offense that are based on the complainant's status. Fourth, the revised definition of "law enforcement officer" in RCC § 22E-701 changes the scope of the enhanced penalties in the revised assault statute as compared to the current APO statute,[109] particularly for certain members of fire departments, investigators, and code inspectors.[110] The commentary to RCC § 22E-701 discusses the revised definition of "law enforcement officer" in detail. Lastly, the revised assault statute does not enhance assaults against family members of LEOs due to their relation to a LEO, which is part of the repeal of the general provision prohibiting targeting family members of District officials and employees in D.C. Code § 22-851.[111] Collectively, these changes replace the APO offenses in current law with enhanced penalties in the gradations of the revised assault statute, improve the clarity of existing statutes, and generally provide for consistent treatment of LEOs and other specially protected complainants. The changes reduce unnecessary gaps and overlap between offenses, and improve the proportionality of the statutes as well.

Seventh, the revised assault statute's enhanced penalties for causing specified types of "bodily injury" partially replace[112] the current offenses of assault and aggravated

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[108] The current APO statute does not specify a culpable mental state for the fact that the complainant is a LEO in the course of his or her official duties. D.C. Code § 22-405(b), (c). However, DCCA case law suggests that a culpable mental state akin to negligence applies to this element. *See, e.g.*, *Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[109] D.C. Code § 22-405(a) (defining "law enforcement officer.").

[110] It should be noted that while the RCC definition of "law enforcement officer" no longer includes these categories of complainants, they remain covered by the revised definition of "public safety employee," also defined in RCC § 22E-701. As such, they still receive enhanced protection as a category of "protected person" and as a category of complainant when the assault is committed with the purpose of harming the complainant due to the complainant's status.

[111] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Many law enforcement officers, as "LEO" is defined in the current APO statute, are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relation to a LEO. However, there is no provision in current law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[112] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses criminalize this conduct and should also be considered to replace the separate assault and

assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[113] If the accused causes "serious bodily injury," the offense is a felony with a maximum penalty of ten years imprisonment.[114] In contrast, in the revised assault statute, assaults against a "vehicle inspection officer"[115] receive enhanced penalties, but are no longer separate offenses. A "vehicle inspection" officer is included in the definition of "protected person" in RCC § 22E-701 as a "public safety employee," also defined in RCC § 22E-701. Since they are included in the definition of "public safety employee," vehicle inspection officers are also included in the assault penalty enhancements for having the purpose of harming the complainant due to the complainant's status. However, the conduct that receives an enhanced penalty is narrowed to causing bodily injury, significant bodily injury, or causing serious bodily injury. Conduct that falls short of these requirements may receive an enhanced penalty elsewhere in the RCC,[116] but conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer does not.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised assault statute results in several additional changes to

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aggravated assault on a public vehicle inspection officer offenses even though they are generally not discussed in this entry.

[113] D.C. Code § 22-404.02.

[114] D.C. Code § 22-404.03(a)(1), (a)(2) (subsection (a)(1) requires "knowingly or purposely causes serious bodily injury to the public vehicle inspection officer" and subsection (a)(2) requires "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). The term "serious bodily injury" is not statutorily defined and it is unclear whether the DCCA would apply the definition of "serious bodily injury" from the sexual abuse statutes to the offenses like it has with aggravated assault.

[115] Although the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in § 50-303(19)," the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430). However, the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer" and that RCC uses that term instead. D.C. Code § 50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation."). The VFHIAA legislative history does not appear to include reference to the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of the term "public vehicle inspection officer."

[116] As is discussed elsewhere in this commentary, physical contacts that do not meet the revised definition of "bodily injury" in the RCC assault statute may be criminalized under other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205), or sex offenses under RCC Chapter 13. Some of these offenses have identical provisions for a "protected person" and harming a complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official.

District law. First, under the revised assault statute, unlike current law,[117] there is no longer an automatic civil penalty of loss of a license to operate public vehicles-for-hire upon conviction of assault of a vehicle inspection officer. Second, the revised assault statute does not enhance assaults against family members of vehicle inspection officers because of their relation to the public vehicle inspection officers, which is part of the repeal of the general provision regarding targeting family members of District officials and employees in D.C. Code § 22-851.[118] Third, the revised assault statute does not bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[119] This change clarifies the revised assault statute and reduces unnecessary overlap with other provisions that specially penalize assaults on District officials.

Eighth, the RCC definition of "protected person," discussed in the commentary to RCC § 22E-701, results in several changes to the scope of enhanced assault conduct. First, through the definition of "protected person," assaults against complainants under the age of 18 years or against complainants 65 years of age or older receive enhanced penalties in the revised assault offense, but only if certain age requirements are met. Current District law enhances various assault offenses against complainants under the age of 18 years if there is at least a two year age gap between the complainant and an actor that is 18 years of age or older,[120] and against all complainants 65 years of age or older.[121]

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[117] D.C. Code §§ 22-404.02(b)(2), 22-404.03(b)(2) (stating that upon conviction for assault or aggravated assault of a public vehicle inspection officer, an individual "shall" "have his or her license or licenses for operating a public vehicle-for-hire, as required by the Commission pursuant to subchapter I of Chapter 3 of Title 50, revoked without further administrative action by the Commission.").

[118] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Vehicle inspection officers, as defined in D.C. Code § 50-301.03(30B), are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relationship.

[119] The current assault on a public vehicle inspection officer statutes bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority. D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful."). The RCC assault statute deletes this provision and bar to self-defense against a public vehicle inspection officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a public vehicle inspection officer's use of force that either is not lawful or when the actor is not reckless as to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the public vehicle inspection officer's conduct being lawful.

[120] D.C. Code § 22-3611(a) ("Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both."); 22-3611(c)(1), (c)(3) (defining "adult" as "a

In contrast, the "protected person" gradations of the revised assault statute require at least a four year age gap between a complainant under 18 years of age and an actor that is 18 years of age or older, and require that the actor be under 65 years of age and at least 10 years younger than a complainant that is 65 years of age or older. With respect to minors, these age requirements are consistent with other offenses in current District law[122] and the age gap for seniors,[123] while new to District law, reserve the enhanced penalties for predatory behavior. Second, assaults against a driver of a private vehicle-for-hire, a "vulnerable adult," and a "public safety employee" receive new enhanced penalties in the revised assault statute through the definition of a "protected person." A driver of a private vehicle-for-hire does not receive any enhanced penalties under current District law, and a vulnerable adult[124] or "public safety employee"[125] receives enhanced penalties in a few non-assault offenses. In contrast, the "protected person" gradations of the revised assault statute recognize the prevalence of drivers of private vehicles-for-hire and the special status elsewhere under current District law for vulnerable adults and public safety employees. Third, assault offenses against a "citizen patrol member"[126] or a "District employee" no longer receive enhanced penalties in the revised assault offenses as they do under current District law.[127] The breadth of these current enhancements is inconsistent as compared to other penalty enhancements in current District law.

The RCC definition of "protected person" also makes broader changes to the revised assault statute. First, the "protected person" penalty enhancement applies to each type of "bodily injury" in the revised assault statute, whereas the various penalty

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person 18 years of age or older at the time of the offense" and a "minor" as "a person under 18 years of age at the time of the offense.").

[121] D.C. Code § 22-3601(a) ("Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[122] Many of the District's offenses against complainants under the age of 18 years require at least a four year age gap between the actor and the complainant. *See, e.g.*, D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (child sexual abuse statutes and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010, 22-3001(3) (enticing a child statute and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010.02 (arranging for a sexual contact with a real or fictitious child and defining "child" as "a person who has not yet attained the age of 16 years."); 22-811(a), (f)(1), (f)(2) (contributing to the delinquency of a minor statute and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.").

[123] None of the District's offenses targeting harms against complainants that are over the age of 65 years require any age gap between the actor and the complainant. See D.C. Code §§ 22-932, 22-933, 22-933.01, 22-934. However, requiring at least a ten year age gap between an actor that is under the age of 65 years and a complainant that is at least 65 years of age is consistent with requiring an age gap in the offenses against complainants that are under 18 years of age. The 10 year age gap recognizes that both the complainant and the actor are adults, as opposed to teenagers.

[124] D.C. Code §§ 22-933 (criminal abuse of a vulnerable adult statute); 22-933.01 (financial exploitation of a vulnerable adult statute); 22-934 (criminal neglect of a vulnerable adult statute).

[125] D.C. Code § 22-2016 (murder of a law enforcement officer statute).

[126] D.C. Code § 22-3602.

[127] D.C. Code § 22-851(d).

enhancements in current District law apply inconsistently to simple assault,[128] the "assault with intent to" offenses,[129] and the various felony assault offenses,[130] resulting in disproportionate penalties for similar conduct. Second, the revised assault statute applies a mental state of "recklessness" to whether the complainant is a "protected person." None of the separate penalty enhancements under current District law specify a culpable mental state, but the penalty enhancements for senior citizens[131] and minors[132] have affirmative defenses for a reasonable mistake of age. The "reckless" culpable mental state in the protected person penalty enhancements preserves the substance of these affirmative defenses[133] and establishes a consistent culpable mental state requirement for

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[128] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

[129] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[130] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for enhancement for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[131] D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[132] D.C. Code § 22-3611(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence.").

[133] The current enhancement for crimes against senior citizens makes it a defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). In the RCC, it must be proven that an actor was reckless that the complainant was 65 years or older or under 18 years of age. The actor must consciously disregard a substantial risk that

each category of complainant in the RCC definition of "protected person." Finally, the RCC assault statute prohibits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[134]

Collectively, these changes provide a consistent enhanced penalty for assaulting the categories of individuals included in the definition of "protected person," removing gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses.

Ninth, the revised assault statute enhances the penalty for assaults committed against LEOs, public safety employees, or District officials when the assault is committed with the "purpose of harming the complainant because of the complainant's status" as a LEO, public safety employee, or District official. Current District law has separate penalty enhancements or enhanced penalties for committing assault-type offenses because of the complainant's status as a LEO,[135] a member of a citizen patrol,[136] a District "official or employee,"[137] or a "family member" of a District "official or

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a circumstance (here the fact that the complainant is over 65 or under 18) exists; and the risk must be of such a nature and degree that, considering the nature of and motivation of the person's conduct (here, assaulting the complainant) and the circumstances the person is aware of, the person's conscious disregard is a gross deviation from the ordinary standard of conduct. Per RCC § 22E-206, a reasonable mistake as to the complainant's age would negate the recklessness required for an age-based gradation enhancement for assault. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

However, given the inherent difficulty in judging the age of another person, an actor who assesses a person's age based on appearance alone likely would be reckless as to the person being over 65 or under 18 if the actor judges a person to be very close in age to the 65 and 18 year old thresholds. For example, if an actor assessed the complainant's age to be in their early 60s based on appearance alone, the actor is likely aware of a substantial risk that the complainant is actually 65 years or older. Whether the actor's disregard of such risk is a gross deviation from the ordinary standard of conduct will depend on why the risk was ignored. For example, an assault based on the actor's allegedly knocking down and harming a complainant, reckless that they were 67 year old might reach different conclusions as to the deviation from the standard of conduct depending on whether the actor was running to a hospital to see a family member versus an actor who was running to the front of a line to see a sports star. Ultimately it is up to the factfinder to determine whether an actor's alleged mistake as to age of the complainant is reasonable given the facts of the case.

[134] Current District statutory law does not prevent stacking of such enhancements, and case law has not addressed the stacking of enhancements based on the categories covered in the RCC definition of protected person. However, convictions have been upheld applying both a "while armed" enhancement under D.C. Code § 22-4502 and an enhancement based on the victim's status as a senior or minor.

[135] D.C. Code § 22-405(b), (c) (prohibiting assaulting a LEO, assaulting a LEO with significant bodily injury, or committing a "violent act that creates a grave risk of causing significant bodily injury" to the LEO "on account of . . . the performance of his or her official duties.").

[136] D.C. Code § 22-3602(b) (prohibiting committing specified offenses against a member of a citizen patrol "because of the member's participation in a citizen patrol."); 22-3602(a) (defining "citizen patrol" as "a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to, Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.").

[137] Current D.C. Code § 22-851(c) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any District "official or employee," broadly defined as "a person who currently holds or

employee."[138] Current District law also enhances the penalty for the murder of a "public safety employee"[139] on account of the complainant's status. In contrast, the revised assault statute limits this type of enhanced penalty to a "law enforcement officer" and a "District official," and extends it to a "public safety employee," resulting in several changes to current District law. First, as is discussed in the commentary to RCC § 22E-701, the revised definitions of "law enforcement officer," "District official," and "public safety employee" change the scope of the revised enhancements as compared to current District law. Second, assaults committed against a citizen patrol member, a District "employee," or the "family member" of a District "official or employee" because of the complainant's status no longer receive an enhanced penalty. These provisions raise a number of difficult definitional issues[140] and current sentencing practices in the District indicate that these penalty enhancements rarely, if ever, are necessary to proportionate sentences. Third, the enhancement applies consistently to each type of "bodily injury" in the revised assault statute, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[141] the "assault with intent to" offenses,[142] and

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formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(c), (a)(2).

[138] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee." "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d).

[139] D.C. Code § 22-2106(a) ("Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties . . . .").

[140] For example, the enhancement for District employees in D.C. Code § 22-851(b) states that it applies "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties." However, District case law has held, in construing other statutes, that a law enforcement officer may be considered always on duty, *Mattis v. United States*, 995 A.2d 223, 225 (D.C. 2010). There follows an ambiguity whether any assault of a law enforcement officer is subject to heightened liability—regardless whether the assault was part of a domestic dispute or the officer was off-duty and not known to the assailant as an officer. The RCC, instead, through a separate reference to law enforcement officers as protected persons, provides heightened penalties where an officer is assaulted while in the performance of his or her duties.

[141] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

[142] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The

the various felony assault offenses,[143] resulting in disproportionate penalties for similar conduct. Codifying enhanced protection for assaulting individuals based on their status as LEOs, public safety employees, or District officials clarifies the law and improves the proportionality of offenses.

Tenth, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[144] Current D.C. Code § 22-401 contains a provision that appears to separately criminalize such poisoning of a water supply, regardless of whether the poisoning results in injury to a person or there was intent to injure a person. No case law exists interpreting this provision. In contrast, the revised assault statute does not criminalize such poisoning except insofar as such conduct may constitute an attempted assault. Another District felony currently criminalizes such a poisoning,[145] and, depending on the facts of the case such poisoning may constitute attempted murder under RCC § 22E-1101, or an attempted assault. This change improves the proportionality of District offenses by punishing such conduct consistent with other inchoate attempts to harm persons.

Eleventh, under the revised assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" due to his or her self-induced intoxication. Under subsection (f), a factfinder may impute awareness of the risk required to prove the defendant acted with extreme indifference to human life. The current assault statute is silent as to the effect of intoxication. However, District case law appears to have established that assault is a general intent offense,[146] which would preclude a defendant from receiving a jury

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protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[143] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[144] D.C. Code § 22-401.

[145] Current District law has an offense for maliciously polluting water. D.C. Code § 22-3318 ("Every person who maliciously commits any act by reason of which the supply of water, or any part thereof, to the City of Washington, becomes impure, filthy, or unfit for use, shall be fined not less than $500 and not more than the amount set forth in § 22-3571.01, or imprisoned at hard labor not more than 3 years nor less than 1 year.").

[146] For District case law establishing that assault is a general intent crime, see, for example, *Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) and *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011). For District case law indicating that a voluntary intoxication defense may not be raised to an assault charge, see

instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[147] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[148]—the claim that, due to his or her self-induced intoxicated state, the defendant did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required for more serious forms of assault.[149] By contrast, under the revised assault offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the culpable mental states of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" as required to prove some types of assaults. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" at issue in assault.[150] However, subsection (h) allows a fact finder to impute awareness of the risk required to prove that the defendant acted with extreme indifference to human life, when the lack of awareness was due to self-induced intoxication. But in some rare cases, a defendant's self-induced intoxication may still negate finding that he or she acted with extreme indifference to human life, as required for second degree murder. This change improves the clarity, consistency, and proportionality of the offense.

Twelfth, due to the revised definition of "serious bodily injury" in RCC § 22E-701, second degree assault of the revised assault statute no longer specifically include rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current aggravated assault statute prohibits "serious bodily injury."[151] While there is no statutory definition of the term's meaning, the definition of

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Parker v. United States, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)). *See also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime).

[147] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[148] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan*, 32 A.3d at 996 (Ruiz, J., concurring) (discussing *Parker*).

[149] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of offensive physical context.

[150] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[151] D.C. Code § 22-404.01(a).

"serious bodily injury" under DCCA case law for aggravated assault includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[152] As discussed in the commentary to the revised definition in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised second degree assault offenses, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or protracted loss of consciousness. This change improves the clarity, consistency, and proportionality of the revised offenses.

Thirteenth, the revised assault statute replaces certain minimum statutory penalties for assault with intent to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse[153] and assault with a dangerous weapon on a police officer.[154] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code apply, if at all, to these provisions.[155] There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

Fourteenth, the revised assault statute deletes the limitation on justification and excuse defenses that is in the current D.C. Code assault on a police officer (APO) statute. The current D.C. Code APO statute states "[i]t is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."[156] This provision is a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).[157] In contrast, the RCC assault statute deletes this provision and bar to self-defense against a law enforcement officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3)

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[152] The DCCA has adopted for the aggravated assault offense the definition of "serious bodily injury" currently codified for the sexual abuse offenses in D.C. Code § 22-3001. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999).

[153] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia.").

[154] D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[155] D.C. Code §§ 22-1804; 22-1804a.

[156] D.C. Code § 22-405(d).

[157] Current D.C. Code § 22-405 and § 22-405.01 provide that it is: "neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."

provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a law enforcement officer's use of force that either is not lawful or when the actor is not reckless as to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer's conduct being lawful. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer which existed in the District until Congress passed a new statute with a new policy in 1970.[158] This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these fourteen changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised assault statute requires a culpable mental state of recklessness for the lower-level gradations of assault, third degree and fourth degree. The current D.C. Code is silent as to the culpable mental states required for simple assault,[159] but the current felony assault with significant bodily injury statute requires recklessness.[160] Current District case law suggests that recklessness may suffice for simple assault.[161] However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient,[162] and, in the context of intent-to-frighten assault, has

[158] As explained by the DCCA in *McDonald v. United States*, "The legislative history indicates that Congress intended to adopt 'the modern rule' in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72." *McDonald v. United States*, 496 A.2d 274, 276 (D.C. 1985).

[159] D.C. Code § 22-404(a)(1).

[160] D.C. Code § 22-404(a)(2).

[161] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

[162] Recently, the DCCA explicitly declined to decide whether assault requires recklessness or a higher culpable mental state like intent to injure, stating "[e]ven if the greater proof was necessary, the jury could permissibly infer such intent from [appellant's] extremely reckless conduct, which posed a high risk of injury to those around him. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

suggested that a higher culpable mental state than recklessness is required.[163] Resolving this ambiguity, the revised assault statute clearly establishes that recklessness is sufficient for specified gradations. This is consistent with prevailing District case law (including District case law on voluntary intoxication[164]), and is consistent with current District statutes. This change improves the clarity of the law.

Second, through the definition of "bodily injury" in RCC § 22E-701, the revised assault statute clarifies the minimal harm that is required. Current District assault statutes do not address whether they cover any infliction of pain or causing illness or impairment of physical condition. District case law has established that any non-consensual touching, even without pain, is simple assault,[165] although a recent DCCA case that is in active litigation may ultimately call into question whether this is sufficient.[166] However, whether recklessly causing illness or impairment of someone's physical condition constitutes simple assault under current law is not established. Resolving this ambiguity, the revised assault statute requires "bodily injury," defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition," to clarify the minimal harm that is required. Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the

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[163] *Powell v. United States*, 238 A.3d 954, 959 (D.C. 2020) ("Our additional concern is whether the evidence proved that appellant had the *mens rea* required for intent-to-frighten assault: a 'purposeful design ... to engender fear' or 'create apprehension.') (quoting *Parks v. United States*, 627 A.2d 1, 5 (D.C. 1993); *id.* at 959 ("For similar reasons, we conclude that the evidence was insufficient for conviction even if we assume *arguendo* that the *mens rea* for intent-to-frighten assault can be satisfied by evidence of recklessness.").

[164] Under District law, voluntary intoxication cannot constitute a defense to a "general intent" crime. *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In accordance with this rule, assault appears to be a general intent crime, to which an intoxication defense may not be raised. *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)); *see, e.g., Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) (observing that assault is a general intent crime); *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011) (same); *see also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime). The RCC does not recognize the distinction between general and specific intent crimes for purposes of the law of intoxication; instead, it employs an imputation approach under which the culpable mental state of recklessness, as defined under RCC § 22E-206(c), may be imputed—notwithstanding the absence of awareness of a substantial risk—based upon the self-induced intoxication of the actor. *See* RCC § 209(c). Under this new approach, application of a recklessness (or negligence) culpable mental state to a revised offense roughly approximates District law governing general intent crimes. *See* First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication, at 27-31 (March 13, 2017).

[165] *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts.") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990).

[166] A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

RCC assault statute, but also potentially painless harms such as sickness[167] or impaired physical conditions.[168] As is discussed elsewhere in this commentary, physical contacts that do not meet the revised definition of "bodily injury" may be criminalized under other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205), or sex offenses under RCC Chapter 13. This change improves the clarity of the revised statute and may remove a possible gap in liability.

Third, the revised assault statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. The District's current assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[169] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[170] Another court ruling is pending regarding the elements of assault that may expand upon the requirement of lack of consent.[171] To resolve this ambiguity, the revised assault statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. The revised statute's effective consent defenses specifically addresses situations where the person giving effective consent is an adult or under 18 years of age. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised assault statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current assault statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for assault. The

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[167] Recklessly engaging in nonconsensual physical contact that transmits a disease to another person may suffice for assault liability. However, particular care should be given to the gross deviation from the ordinary standard of conduct requirement in the RCC definition of recklessness. For example, a sneezy office worker who disregards a substantial risk that he will transmit a cold virus to others by working in proximity to them would not ordinarily satisfy the requirement of bodily injury, whereas, a sneezy surgeon who disregards a substantial risk that she will transmit a cold virus to a patient undergoing a procedure and having a compromised immune system may satisfy the requirement of bodily injury for assault liability. Note, however, that effective consent may be a defense in any of these examples, under the effective consent defenses in subsection (f) of the revised statute.

[168] For example, a person who surreptitiously adds alcohol to another's drink, consciously disregarding a substantial risk that the alcohol will alter the drinker's physical condition, such as their sense of balance, may satisfy the requirement of bodily injury for assault liability if the "gross deviation from the standard of conduct" requirement in the definition of "recklessness," per RCC § 22E-206, is met.

[169] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

[170] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

[171] *Perez Hernandez v. United States*, 207 A.3d 594, 602–03 (D.C.), *vacated,* 207 A.3d 605 (D.C. 2019)]

exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[172] This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised assault statute codifies the culpable mental state in the District's current aggravated assault statute as "recklessly, with extreme indifference to human life". The District's current aggravated assault statute lists two different culpable mental states: "knowingly or purposely causes serious bodily injury" in D.C. Code § 22-404(a)(1) and "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury" in D.C. Code § 22-404(a)(2). The DCCA, however, has stated that "[i]n order to give effect to the [aggravated assault] statute as a whole, subsection (a)(2) must be read as requiring a different type of mental element—gross recklessness."[173] The DCCA has also stated that the lower culpable mental state in the current aggravated assault statute "can be proven by evidence of 'conscious disregard of an extreme risk of death or serious bodily injury'"[174] and that it is "substantively indistinguishable from the minimum state of mind required for conviction of second-degree murder,"[175] in that it, too, requires "'extreme recklessness' regarding risk of death or serious bodily injury.'"[176] In the RCC it is only necessary to specify the latter culpable mental state because the higher culpable mental states "knowingly" or "purposely" satisfy the lower culpable mental state under RCC § 22E-206. This revision clarifies without changing[177] existing law on the "gross recklessness" standard in the current aggravated assault statute.

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[172] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[173] *Perry*, 36 A.3d at 817. The DCCA further explained that this mental state is "shown by 'intentionally or knowingly' engaging in conduct that, in fact, 'creates a grave risk of serious bodily injury,' and "doing so 'under circumstances manifesting extreme indifference to human life.'" *Id.*

[174] *Id.* at 818 (*quoting Coleman v. United States*, 948 A.2d 534, 553 (D.C. 2008). *See Perry*, 36 A.3d at 818 ("In this opinion, we have clarified that both prongs of the aggravated assault statute require an element of *mens rea:* either specific intent to cause serious bodily injury, or, as the plain terms of the statute provide, "extreme indifference to human life.") *See also Comber v. United States*, 584 A.2d 26, 38-39 (D.C. 1990) (*en banc*).

[175] *Perry*, 36 A.3d at 823 (Farrell, J. concurring).

[176] *Id.* at n.3 (quoting *Comber*, 584 A.2d at 39 n. 11).

[177] *See, e.g.*, *Perry v. United States*, 36 A.3d 799, 817, 818 (stating that the required mental state in subsection (a)(2) of the aggravated assault statute (D.C. Code § 22-404.01) was "gross recklessness" and that this mental state was "substantively indistinguishable" from the required mental state for second degree murder); *In re D.P.,* 122 A.3d 903, 908-910 (holding that evidence was insufficient to prove depraved heart malice as required for aggravated assault under D.C. Code § 22-404.01(a)(2) when

Second, the revised assault statute, by the use of the phrase, "in fact," clarifies that no culpable mental state is required as to whether the object displayed or used to cause the specified types of bodily injury is a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-701. As is discussed above as a substantive change to current District law, the revised assault statute's weapons penalty enhancements replace the current offense of assault with a dangerous weapon (ADW), as well as the separate penalty enhancement for committing certain assault offenses "when armed with or having readily available" a deadly or dangerous weapon.[178] The current ADW statute is silent as to what culpable mental state applies to whether the object at issue is a dangerous weapon.[179] However, District case law provides that whether an object qualifies as a "dangerous weapon" hinges upon a purely objective analysis of the nature of the object rather than on the accused's understanding of the object.[180] District case law for the "while armed" enhancement in D.C. Code § 22-4502 similarly supports applying strict liability to whether the object at issue is a dangerous weapon.[181] Applying strict liability to statutory elements that do not distinguish innocent from criminal

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appellant was unarmed, engaged in assaultive conduct for approximately fourteen seconds on a public bus, and ceased the assault when the complainant was no longer fighting back); *Vaughn v. United States*, 93 A.3d 1237, 1268, 1270 (D.C. 2014) (deeming the enhanced recklessness of aggravated assault to "set [such] a high bar" that a jury instruction which suggested the mens rea of the offense was only was one of normal recklessness—i.e. the "awareness of and disregard [of a risk]" at issue in felony assault—constituted plain error that was prejudicial, "affect[ed] the integrity of th[e] proceeding," and "impugn[ed] the public reputation of judicial proceedings in general.").

It should be noted that the revised second degree murder statute in RCC § 22E-1101(b) also requires the culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life," which will not change DCCA case law interpreting depraved heart murder. *See, e.g.*, *Comber v. United States*, 584 A.2d 26, 39 (D.C.1990) (en banc) (noting that "depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury, but engaged in that conduct nonetheless); *Powell v. United States*, 485 A.2d 596 (D.C.1984) (affirming second degree murder conviction on depraved heart malice theory when defendant led police in a high speed chase at speeds of up to ninety miles an hour); *Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (affirming second degree murder conviction on depraved heart malice theory when defendant handed a knife to co-defendant whom he knew wanted to harm the victim, and the co-defendant used the knife to fatally wound the victim).

[178] D.C. Code § 22-4502(a).

[179] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

[180] *See, e.g.*, *Perry*, 36 A.3d at 812 ("This is an objective test, and has nothing to do with the actor's subjective intent to use the weapon dangerously."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (rejecting appellant's argument that "unless one is possessed with the specific intent to use an object offensively, it is not a dangerous weapon").

[181] *See, e.g.*, *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) (stating "[t]his court has traditionally looked to the use to which an object was put during an assault in determining whether that object was a dangerous weapon" and citing the objective tests used to determine if an object is a dangerous weapon in ADW).

behavior is an accepted practice in American jurisprudence.[182] Notably, however, the revised assault offense requires at least recklessness as to causing specified bodily injury by the display or use of what is, in fact, a dangerous weapon or imitation dangerous weapon.[183] This change clarifies, and potentially fills a gap in, District law.

[182] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[183] The revised assault statute requires that the object that a person recklessly displays or uses to cause the specified "bodily injury" be, in fact, a dangerous weapon or imitation dangerous weapon. So, for example, where a person believes that he or she is causing the complainant bodily injury by displaying or using only a heavy bag, the heavy bag must, in fact, be a dangerous weapon or imitation dangerous weapon, and if it is not, there is no enhanced liability in the RCC assault statute. However, if the heavy bag contains a per se "dangerous weapon," such as a firearm (which adds to its weight), this would not suffice for the assault weapons enhancement if the actor did not know and should not have known that the heavy bag contained a firearm. One cannot conceptualize the assault as being by "displaying or using" a heavy bag, then analyze the assault with respect to a firearm which is one of the unknown contents of the bag. The causation requirement in RCC § 22E-204 may also preclude liability in such a situation to the extent that wielding a bag with an unknown firearm in it causes a bodily injury (e.g., by discharge) that is not reasonably foreseeable.

RCC § 22E-1204. Criminal Threats.

Explanatory Note. *This section establishes the criminal threats offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes efforts to inflict fear of criminal harm. The offense is graded according to the type of criminal harm the defendant threatens: an immediate death, serious bodily injury, sexual act, or confinement (first degree); a bodily injury or sexual contact (second degree) or loss or damage to property (third degree). The revised criminal threats offense replaces the misdemeanor and felony threats statutes,*[1] *as well as the intent-to-frighten form of simple assault*[2] *and the intent-to-frighten form of assault with a dangerous weapon*[3] *in the current D.C. Code.*

Paragraphs (a)(1), (b)(1), and (c)(1) state the prohibited conduct—that the defendant communicates to another person,[4] who is not a co-conspirator or an accomplice.[5] Communication requires not only that the defendant take action to convey a message, but also that the message is received and understood by another person.[6] However, the government is not required to prove that the target of the threat is the one to whom the communication is made.[7] No precise words are necessary to convey a threat; it may be bluntly spoken, or done by innuendo or suggestion.[8] The verb "communicates" is intended to be broadly construed, encompassing all speech[9] and other messages[10] that are received and understood by another person. First degree criminal threats, under

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[1] D.C. Code §§ 22-407, 22-1810.

[2] D.C. Code § 22-404.

[3] D.C. Code § 22-402.

[4] *See Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (holding that "the contextual features suggest that 'person' is limited to natural persons" in threats, and therefore, threatening to destroy District of Columbia government property does not constitute an offense).

[5] For example, if Conspirator A says to Conspirator B, "I am going to punch him and you are going to take his keys," the statement does not constitute a criminal threat.

[6] DCCA case law clarifies in *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), and the RCC criminal threats statute recognizes, that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

[7] For example, assuming other elements of the offense are satisfied, it would be enough for the actor to tell a friend that the actor will kill person Z even if the friend never communicates that to person Z and the actor didn't intend the threat to reach person Z. See *Beard v. U.S.,* 535 A.2d 1373, 1378 (D.C. 1988); *U.S. v. Baish,* 460 A.2d 38, 42 (D.C. 1983); *Joiner v. U.S.,* 585 A.2d 176 (D.C. 1991).

[8] *Griffin v. United States*, 861 A.2d 610, 616 (D.C. 2004) (citing *Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000)).

[9] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[10] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

paragraph (a)(1), requires the defendant communicate that they will immediately cause[11] a criminal harm[12] involving death, serious bodily injury, a sexual act, or confinement, to any person. Second degree criminal threats, under paragraph (b)(1), requires the defendant indicate that they will, at any time or on any condition,[13] cause[14] a criminal harm[15] involving a bodily injury or sexual contact. Third degree criminal threats, under paragraph (c)(1) requires the defendant indicate that they will, at any time or on any condition,[16] cause[17] a criminal harm[18] involving loss or damage to property. The terms "serious bodily injury," "sexual act," bodily injury," "sexual contact," and "property" are defined in RCC § 22E-701.

Paragraphs (a)(1), (b)(1), and (c)(1) also require a culpable mental state of knowledge, a term defined at RCC § 22E-206. Applied to the elements here, the accused must at least be aware to a practical certainty that their conduct communicates the threat to a complainant.[19] Whether particular words, gestures, symbols, or other conduct communicate such content is a question of fact that will often require judgment by a factfinder.[20]

Paragraphs (a)(2), (b)(2), and (c)(2) require the defendant make the communication "with intent that" it be perceived as a serious expression of an intent to

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[11] "Cause" includes personally engaging in criminal conduct and soliciting or allowing an accomplice or innocent instrumentality to engage in criminal conduct.

[12] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[13] The statute punishes both "conditional" and "unconditional" threats. *See Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971).

[14] "Cause" includes personally engaging in criminal conduct and soliciting or allowing an accomplice or innocent instrumentality to engage in criminal conduct.

[15] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[16] The statute punishes both "conditional" and "unconditional" threats. *See Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971).

[17] "Cause" includes personally engaging in criminal conduct and soliciting or allowing an accomplice or innocent instrumentality to engage in criminal conduct.

[18] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

[19] For example, a person who writes threatening messages in his or her own personal diary or journal, expecting that no other person will read it, does not commit criminal threats. The term "complainant" is defined in RCC § 22E-701.

[20] For example, a jury may evaluate whether the accused's gesture of drawing a finger across his throat communicated that the accused would kill the recipient of the communication. A jury may also evaluate whether texting a photograph of someone's car communicated that the accused would damage the car. *See Roberts v. United States*, 216 A.3d 870, 886 (D.C. 2019) (citing *Gray v. United States*, 100 A.3d 129, 134, 136 (D.C. 2014) (jury assessing how ordinary hearer would interpret statements must consider the "full context in which the words are spoken," including "the relationship between the speaker and hearer, and their shared knowledge and history") (internal quotation marks omitted); *Andrews v. United States*, 125 A.3d 316, 325 (D.C. 2015) ("There may be all the more reason to construe an ambiguous statement as threatening when it is made in the context of a volatile or hostile relationship")).

do harm.[21] "Intent" is a defined term in RCC § 22E-206 that here requires that the defendant was practically certain that his or her communication would be perceived as a serious expression of an intent to do harm. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the communication was perceived as a serious expression of an intent to do harm, only that the actor believed to a practical certainty that it would be so perceived. Not all insulting, abusive, or violent language is threatening.[22] For example, a statement about what a person believes ought to happen, may not be intended and understood as an expression that the declarant will cause it to happen.[23] Whether a particular communication amounts to a serious expression of intent to inflict harm is a question of fact that will often require judgment by a factfinder. "Intent" is a defined term in RCC § 22E-206 and requires the defendant believe his or her communication is practically certain to be perceived as a serious expression of an intent to do harm.[24]

Paragraphs (a)(3), (b)(3), and (c)(3) require proof that the accused's communication is objectively threatening, under the circumstances.[25] "In fact," a defined term,[26] is used to indicate that there is no culpable mental state requirement for paragraphs (a)(3), (b)(3), and (c)(3). Rather, the only proof required with respect to this element of the offense is that the defendant's message would cause a reasonable person in the complainant's circumstances to believe that the harm would occur.[27] This is an objective standard, but it is evaluated contextually, assuming awareness of the

[21] *Virginia v. Black*, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.") (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) ("political hyberbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

[22] *See Lewis v. United States,* 95 A.3d 1289, 1290 (D.C. 2014) (reversing a conviction where the appellant was expressing frustration over his arrest by yelling derogatory names at the officers and yelling that the officer was "lucky" that appellant had not had a gun on him because he would have "blown [the officer's] partner's god-damned head off.")

[23] *Compare State v. Draskovich*, 904 N.W.2d 759, 761 (S.D. 2017) (upholding a threats conviction where a defendant told a court employee, "Well, that deserves 180 pounds of lead between the eyes,") *with People v. Wood*, 127 N.E.3d 1 (Ill. App. Ct. 2017) (reversing a threats conviction where a defendant expressed a "dream for revenge," stating, "There is not a day that goes by since I was sentenced at that courthouse that I have not dreamed about revenge and the utter hate I feel for the judge," and "there's not a day that goes by that I don't pray for the death and destruction upon the judge.")

[24] The criminal threats offense requires that the listener receive and understand, at the most basic level, the *meaning* of the defendant's speech. *See Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001). For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend. However, the offense does not require that the listener be certain about the *intent* behind the defendant's speech. So long as (1) the defendant intended that the victim perceive the threat as serious and (2) a reasonable person in the victim's circumstances would perceive the threat as serious, it is of no consequence that the listener does not actually believe that the defendant means what was said.

[25] The government must prove a conduct element and a result element: that the defendant (1) "uttered words to another person" (2) with a result that "the ordinary hearer [would] reasonably…believe that the threatened harm would take place." *In re S.W.*, 45 A.3d 151, 155 (D.C. 2012); *see also Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000) (acknowledging these two actus reus elements).

[26] RCC § 22E-207.

[27] *Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).

circumstances known to the parties in the case.[28] The relevant facts and circumstances in an individual case may include prior interactions between the declarant and the listener,[29] the power dynamics between the declarant and the target of the threat,[30] and the conditional nature of the threat.[31] Paragraphs (a)(3), (b)(3), and (c)(3) do not require that the defendant actually have the ability or apparent ability to carry out the threatened harm.[32] The offense also does not require proof that the defendant actually intended to eventually carry out the threat.

Subsection (d) specifies relevant penalties for each gradation of the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (d)(4) establishes three penalty enhancements for the criminal threats offense.

Subparagraph (d)(4)(A) specifies that the classification of the offense is increased by one class when it is proven[33] that the actor was reckless as to the complainant being a protected person. The term "reckless" is defined in RCC § 22E-206 and the terms "actor," "complainant," and "protected person" are defined in RCC § 22E-701.

Subparagraph (d)(4)(B) specifies that the classification of the offense is increased by one class when it is proven[34] that the actor uses or displays a dangerous weapon or imitation dangerous weapon in the course of making the communication. The terms "dangerous weapon" and "imitation dangerous weapon" are defined in RCC § 22E-701. "'Displaying or using" should be broadly construed to include making a weapon known by sight, sound, or touch,[35] but does not include displaying an image of a weapon. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "recklessly" from subparagraph (d)(4)(A) applies to whether the person made the communication by using a weapon. That is, the person must consciously disregard a substantial risk that the communication is being made through such a display or use and the conduct must be a gross deviation from the ordinary standard of conduct. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for a

[28] *High v. United States*, 128 A.3d 1017, 1021 (D.C. 2015).

[29] For example, a complainant who testifies, "I knew that the defendant would not ever actually try to hit me," has not suffered a criminal threat, even if the defendant intended the puffery to be taken seriously.

[30] *See, e.g., High v. United States*, 128 A.3d 1017 (D.C. 2015) (concluding that an ordinary hearer, in the circumstances of an on-duty law enforcement officer, would not reasonably fear imminent or future harm or injury based on the defendant's expression of exasperation or resignation, "Take that gun and badge off and I'll f*** you up.").

[31] A threat on a condition that victim believes will never occur does not amount to a criminal threat. *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971). Additionally, a statement that a person will defend themselves or another person from criminal harm does not amount to a criminal threat. Consider, for example, a parent who warns, "If you touch my child, you are going to regret it!"

[32] Consider, for example, Person A sends multiple messages to Person B threatening to "beat him up." Person B is unafraid because he has been specially trained as a fighter. Person A, nevertheless, may have committed criminal threats against Person B.

[33] RCC § 22E-605 requires that penalty enhancements be charged and proven beyond a reasonable doubt.

[34] RCC § 22E-605 requires that penalty enhancements be charged and proven beyond a reasonable doubt.

[35] For example, assuming the other elements of the offense are proven, the following conduct may be sufficient for first degree liability: rearranging one's coat to provide a momentary glimpse of part of a knife; holding a sharp object to someone's back; audibly cocking a firearm; or shooting a firearm in the air.

given element, here whether the item displayed or used is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (d)(4)(C) specifies that the classification of the offense is increased by one class when it is proven[36] that the actor had the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. The terms "law enforcement officer," "public safety employee," and "District official" are defined in RCC § 22E-701.[37] This aggravating circumstance requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to cause the death of a person of such a status.

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised criminal threats statute clearly changes current District law in four main ways*.

First, the revised criminal threats statute establishes three gradations based on the nature of the threatened harm. Under current District law, a felony threats offense punishes threats to kidnap, injure, or damage property, [38] whereas a misdemeanor threats offense punishes infliction of bodily harm only.[39] Consequently, although there are two penalty gradations under current law, the gradations do not limit liability for less severe threats.[40]

The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that intent-to-frighten assault covers a defendant's "conduct as could induce in the victim a

[36] RCC § 22E-605 requires that penalty enhancements be charged and proven beyond a reasonable doubt.

[37] While the RCC § 22E-701 definitions of "law enforcement officer" and "public safety employee" refer to some persons only when on-duty (e.g., a campus officer), this provision on committing the offense with the purpose of harming the complainant because of their status as a law enforcement officer or public safety employee applies to committing the offense against an off-duty person based on their on-duty role.

[38] Neither current statutes nor case law define the precise meaning of terms like "injure," or "do bodily harm," and it is unclear if the phrases are equivalent to the harm described in case law for simple assault. D.C. Code § 22-404. *See Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001) ("[A]ssault is defined as the unlawful use of force causing injury to another…"). The DCCA has further held that "assault" includes "non-violent sexual touching assault as a distinct type of assault." *Id*. And in fact, even non-sexual but "offensive" touchings can constitute assault. *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990). In at least one case, the DCCA has upheld a threats conviction where the threat consisted of saying, "I'm going to smack the s*** out of you." *Jones v. United States*, 124 A.3d 127, 131 (D.C. 2015). It's unclear whether slapping a person would constitute simple assault *qua* inflicting bodily harm, or simple assault *qua* engaging in an offensive touching.

[39] D.C. Code §§ 22-407, 22-1810.

[40] The current statutory structure provides no lesser-included offenses for threats of kidnapping or threats to property.

well-founded apprehension of peril."[41] District case law concerning intent-to-frighten assault has upheld convictions for placing a person in fear of "immediate injury."[42] However, there is no District case law deciding whether placing someone in fear of an offensive physical contact, the lowest level of assault recognized under current District law,[43] suffices for intent-to-frighten assault liability.[44] Current District threats statutes refer to a few types of conduct: to "kidnap," "injure the person of another," "physically damage the property of any person," or "do bodily harm."[45] Neither the current statutes nor case law define the precise meaning of terms like "injure" or "do bodily harm," and it is unclear whether the phrases are equivalent to the harm described in case law for simple assault.[46]

In contrast, the RCC criminal threats statute specifies the relevant harms that may be the basis for prosecution and grades according to the severity of the harm threatened. First degree liability requires a threat to immediately inflict death, serious bodily injury, a sexual act,[47] or confinement.[48] Second degree liability requires a threat to cause a bodily injury or a sexual contact.[49] Third degree liability requires a threat to cause property loss or damage. The revised statute also provides a penalty enhancement for threats committed with a weapon, against a protected person,[50] or targeting a law enforcement officer, public safety employee, or District official.[51] This change narrows the scope of the offense by excluding non-sexual, merely offensive physical contacts (that fall short of

[41] *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986).

[42] *Joiner-Die*, 899 A.2d at 765; accord *Alfaro v. United States*, 859 A.2d 149, 156 (D.C. 2004) ("The essence of the common law offense of assault is the intentional infliction of bodily injury or the creation of fear thereof," and "[a]ll forms of assault share one common feature, namely, that they intrude upon bodily integrity and inflict bodily harm or the fear or threat thereof."). For purposes of instructing juries, the pattern jury instructions provide, "Injury means any physical injury, however small, including a touching offensive to a person of reasonable sensibility." D.C. Crim. Jur. Instr. § 4.100.

[43] *Ray v. United States*, 575 A.2d 1196, 1199 (D.C.1990).

[44] The holding in *Ray* is directed mainly at the attempted-battery form of simple assault. *Ray*, 575 at 1199. It is only by logical inference (admittedly, a small inference) that one can conclude that intent-to-frighten assault includes threatened offensive contact. But the Redbook does include the possibility of an intent-to-frighten assault premised on a threatened offensive contact. D.C. Crim. Jur. Instr. § 4.100. Notably, neither the Redbook nor any DCCA case law seems to address the possibility that intent-to-frighten assault can be based on a threatened non-violent sexual touching.

[45] D.C. Code §§ 22-407, 22-1810.

[46] D.C. Code § 22-404. *See Mungo v. United States*, 772 A.2d 240, 245 (D.C. 2001) ("[A]ssault is defined as the unlawful use of force causing injury to another…"). The DCCA has further held that "assault" includes "non-violent sexual touching assault as a distinct type of assault." *Id*. And in fact, even non-sexual but "offensive" touching can constitute assault. *Ray*, 575 A.2d at 1199. In at least one case, the DCCA has upheld a threats conviction where the threat consisted of saying, "I'm going to smack the s*** out of you." *Jones v. United States*, 124 A.3d 127, 131 (D.C. 2015). It is unclear whether slapping a person would constitute simple assault *qua* inflicting bodily harm, or simple assault *qua* engaging in an offensive touching.

[47] "Serious bodily injury" and "sexual act" are defined in RCC § 22E-701.

[48] The revised statute's use of "criminal harm involving…confinement" provides an ordinary language approach to specifying the harm commonly involved in kidnapping.

[49] "Bodily injury" and "sexual contact" are defined in RCC § 22E-701.

[50] "Protected person" is defined in RCC § 22E-701.

[51] "Law enforcement officer," "public safety employee," and "District official" are defined in RCC § 22E-701.

inflicting bodily injury),[52] but broadens the offense to include kidnapping conduct that does not involve a bodily harm.[53] This change also brings the criminal threats offense into conformity with the approach to penalty gradations used through most of the current D.C. Code and the RCC[54] and improves the proportionality of the revised offense. This change reduces an unnecessary gap in liability, and improves the clarity, consistency and proportionality of the revised offense.

Second, the revised criminal threats statute uses the word "communicates," which includes all verbal and non-verbal conduct that conveys a message, expanding the means by which a threat may be issued. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[55] or issues a "threat."[56] The current District assault statutes are silent as to the type of conduct that may constitute an "intent-to-frighten" form of assault. However, District case law holds that "mere words do not constitute an assault."[57] Under common law, non-verbal conduct is required for intent-to-frighten assault,[58] although case law does not specify what conduct is required. The current District threats statutes are silent as to the type of conduct that may convey a threat, simply referring to a person who "threatens"[59] or issues a "threat."[60] However, in at least one case, District of Columbia Court of Appeals ("DCCA") has stated that a threat "requires *words* to be communicated to another person" in contrast with intent-to-frighten assault which "requires threatening conduct."[61] Case law describes an element of threats as having "uttered words,"[62] which

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[52] As noted above, there is no District case law on point as to whether placing someone in fear of an offensive physical contact, the lowest level of assault recognized under current District law, would suffice for intent-to-frighten assault liability. However, to the extent that an attempted offensive physical contact, even when actually inflicted, is the least or nearly the least severe form of offense against person in the RCC, a criminal threat that places another person in fear of an offensive physical contact would be less severe than even an attempted offensive physical contact.

[53] For example, a form of kidnapping that involves no physical contact, such as locking the door to a room someone is in, has been held to not constitute an assault. *Patterson v. Pillans*, 43 App. D.C. 505, 506-07 (C.C.D.C. 1915).

[54] Virtually all criminal offenses that have penalty gradations in the current D.C. Code, or in the RCC, are structured such that the more severe penalty is for more harmful conduct that is a subset of the broader set of conduct covered by the less severe gradation. The District's current threats statutes reverse the usual approach to statutory drafting, making the least harmful conduct a subset of the broader set of conduct covered by the more severe gradation. Interestingly, the DCCA has noted that the legislative history behind the District's felony threats offense is somewhat muddled, and actually suggests that the offense was intended to cover extortionate conduct, not merely threatening conduct in the abstract. See *United States v. Young*, 376 A.2d 809, 814-16 (D.C. 1977) (discussing legislative history). The relatively harsh penalty associated with felony threats has been explained by reference to this history. *Id*.

[55] D.C. Code § 22-1810.

[56] D.C. Code § 22-407.

[57] *Williamson v. United States*, 445 A.2d 975, 978 (D.C. 1982).

[58] One of the District's oldest cases, from the very first volume of Cranch's Reports, turns on this issue. In *United States v. Myers*, the defendant "doubled his fist and ran it towards the witness, saying, 'If you say so again, I will knock you down.'" 1 Cranch C.C. 310, 310 (D.C. 1806). The guilty verdict was upheld.

[59] D.C. Code § 22-1810.

[60] D.C. Code § 22-407.

[61] *Joiner-Die v. United States*, 899 A.2d 762, 766 (D.C. 2006) (emphasis in the original). However, although no reported threats case before the DCCA appear to have been based on gestures alone, symbolic or non-verbal threats have been considered by that Court in the broader context of threatening conduct.

has been explicitly construed to cover not only oral but written threats.[63] In contrast, the RCC criminal threats statute punishes threatening words (written or oral), gestures, and symbols,[64] as well as conduct. Assuming other elements of the offense are proven, the social harm at issue—the intentional infliction of fear upon a person—occurs whether the message is conveyed verbally or non-verbally.[65] This change improves the consistency and proportionality of the revised offense.

Third, the revised statute does not expressly authorize the issuance of a bond to keep the peace for one year. Current D.C. Code § 22-407 specifies that a person who commits threats to do bodily harm "may be required to give bond to keep the peace for a period not exceeding 1 year." The RCC specifies a maximum term of imprisonment and a maximum fine for each revised offense, but it does not address what, if any, terms of probation may be appropriate or desirable for a given offense. Nor does it limit a period of probation or a condition of probation to a term of one year. A court may, in its discretion, suspend the imposition of a period of incarceration and place an offender on supervised or unsupervised probation on the condition that the person not reoffend for up to five years, under D.C. Code § 16-710(b). This change improves the consistency of the revised offenses.

Fourth, the RCC criminal threats offense eliminates liability based on an "intent to injure." The current District assault statutes are silent as to the types of intent that may constitute an "intent-to-frighten" form of assault. However, District case law has indicated that, in addition to an intent to scare a victim, intent-to-frighten assault liability also may exist where there is an intent to cause bodily injury to the victim.[66] This "intent to cause injury" form of intent-to-frighten assault appears to be distinct from criminal liability for an attempted battery form of simple assault in District case law.[67] In contrast,

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See, *e.g.*, *Gray v. United States*, 100 A.3d 129, 136 (D.C. 2014) ("[T]he trial court found appellant guilty of threats based on Lowery's testimony that [the defendant] said 'I'm going to kill you,' and made 'a gun motion' with his fingers."). *See also*, D.C. Crim. Jur. Instr. § 4.130 (including gestures and symbols as means of completing the offense); *Ebron v. United States*, 838 A.2d 1140, 1150-53 (D.C. 2016) (in context of threats evidence admissibility, hand being dragged across the throat constituted a "threatening action").

[62] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person 'threatens' when she utters words[.]").

[63] *Tolentino v. United States*, 636 A.2d 433, 434-35 (D.C. 1994) (rejecting defendant's argument that the threats offense only covers oral communications, and upholding conviction based on written threats); *Andrews v. United States*, 125 A.3d 316, 325 (D.C. 2015) (upholding conviction on the basis of threatening text messages).

[64] E.g., transmitting an image or sound to a recipient.

[65] *See*, *e.g.*, *State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[66] *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986).

[67] The attempted battery form of assault requires proof that the defendant committed an "actual attempt, with force or violence, to injure another." *Williamson*, 445 A.2d at 978; *accord Patterson v. Pillans*, 43 App. D.C. 505, 506-07 (C.C.D.C.) ("attempt to cause a physical injury, which may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person.").

the RCC criminal threats offense requires only that the defendant intend that communication be perceived as a threat. A person who engages in conduct with an intent to inflict bodily injury may be liable under the RCC assault statute.[68] This new division of criminal liability between the revised assault and revised criminal threats statutes may limit punishment for some conduct currently recognized as a completed form of intent-to-frighten assault to an attempted assault in the revised statute.[69] The change clarifies the revised offenses of assault and criminal threats and eliminates unnecessary overlap in current District law between attempted battery forms of assault and intent-to-frighten forms of assault.

Beyond these four changes, six other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised criminal threats statute clarifies that the defendant must act with intent—i.e. must believe to a practical certainty—that his or her communication will be perceived as a serious expression that the defendant would cause a criminal harm. The District's current threats statutes are silent as to the offense's requisite culpable mental states, and recent DCCA case law has addressed but not entirely resolved the culpable mental state as to whether the communication will be understood as a threat. In 2017, an *en banc* DCCA decision, *Carrell v. United States*, held that something more than negligence, but less than purpose, is necessary.[70] The DCCA, following recent Supreme Court precedent,[71] said that acting with intent that the communication be perceived as a threat is sufficient for liability, but did not decide whether recklessness is also sufficient and acknowledged that it was leaving the law unsettled.[72] Current District case law has often indicated that recklessness may suffice for such assaults,[73] however, in some

[68] RCC § 22E-1202.

[69] I.e. to the extent that intent-to-frighten assault in current DCCA case law recognizes liability for an intent to cause bodily harm without an intent to frighten, there is no corresponding liability for a completed offense in the revised criminal threats statute—even though liability would exist in the revised assault statute.

[70] *Carrell v. United States*, 165 A.3d 314, 324-25 (D.C. 2017).

[71] *Elonis v. United States*, 135 S. Ct. 2001 (2015).

[72] 165 A.3d 314, 323-24 (D.C. 2017) ("[W]e decline to decide whether a lesser threshold mens rea for the second element of the crime of threats—recklessness—would suffice.").

[73] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams*, 106 A.3d at 1065 & n.5 (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); D.C. Code § 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

instances a higher level of intent has been required,[74] and the DCCA recently declined to hold that recklessness is sufficient.[75] To resolve this ambiguity, the revised statute clarifies that the defendant must act with intent, not mere recklessness, as to whether the communication is perceived as a threat. Applying an intent culpable mental state requirement (an inchoate form of a knowledge requirement, as defined in the RCC[76]) to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[77] Requiring an intent culpable mental state in the revised threats offense also appears to be consistent with existing District practice.[78] These changes improve the clarity and consistency of the offense.

Second, the revised criminal threats statute includes an "objective element" in paragraphs (a)(3), (b)(3), and (c)(3), subject to strict liability.[79] The District's current threats statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, longstanding District case law requires proof that that the "ordinary hearer would reasonably believe that threatened harm would take place."[80] Case law further specifies that this reference to an "ordinary hearer" takes into account all the context-specific factual circumstances of the case.[81] The DCCA's recent *en banc* opinion in *Carrell*

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[74] *See, e.g.*, *Buchanan v. United States*, 32 A.3d 990, 998 (D.C. 2011) (Ruiz, J., concurring) ("At the same time that we have labeled assault a general intent crime, however, we have also articulated additional showings of intent which would seem to go above and beyond the ordinary conception of general intent merely to do the act constituting the assault."); *Powell v. United States*, 238 A.3d 954, 959 (D.C. 2020) ("Our additional concern is whether the evidence proved that appellant had the *mens rea* required for intent-to-frighten assault: a 'purposeful design ... to engender fear' or 'create apprehension.') (quoting *Parks v. United States*, 627 A.2d 1, 5 (D.C. 1993); *id.* at 959 ("For similar reasons, we conclude that the evidence was insufficient for conviction even if we assume *arguendo* that the *mens rea* for intent-to-frighten assault can be satisfied by evidence of recklessness.").

[75] Recently, the DCCA explicitly declined to decide whether assault requires recklessness or a higher culpable mental state like intent to injure, stating "[e]ven if the greater proof was necessary, the jury could permissibly infer such intent from [appellant's] extremely reckless conduct, which posed a high risk of injury to those around him. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[76] RCC § 22E-206(b).

[77] *See Elonis*, 135 S. Ct. at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[78] *See* D.C. Crim. Jur. Instr. § 4.130 (applying knowledge). The DCCA also noted that "the United States Attorney's Office [ ] disclaims reliance on recklessness…and states that it does not intend to prosecute future threats cases on a recklessness theory." *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017). Of course, other parties, including the Office of the Attorney General, may rely on the threats statute as well.

[79] *See Carrell v. United States*, 165 A.3d 314, 320 (D.C. 2017).

[80] *Id*.

[81] The DCCA has noted that "the factfinder must weigh not just the words uttered, but also the complete context in which they were used." *Gray v. United States*, 100 A.3d at 136. For example, words that on their face are innocuous or ambiguous can become threatening in the circumstances of the threat; the opposite is true, as well. *See Clark v. United States*, 755 A.2d at 1031; *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) ("Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening."). The DCCA has noted that words "often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations of the speaker…" *Id*.

reaffirmed that there must be proof of this "objective element,"[82] while adding the additional requirement "that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat."[83] However, the *Carrell* decision did not fully specify the relationship between the objective standard and the defendant's culpable mental state of knowledge that his communication be a threat.[84] The District's current assault statutes are silent as to whether the communication must be one that would cause a reasonable recipient to believe that the threatened harm would take place. However, District case law on intent-to-frighten assault requires that the defendant had the "apparent present ability to injure" the complainant.[85] The DCCA further qualified that a reasonable person test is to be used to determine such an ability.[86] In contrast, the RCC criminal threats offense specifies that while the defendant must act with intent that the communication be perceived as a threat,[87] the objective elements in paragraphs (a)(3) and (b)(3) are additional, separate elements,[88] independent of the defendant's own awareness of the threatening nature of the message. The RCC's use of "in fact" with the objective requirement in the threats statutes clarifies the state of the law and appears to be consistent with District practice[89] and the recent DCCA ruling in *Carrell.* This change improves the clarity of the law and is consistent with prevailing District law on criminal threats.

Fourth, the revised criminal threats statute specifies that the defendant must know that the communication conveys that the defendant will cause a criminal harm, and have intent that the communication be perceived as a serious expression that the actor would cause the harm. The District's current threats statutes are silent as to whether the harm that is threatened is criminal, and case law has not directly addressed the issue. However, a knowledge requirement as to the nature of the communication as a threat is consistent with the DCCA's recent *en banc* opinion in *Carrell*.[90] Moreover, in other contexts, District case law has recognized that consent may be a valid general defense to harms that otherwise would be criminal, [91] and that a parent or other person in a custodial

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[82] *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017).
[83] *Id*.
[84] For example, the opinion does not address whether, in addition to believing to a practical certainty that the communication would be perceived as a threat, the defendant must also believe that a "reasonable recipient" would believe that the harm would take place.
[85] *See Anthony v. United States*, 361 A.2d 202, 207 (D.C. 1976).
[86] *See id*. at 206 ("[T]he crucial inquiry remains whether the assailant acted in such a manner as would under the circumstances portend an immediate threat of danger to a person or reasonable sensibility.").
[87] *Carrell v. United States*, 165 A.3d 314, 325 (D.C. 2017).
[88] Even though paragraphs (a)(3) and (b)(3) provide for an objective assessment, the factfinder may take into account, among other factors, the subjective reactions of the recipients of the communication. *See Gray*, 100 A.3d at 134-35 ("[W]hether an ordinary hearer would understand words to be in the nature of a threat of serious bodily harm is a highly context-sensitive question.").
[89] *See* D.C. Crim. Jur. Instr. § 4.130.
[90] *Carrell v. United States*, 165 A.3d 314, 323-24 (D.C. 2017) (rejecting an analysis of the threats statute in terms of "specific" or "general" intent and requiring proof of knowledge, or at least some subjective intent, on the part of the defendant as to whether his or her communication would be perceived as a threat).
[91] *See Guarro v. United States,* 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

relationship is not liable for committing some harms that are in fulfillment of the duties of that relationship.[92] The RCC criminal threats statute clarifies that the actor must know and have intent that the harm he or she communicates to another is a criminal harm. The requirement that the harm be "criminal" clarifies that there is no liability for a communication of a harm to which there is an effective consent[93] or other general defense, or other harms that do not rise to the level of criminality. Moreover, District practice[94] has long recognized the general existence of a consent defense that is consistent with the RCC criminal threat requirement that the harm be criminal. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fifth, the RCC first degree criminal threats offense explicitly addresses threatening by displaying or using imitation dangerous weapons. The current District assault with a dangerous weapon statute is silent as to whether the offense may be completed using an imitation weapon.[95] The DCCA has held that imitation *firearms* are within the scope of the assault with a dangerous weapon statute[96] but has not yet explicitly addressed non-firearm imitation weapons (e.g., fake knives).[97] The current District threats statutes do not include the use of dangerous weapon as an element.[98] In contrast, the RCC criminal threats offense explicitly includes all imitation dangerous weapons, a term defined in RCC § 22E-701. Assuming other elements of the offense are proven, the social harm at issue—the immediate, intentional infliction of fear upon a person—occurs whether the weapon is real or an imitation that a reasonable person would believe is real. This change improves the clarity of the statute and may fill a gap in existing law.

Sixth, the RCC criminal threats offense replaces penalty enhancements based on the victim's status as a minor, a senior citizen, a transportation worker, a District official or employee, or a citizen patrol member. Under current District statutes, certain penalty

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[92] *See, e.g., Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980) (Parents have common law duty of care to provide medical care for minor dependent children.)

[93] For example, but for the requirement that the harm be "criminal," a surgeon describing the procedure he is intends to carry out on a patient would appear to be liable under the plain language of the statute. Similarly, threats made as part of sports, acting, sexual interactions, and other activity not forbidden by law would appear to fall within the scope of the criminal threat offense.

[94] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

[95] D.C. Code § 22-402.

[96] *Washington v. United States*, 135 A.3d 325, 329-30 (D.C. 2016).

[97] However, in another case on an imitation firearm, the DCCA has generally stated that it is the apparent ability of a weapon to inflict harm, not actual ability that matters. *See Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) ("However, present ability of the weapon to inflict great bodily injury is not required to prove an assault with a dangerous weapon. Only apparent ability through the eyes of the victim is required. *See United States v. Cooper*, 462 F.2d 1343, 1344 (5th Cir. 1972) (assault with dangerous weapon, i.e. imitation bomb); *Bass v. Stat*e, 232 So.2d 25, 27 (Fla.App.1970) (assault with deadly weapon, i.e. unloaded pistol); *State v. Johnston*, 207 La. 161, 20 So.2d 741 (1944) (assault with dangerous weapon, i.e. unloaded pistol). *See also* Annot., 79 A.L.R.2d 1412, 1424 (1961) and Later Case Service (1968).").

[98] D.C. Code §§ 22-407, 22-1810.

enhancements apply to simple assault (including intent-to-frighten assault)[99] and assault with a deadly weapon.[100] By contrast, under the RCC, it must be proven that the person was reckless as to the complainant being a "protected person" as defined in the RCC[101] or target the complainant based on their status as a "law enforcement officer," "public safety employee," or "District official," as defined in the RCC.[102] This change simplifies current law and improves the consistency and proportionality of the revised offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised offense clarifies that a threat to harm a third party is sufficient for criminal liability. The current District threats statutes are silent on this matter. However, DCCA case law has long recognized that threats to harm a third party, other than the recipient of the communication, are sufficient for liability if other elements of the offense are met.[103] This does not appear to have been addressed in District assault case law.[104] Additionally, although the current statutes do not explicitly note that the offenses only apply to natural persons, the revised statute incorporates current DCCA case law holding that business and government entities are not protected by the threats statutes.[105]

Second, the revised criminal threats statute specifies that the offense is complete only when the message is communicated to another person. Thus, a person is not guilty of a completed criminal threat if the communication does not reach a person other than

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[99] The enhancements are: D.C. Code § 22-851 (District official, employee or the family member thereof) and D.C. Code § 22-3602 (citizen patrol member). Note that there is also a slightly greater penalty for simple assault of a law enforcement officer (6 months versus 180 days) per D.C. Code § 22-405.

[100] The enhancements are: D.C. Code § 22-3611 (minor); D.C. Code § 22-3601 (senior citizen); D.C. Code §§ 22-3751, 22-3751.01, 22-3752 (transportation worker); D.C. Code § 22-851 (District official, employee or the family member thereof); or D.C. Code § 22-3602 (citizen patrol member).

[101] *See* RCC § 22E-701.

[102] *See* RCC § 22E-701.

[103] *Gurley v. United States*, 308 A.2d 785, 786 (D.C. 1973) ("It is obvious that this statute does not expressly require that the threats be communicated directly to the threatened individual."); *see also Beard v. United States*, 535 A.2d 1373, 1378 (D.C. 1988) ("The crime was complete as soon as the threat was communicated to a third party, regardless of whether the intended victim ever knew of the plot.").

[104] The Redbook, however, includes an instruction on the same element with an alternative including threats to someone other than the recipient. D.C. Crim. Jur. Instr. § 4.100 ("S/he intended to cause injury or to create fear in [name of complainant] [another person]…"). However, there is case law holding that there cannot be more than one ADW conviction for directing a threat at a group of people. *See, e.g., Smith v. United States*, 295 A.2d 60, 61 (D.C.1972) (holding, where the defendant patted his pocket and told two men he had a gun, that "a single threat directed to more than one person constitutes but a single unit of prosecution"); *United States v. Alexander*, 471 F.2d 923, 932–34 (D.C.Cir.1972) (holding, in case where defendant pointed his gun at a group of four individuals, that "where by a single act or course of action a defendant has put in fear different members of a group towards which the action is collectively directed, he is guilty of but one offense") *Graure v. United States*, 18 A.3d 743, 763 (D.C. 2011). The RCC criminal threats statute does not change this law regarding the appropriate unit of prosecution.

[105] *See Ruffin v. United States*, 76 A.3d 845, 855 (D.C. 2013) (holding that "the contextual features suggest that 'person' is limited to natural persons" in threats, and therefore, threatening to destroy District of Columbia government property does not constitute an offense).

the defendant. This requirement is well established in District case law.[106] Of course, a failed attempt to deliver a message to another person could constitute attempted criminal threats, as could a message that is transmitted but "garbled and not understood."[107] This, too, is well established in District case law.[108]

Third, under the revised criminal threats statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current threats statutes are silent as to the availability of an intoxication defense, and case law has not addressed the matter since the DCCA's recent *en banc* opinion in *Carrell* found that knowledge or some subjective intent is required for liability.[109] Under the RCC criminal threats statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove a criminal threat. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[110]

Fourth, the revised criminal threats offense clarifies that the defendant need not threaten to carry out the harm himself. The District's current threats statutes do not address whether a threat to have another person harm someone is sufficient for liability.[111] At least one case suggests that it is sufficient for liability that a defendant communicates that another person will harm the victim,[112] but there is no case law directly on point. The District's current simple assault and assault with a deadly weapon statutes do not address whether a threat to have another person harm someone is sufficient for liability.[113] In contrast, paragraphs (a)(2) and (b)(2) of the revised statute prohibit threats that "the actor will cause a criminal harm." This includes causing the

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[106] *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983) ("[A] person making threats does not commit a crime until the threat is heard by one other than the speaker.").

[107] *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001).

[108] *Id.* ("[I]f a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense.").

[109] *Id.* at 324.

[110] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[111] Arguably, however, the current statutory language suggests that the utterer of the threat must directly inflict the harm. *See, e.g.*, D.C. Code § 22-1810: "Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part…"

[112] In *Clark v. United States*, the defendant was convicted of threats when, after his arrest, he told a police officer, "You won't work here again, wait until I tell the boys, they will take care of you." 755 A.2d 1026, 1028 (D.C. 2000), abrogated on other grounds by *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017). Although the legal question was not presented, the DCCA upheld the defendant's conviction, despite the fact that the defendant's communication indicated "the boys" (and not the defendant) would harm the victim. *See also Aboye v. United States*, 121 A.3d 1245, 1251-52 (D.C. 2015) (defendant's conviction for threats upheld on basis that he said to victims, "I'm going to kill you with my dog. I'm going to have my dog kill you.").

[113] This may reflect the fact that, as noted above, current District intent-to-frighten assault liability is only based on conduct (not words) and it presumably is more difficult to indicate to a stranger through gestures alone how an accomplice will accomplish the harm. In the RCC criminal threats statute, by contrast, the requisite communication may be oral or by any means.

harm personally, remotely, through an accomplice, through an innocent instrumentality, or otherwise. This change improves the clarity of the revised offense.

Fifth, the revised criminal threats statutes clarifies that there is no gradation distinction based on whether harm did or did not result from the defendant's communication. Current District law provides more severe penalties for causing assaults that result in more severe physical harms—for example, the felony assault statute punishes anyone who "unlawfully assaults…[and] causes significant bodily injury to another," thus creating the offense of "felony assault."[114] Consequently, it may be possible under current District law for a person whose conduct amounts to an intent-to-frighten form of assault to be liable for felony punishment if that frightening conduct results in significant or serious bodily injury. No DCCA case law has addressed such felony-level liability based on intent-to-frighten conduct versus battery. The fact patterns that would give rise to such liability are unlikely,[115] though arguably possible.[116] District threats statutes do not grade on the basis of the infliction of a bodily harm.[117] While the revised statute does not grade based on whether there are any resulting physical harms, conduct that causes such a harm may be punishable under the RCC assault statute.[118]

Sixth, the first degree criminal threats offense requires that the harm threatened must be immediate. The current District simple assault and assault with a dangerous weapon statutes are silent as to immediacy. However, District case law on intent-to-frighten assault and assault with a dangerous weapon implicitly require it, particularly through requirements that the defendant have the "apparent present ability to injure" the complainant.[119] As noted above, the DCCA held "that at the time of the assault the surrounding circumstances must connote the intention and present ability to do immediate violence."[120] Although the District's threats statutes are silent on the matter, District case law has affirmed liability for threats regardless of physical presence or the immediacy of harm.[121] The revised criminal threats statute clarifies these immediacy and physical presence requirements in existing law.

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[114] D.C. Code § 22-404(a)(2).

[115] The pattern jury instructions acknowledge the possibility of intent-to-frighten conduct triggering a felony assault charge and includes an instruction. *See* D.C. Crim. Jur. Instr. § 4.102. But the Commentary states frankly that "it is unlikely that [felony assault] will be based on facts indicating only threatening acts…"

[116] For example, a person who intentionally menaces a person who is using a knife for carving might cause that person to cut themselves badly, requiring stitches. However, while such fact patterns may be unusual, the more relevant point may be that such fact patterns also could be prosecuted under a battery-type assault theory in current District law and the RCC assault statute. The person who recklessly engages in conduct of any kind that results in a significant bodily injury is liable for assault.

[117] D.C. Code §§ 22-407, 22-1810.

[118] RCC § 22E-1202. Under the revised assault statute, the *means* of causing the harms specified in the gradations is irrelevant. For example, a person who satisfies the requirements of recklessly causing bodily injury to another is liable whether the predicate conduct was threatening someone with a gesture, punching them with a fist, or poking them with a fork.

[119] *See Anthony v. United States*, 361 A.2d 202, 207 (D.C. 1976).

[120] *Id*. at 205.

[121] See commentary to RCC § 22E-204.

RCC § 22E-1205. Offensive Physical Contact.

Explanatory Note. *This section establishes the offensive physical contact offense and penalty for the Revised Criminal Code (RCC). The offense proscribes conduct in which the accused knowingly causes offensive physical contact to the complainant. Offensive physical contact includes behavior that does not rise to the level of causing bodily injury as the revised assault offense[1] requires. The penalty gradations are primarily based on the type of offensive physical contact, with enhancements for harms to special categories of persons. The offensive physical contact offense partially replaces[2] sixteen distinct offenses in the current D.C. Code: assault with intent to kill,[3] assault with intent to commit first degree sexual abuse,[4] assault with intent to commit second degree sexual abuse,[5] assault with intent to commit child sexual abuse,[6] and assault with intent to commit robbery;[7] willfully poisoning any well, spring, or cistern of water;[8] assault with intent to commit mayhem;[9] assault with a dangerous weapon;[10] assault with intent to commit any other felony;[11] simple assault;[12] assault with significant bodily injury;[13] aggravated assault;[14] assault on a public vehicle inspection officer[15] and aggravated assault on a public vehicle inspection officer;[16] assault on a law enforcement officer[17] and assault with significant bodily injury to a law enforcement officer.[18] Insofar as they are applicable to current assault-type offenses, the revised offensive physical contact offense also replaces the protection of District public officials statute,[19] certain minimum statutory penalties for assault-type offenses,[20] and five penalty enhancements: the*

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[1] RCC § 22E-1202.

[2] As is discussed in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Numerous other RCC offenses, such as the RCC offensive physical contact offense (RCC § 22E-1205) criminalize this conduct and should also be considered to replace many of these current D.C. Code "assault" offenses although they are generally not discussed in this commentary.

[3] D.C. Code § 22-401.

[4] D.C. Code § 22-401.

[5] D.C. Code § 22-401.

[6] D.C. Code § 22-401.

[7] D.C. Code § 22-401.

[8] D.C. Code § 22-401.

[9] D.C. Code § 22-401.

[10] D.C. Code § 22-402.

[11] D.C. Code § 22-403.

[12] D.C. Code § 22-404(a)(1).

[13] D.C. Code § 22-401(a)(2).

[14] D.C. Code § 22-404.01.

[15] D.C. Code § 22-404.02.

[16] D.C. Code § 22-404.03.

[17] D.C. Code § 22-405.

[18] D.C. Code § 22-405.

[19] D.C. Code § 22-851.

[20] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia.");

enhancement for senior citizens;[21] *the enhancement for citizen patrols;*[22] *the enhancement for minors;*[23] *the enhancement for taxicab drivers;*[24] *and the enhancement for transit operators and Metrorail station managers.*[25]

Paragraph (a)(1) specifies the prohibited conduct for first degree offensive physical contact, the most serious gradation of the offense—causing the complainant to come into physical contact with bodily fluid or excrement. Paragraph (a)(1) specifies that the required culpable mental state is "knowingly." Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(1) applies to each element in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she will cause physical contact between the complainant and bodily fluid or excrement.

Paragraph (a)(2) further requires that the accused act "with intent that" the physical contact be offensive to the complainant. "Intent" is a defined term in RCC § 22E-206 meaning here that the accused was practically certain that the physical contact was offensive to the complainant. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the physical contact actually offended the complainant, only that the actor believed to a practical certainty that it would do so. Paragraph (a)(3) requires that a reasonable person in the situation of the complainant would regard the physical contact as offensive. "In fact," a defined term in § 22E-207, here is used to indicate that there is no culpable mental state requirement as to whether a reasonable person in the situation of the complainant would regard the physical contact as offensive.

Subsection (b) establishes the prohibited conduct for second degree offensive physical contact, the lowest gradation of the offense. Paragraph (b)(1) specifies the prohibited conduct—causing the complainant to come into physical contact with any person[26] or any object or substance. Paragraph (b)(1) specifies that the required culpable mental state is "knowingly." Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (c)(1) applies to each element in paragraph (c)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she will cause the complainant to come into

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D.C. Code § 24-403.01(f)(1) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[21] D.C. Code § 22-3601.

[22] D.C. Code § 22-3602.

[23] D.C. Code § 22-3611.

[24] D.C. Code §§ 22-3751; 22-3752.

[25] D.C. Code §§ 22-3751.01; 22-3752.

[26] "Any person" includes the actor or the complainant. For example, if the actor pushes the complainant and does not cause "bodily injury" as required by the RCC assault statute (RCC § 22E-1202), that would constitute causing the complainant to come into physical contact with "any person." Similarly, if the actor causes the complainant to hit or touch themselves—for example, pushing the complainant's hand into the complainant's face—and it does not cause "bodily injury" as required by the RCC assault statute (RCC § 22E-1202),that would constitute causing the complainant to come into physical contact with "any person."

physical contact with any person or any object or substance. The requirements in paragraph (b)(2) and (b)(3) are identical to the requirements in paragraphs (a)(2) and (a)(3).

Subsection (c) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. An actor does not commit an offense under the revised offensive physical contact statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[27]

Subsection (d) codifies a defense for the revised offensive physical contact statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (d)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (d)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. Paragraph (d)(1) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under 18 years of age, RCC § 22E-701 defines a "person with legal authority over the complainant" as "a parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent under civil law" and "effective consent" also are defined terms in RCC § 22E-701. When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "a court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of paragraph (d)(1) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense[28] to the revised offensive physical contact statute.

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[27] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[28] The defense under subsection (d) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[29]

Paragraph (d)(2) and its subparagraphs specify the individuals from whom an actor must receive "effective consent" in order for the defense to apply. Each subparagraph will be discussed separately, but general principles that apply to each subparagraph will be discussed first.

Paragraph (d)(2) requires that the actor "reasonably believes"[30] that the specified individuals in the following subparagraphs—either the complainant or a "person with legal authority over the complainant" acting consistent with that authority—give "effective consent" to the actor to cause the physical contact. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (d)(2) and its subparagraphs permit complainants under the age of 18 years to give effective consent in certain situations, the defendant's belief that a very young person gave "consent" may not be reasonable and, in such a case, the defense would not apply.

The "in fact" specified in subsection (d) applies to paragraph (d)(2) and the requirements in the following subparagraphs. No culpable mental state, as defined in RCC § 22E-205, applies to paragraph (d)(2) or the following subparagraphs. It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent.[31] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[32] There is no effective consent defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the effective

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[29] These defenses have different requirements than the effective consent defense in subsection (d). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[30] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[31] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[32] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Paragraph (d)(2) further requires that the actor "reasonably believes" that the complainant and the actor meet various age requirements in the following subparagraphs. As is discussed above, due to the "in fact" specified in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to paragraph (d)(2) or the following subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[33] that the actor and the complainant satisfy the age requirements in the subparagraphs under paragraph (d)(2). There is no effective consent defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the required age of the complainant or required age of the actor.

Finally, paragraph (d)(2) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to paragraph (d)(2) or the following subparagraphs. However, the actor must subjectively believe, and that belief must be reasonable,[34] that there is effective consent to cause the physical contact. There is no effective consent defense under paragraph (d)(2) when the actor makes an unreasonable mistake as to the type of physical contact to which effective consent is given.[35]

Having discussed the general principles that apply to the defense requirements in paragraph (d)(2) and its subparagraphs, each subparagraph will now be discussed.

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[33] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[34] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[35] For example, if, the complainant gives effective consent to the actor to push the complainant then instead throws urine at the complainant, the effective consent does not apply, and the actor is still guilty of first degree offensive physical contact.

Under paragraph (d)(2) and subparagraph (d)(2)(A), the actor must reasonably believe that the complainant is 18 years of age or older and that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to either cause the physical contact, or to engage in a lawful sport, occupation, or other concerted activity.[36] As is discussed above, "effective consent" and "person with legal authority over the complainant" are defined terms in RCC § 22E-701. The provision in subparagraph (d)(2)(A) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of incompetent adults giving effective consent to the actor. Sub-subparagraph (d)(2)(A)(ii), in the alternative, requires that, if the physical contact occurs during a lawful sport, occupation, or other concerted activity, the defense is applicable when the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in subsection (d), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's infliction of the physical contact is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the physical contact is not a reasonably foreseeable hazard.

Second, and in the alternative, under subparagraph (d)(2)(B), the actor must reasonably believe that the complainant is under 18 years of age and the actor is 18 years of age or older and more than four years older than the complainant (subparagraph (d)(2)(B)(i)). In addition, the actor must reasonably believe that a "person with legal authority over the complainant" gives "effective consent" to the actor to either cause the physical contact, or to engage in a lawful sport, occupation, or other concerted activity,[37] where the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (d)(2)(A)(ii) applies here to sub-subparagraph (d)(2)(B)(ii)(II).

Finally, and in the alternative, under paragraph (d)(2) and subparagraph (d)(2)(C), the actor must reasonably believe that the complainant is under 18 years of age, and that the actor is either under years of age or over 18 years of age and not more than four years older (sub-subparagraph (d)(2)(C)(i)). Paragraph (d)(2) and subparagraph (d)(2)(C)(ii) further require that the actor must reasonably believe that the complainant gives "effective consent" to the actor to cause the physical contact, or to engage in a lawful sport, occupation, or other concerted activity,[38] where the actor's infliction of the physical contact is a reasonably foreseeable hazard of that activity. The above discussion of "engage in a lawful sport, occupation . . ." for sub-subparagraph (d)(2)(A)(ii) applies here to sub-subparagraph (d)(2)(C)(ii)(II).

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[36] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[37] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[38] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

Subsection (e) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (e)(3) codifies a penalty enhancement for either gradation of the revised physical contact offense. If either of the specified enhancements apply, the penalty classification for the offense is increased by one class.

The first penalty enhancement is in subparagraph (e)(3)(A). The actor must commit the offense "reckless" as to the fact that the complainant is a "protected person" as that term is defined in RCC § 22E-701, such as being a law enforcement officer in the course of his or her duties. "Reckless," a term defined at RCC § 22E-206, here means the accused must consciously disregard a substantial risk that the complainant is a "protected person" as that term is defined in RCC § 22E-701.

The second penalty enhancement is in subparagraph (e)(3)(B). The actor must commit the offense with the "purpose" of harming the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official" as those terms are defined in RCC § 22E-701.[39] "Purpose" is a defined term in RCC § 22E-206 that here means that the actor must consciously desire to harm the complainant because of his or her status as a "law enforcement officer," "public safety employee," or "District official."[40] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes. Per RCC § 22E-205, the object of the phrase "has the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Subsection (f) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised offensive physical contact statute clearly changes current District law in ten main ways.*

First, the RCC offensive physical contact offense punishes as a separate offense, with a distinct name, low-level conduct that is part of assaultive conduct in current law. Current District assault statutes are silent as to whether offensive physical contacts are sufficient for liability,[41] but DCCA case law establishes that a simple assault includes: 1) non-violent sexual touching[42] that causes no pain or impairment to the complainant's

[39] While the RCC § 22E-701 definitions of "law enforcement officer" and "public safety employee" refer to some persons only when on-duty (e.g., a campus officer), this provision on committing the offense with the purpose of harming the complainant because of their status as a law enforcement officer or public safety employee applies to committing the offense against an off-duty person based on their on-duty role.

[40] For example, a defendant who commits aggravated assault an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing aggravated assault with the purpose of harming the complainant due to his status as a law enforcement officer.

[41] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults . . . another . . . shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[42] "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'"

body; and 2) any completed battery where the accused inflicts an unwanted touching on the complainant that causes no pain or impairment to the complainant's body.[43] However, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient.[44] In contrast, in the RCC, the revised assault statute (RCC § 22E-1202) is limited to causing three types of bodily injury—"serious bodily injury," "significant bodily injury," and "bodily injury"—as those terms are defined in RCC § 22E-701—as well as serious and permanent disfigurement and injuries. The RCC offensive physical contact statute generally criminalizes offensive physical contacts that fall short of inflicting "bodily injury." Offensive physical contact that satisfies the RCC offensive physical contact offense may be sexual in nature. However, depending on the facts of the case, other offenses in the RCC may provide more serious liability for offensive touching that is sexual in nature such as other RCC Chapter 12 offenses, RCC weapons offenses, or RCC sex offenses in Chapter 13. The RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law.[45] This change improves the organization and proportionality of the District's current law on assaults, by distinguishing harms of different severity.

Second, the RCC offensive physical contact statute is not subject to a penalty enhancement for the involvement of a dangerous weapon. The District's current assault with a dangerous weapon (ADW) statute is a separate offense with a ten-year maximum penalty.[46] Although the statute is silent as to what level of conduct suffices as a predicate

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Matter of A.B., 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)); *see also Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

[43] *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Dunn v. United States*, 976 A.2d 217, 218-19, 220, 221 (D.C. 2009) (stating that the injury resulting from an assault "may be extremely slight," requiring "no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment" and finding the evidence sufficient for assault when appellant "shoved" the complainant because the contact was "offensive.").

[44] A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[45] *See, e.g.*, *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020).

[46] D.C. Code § 22-402 ("Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. In

for liability, District case law specifies that engaging in any conduct that constitutes a simple assault is sufficient.[47] In contrast, the RCC offensive physical contact offense does not have an enhancement for the use of a "dangerous weapon" or "imitation dangerous weapon," as those terms are defined in RCC § 22E-70. The use or display of a dangerous weapon or imitation dangerous weapon during conduct that satisfies the RCC offensive physical contact offense may be criminalized as attempted assault under the RCC general attempt provision (RCC § 22E-301) or the criminal threats statute and its weapon enhancement (RCC § 22E-1204). In addition, simple possession of a dangerous weapon during offensive physical contact may also entail liability for an RCC weapons offense.[48] This change improves the law's clarity and proportionality by distinguishing harms of different severity.

Third, the conduct in the RCC offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. Current District law recognizes as separate offenses assault with intent to kill,[49] assault with intent to commit first degree sexual abuse,[50] assault with intent to commit second degree sexual abuse,[51] assault with intent to commit child sexual abuse,[52] assault with intent to commit robbery,[53] assault with intent to commit mayhem,[54] and assault with intent to commit any other felony,[55] collectively referred to as the "assault with intent to" or "AWI" offenses. Current District case law generally indicates that conduct constituting a simple assault, with the appropriate intent, is sufficient for liability for the AWI offenses[56]—and insofar as the conduct in the RCC offensive physical contact offense constitutes simple assault in current law, such conduct also would be a predicate

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addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

The more stringent 10-year maximum penalty, as opposed to 180 days for simple assault in D.C. Code § 22-404(a)(1), is "imposed as 'a practical recognition of the additional risks posed by use of the weapon.'" *Williamson v. United States*, 445 A.2d 975, 979 (D.C. 1982) (*quoting Parker v. United States*, 359 F.2d 1009, 1012 (D.C. Cir. 1966)).

[47] *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011) ("Because there was no crime of "assault with a dangerous weapon" at common law, we have interpreted the statute to require no more than is required to prove the common law crime of simple assault, plus the fact that the assault is committed with a dangerous weapon . . . ."). However, as this commentary noted elsewhere, a recent DCCA case that is in active litigation may ultimately call into question whether an unwanted touching on the complainant that causes no pain or impairment is sufficient. If an individual merely possesses a dangerous weapon during offensive physical contact, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of offensive physical contact per RCC § 22E-4104) or other RCC weapons offenses.

[48] If an individual merely possesses a dangerous weapon during offensive physical contact, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of offensive physical contact per RCC § 22E-4104) or other RCC weapons offenses. The same analysis would apply for an imitation firearm under RCC § 22E-4104, but not any other kind of "imitation dangerous weapon."

[49] D.C. Code § 22-401.

[50] D.C. Code § 22-401.

[51] D.C. Code § 22-401.

[52] D.C. Code § 22-401.

[53] D.C. Code § 22-401.

[54] D.C. Code § 22-402.

[55] D.C. Code § 22-403.

[56] *See, e.g.*, *Anthony v. United States*, 361 A.2d 202, 204 (D.C. 1976) ("The assault which comprises an essential element of the offense of assault with intent to commit robbery is common law assault.").

for liability under existing AWI offenses. In contrast, in the RCC, the AWI offenses no longer exist and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[57] The RCC general attempt provision provides for liability that is *at least as expansive* as that afforded by AWI offenses.[58] The change improves the clarity of the revised offensive physical contact statute, and eliminates unnecessary overlap between the AWI offenses and general attempt liability for assault-type offenses.

Fourth, under the revised offensive physical contact statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication. The current assault statute from which the offense of offensive physical contact is derived is silent as to the effect of intoxication. However, District law seems to have established that assault is a general intent offense,[59] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary culpable mental state requirement for the crime.[60] This DCCA case law would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[61]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess the knowledge or intent required for any element of offensive physical contact.[62] In contrast, under the revised offensive physical contact offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the defendant from forming the knowledge or intent required to prove offensive physical contact. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is

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[57] For example, rather than having a separate offense of assault with intent to kill, as is codified in current D.C. Code § 22-401, the RCC criminalizes that conduct as an attempt to commit an offense such as murder or aggravated assault.

[58] For more details, see Commentary to the revised assault statute (RCC § 22E-1202).

[59] For District case law establishing that assault is a general intent crime, see, for example, *Smith v. United States*, 593 A.2d 205, 206–07 (D.C. 1991) and *Perry v. United States*, 36 A.3d 799, 823 (D.C. 2011). For District case law indicating that a voluntary intoxication defense may not be raised to an assault charge, see *Parker v. United States*, 359 F.2d 1009, 1013 n.4 (D.C. Cir. 1966) ("It seems clear that, regardless of the definition, voluntary intoxication is no defense to simple assault.") (citing *McGee v. State*, 4 Ala. App. 54, 58 So. 1008 (1912), and *State v. Truitt*, 21 Del. 466, 62 A. 790 (1904)). *See also Buchanan v. United States*, 32 A.3d 990, 996-98 (D.C. 2011) (Ruiz, J. concurring) (discussing the relationship between the law of intoxication and assault's status as a general intent crime).

[60] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[61] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan*, 32 A.3d at 996 (Ruiz, J., concurring) (discussing *Parker*).

[62] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of offensive physical context.

necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue in offensive physical contact.[63] This change improves the clarity, consistency, and proportionality of the offense.

Fifth, to the extent that certain statutory minimum penalties[64] apply to the current assault statute and related assault offenses, the RCC offensive physical contact offense partially replaces them. The statute is silent as to whether the penalties are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, low-level assaultive conduct is no longer subject to these statutory minimum penalties. For the RCC offensive physical contact offense specifically, offensive physical contacts that fall short of "bodily injury" required in the revised assault statute are no longer subject to these penalties.[65] This change improves the proportionality of the revised offense.[66]

Sixth, the revised offensive physical contact statute's enhanced penalties for harming a law enforcement officer (LEO) partially replace[67] the separate assault on a police officer (APO) offenses. Under current District law, a simple assault against a LEO "on account of, or while that law enforcement officer is engaged in the performance of his or her official duties"[68] is a misdemeanor, with a maximum term of imprisonment of 6 months,[69] and an assault that causes "significant bodily injury" or "a violent act that

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[63] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[64] D.C. Code §§ 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

[65] As discussed in this commentary, in addition to unwanted touchings that do not cause pain or impairment to the complainant, current District law generally includes in assault: 1) non-violent sexual touching that causes no pain or impairment to the complainant's body; and 2) intent-to-frighten assaults that do not result in physical contact with the complainant's body. In the RCC, this conduct is no longer covered by the revised assault statute, but may be covered by attempted assault under the general attempt provision (RCC § 22E-301), or by criminal threats (RCC § 22E-1204), or second degree nonconsensual sexual conduct (RCC § 22E-1307(b)). As with the RCC offensive physical contact offense, criminal threats (RCC § 22E-1204), and second degree nonconsensual sexual conduct (RCC § 22E-1307(b)) are no longer subject to these statutory minimums, which is discussed further in the commentaries to these RCC statutes.

[66] For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

[67] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. The RCC offensive physical contact offense is one RCC offense that criminalizes this conduct. However, other RCC offenses may also criminalize this conduct and should also be considered to replace the separate APO offenses even though they are generally not discussed in this entry.

[68] D.C. Code § 22-405(b), (c).

[69] D.C. Code § 22-405(b).

creates a grave risk of causing significant bodily injury" carries a maximum penalty of ten years imprisonment.[70] In contrast, the revised offensive physical contact statute provides enhanced penalties for offensive physical contact with LEOs that falls short of the "bodily injury" requirements in the RCC assault statute (RCC § 22E-1202).[71]

Codifying the LEO enhancement in the revised offensive physical contact statute results in several changes to current District law. First, the enhanced gradations of the revised offensive physical contact offense require recklessness as to whether the LEO is a "protected person," rather than negligence.[72] A culpable mental state of recklessness makes the enhanced LEO gradations of the revised offensive physical contact statute consistent with the other enhancements in the revised offense that are based on the complainant's status. Fourth, the revised definition of "law enforcement officer" in RCC § 22E-701 changes the scope of the enhanced penalties in the revised offensive physical contact statute as compared to the current APO statute,[73] particularly for certain members of fire departments, investigators, and code inspectors.[74] The commentary to RCC § 22E-701 discusses the revised definition of "law enforcement officer" in detail. Third, the revised offensive physical contact statute does not enhance offensive physical contact against family members of LEOs due to their relation to a LEO, which is part of the repeal of the general provision prohibiting targeting family members of District officials

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[70] D.C. Code § 22-405(c).

[71] Codifying enhanced penalties for causing offensive physical contact with a LEO is consistent with recent District legislation that amended the APO statute. Prior to June 30, 2016, in addition to an assault, the APO statute prohibited "resist[ing], oppos[ing], imped[ing], intimidate[ingt], or interfer[ing] with a law enforcement officer" in the course of his or her official duties or on account of those duties. D.C. Code § 22-405(b), (c) (repl.). On January 28, 2016, the Office of the District of Columbia Auditor issued a report titled "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," available at http://www.dcauditor.org/sites/default/files/Full%20Report_2.pdf (Office of the District of Columbia Auditor Report). The report recommended that the APO misdemeanor statute "be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with a [Metropolitan Police Department] officer." Office of the District of Columbia Auditor Report at 107.
The Neighborhood Engagement Achieves Results Amendment Act of 2016 ("NEAR Act") amended the current APO statute by limiting it to "assault[s]" and created a new statute for resisting arrest (D.C. Code § 22-405.01). The Committee Report for this legislation cited the Office of the District of Columbia Auditor Report. Committee on the Judiciary, *Report on Bill 21-0360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016)* (January 27, 2016).

[72] The current APO statute does not specify a culpable mental state for the fact that the complainant is a LEO in the course of his or her official duties. D.C. Code § 22-405(b), (c). However, DCCA case law suggests that a culpable mental state akin to negligence applies to this element. *See, e.g.*, *Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[73] D.C. Code § 22-405(a) (defining "law enforcement officer.").

[74] It should be noted that while the RCC definition of "law enforcement officer" no longer includes these categories of complainants, they remain covered by the revised definition of "public safety employee," also defined in RCC § 22E-701. As such, they still receive enhanced protection as a category of "protected person" and as a category of complainant when the assault is committed with the purpose of harming the complainant due to the complainant's status.

and employees in D.C. Code § 22-851.[75] Collectively, these changes partially replace the APO offenses in current law with enhanced penalties in the gradations of the revised offensive physical contact statute, improve the clarity of existing statutes, and generally provide for consistent treatment of LEOs and other specially protected complainants. The changes reduce unnecessary gaps and overlap between offenses, and improve the proportionality of the statutes as well.

Seventh, the revised offensive physical contact statute partially replaces[76] the current offenses of assault and aggravated assault on a public vehicle inspection officer. Under current District law, "assault[ing]" a "public vehicle inspection officer" or "imped[ing], intimidate[ing], or interfer[ing] with" that officer while that officer "is engaged in or on account of the performance of his or her official duties" is a misdemeanor with a maximum term of imprisonment of 180 days.[77] If the accused causes "serious bodily injury," the offense is a felony with a maximum penalty of ten years imprisonment.[78] In contrast, in the revised offensive physical contact statute, offensive physical contact against a "vehicle inspection officer"[79] receives enhanced

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[75] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Many law enforcement officers, as "LEO" is defined in the current APO statute, are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relation to a LEO. However, there is no provision in current law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[76] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. The RCC offensive physical contact offense is one RCC offense that criminalizes this conduct. However, other RCC offenses may also criminalize this conduct and should also be considered to replace the separate assault and aggravated assault on a public vehicle inspection officer offenses even though they are generally not discussed in this entry.

[77] D.C. Code § 22-404.02.

[78] D.C. Code § 22-404.03(a)(1), (a)(2) (subsection (a)(1) requires "knowingly or purposely causes serious bodily injury to the public vehicle inspection officer" and subsection (a)(2) requires "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). The term "serious bodily injury" is not statutorily defined and it is unclear whether the DCCA would apply the definition of "serious bodily injury" from the sexual abuse statutes to the offenses like it has with aggravated assault.

[79] Although the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 state that the term "public vehicle inspection officer shall have the same meaning as provided in § 50-303(19)," the term "public vehicle inspection officer" no longer exists in Title 50 of the D.C. Code. The definition of "public vehicle inspection officer" was repealed with the passage of the Vehicle-For-Hire Innovation Amendment Act of 2014 ("VFHIAA") (Mar. 10, 2015, D.C. Law 20-197, § 2(a), 61 DCR 12430). However, the VFHIAA included a substantially similar, new definition for a "vehicle inspection officer" and that RCC uses that term instead. D.C. Code § 50-301.03(30B) ("'Vehicle inspection officer' means a District employee trained in the laws, rules, and regulations governing public and private vehicle-

penalties, but is no longer a separate offense. A "vehicle inspection" officer is included in the definition of "protected person" in RCC § 22E-701 as a "public safety employee," also defined in RCC § 22E-701. Since they are included in the definition of "public safety employee," vehicle inspection officers are also included in the offensive physical contact penalty enhancements for having the purpose of harming the complainant due to the complainant's status. Conduct that falls short of offensive physical contact may receive an enhanced penalty elsewhere in the RCC,[80] but conduct that consists merely of "imped[ing], intimidat[ing], or interfer[ing] with" a public vehicle inspection officer does not.

Replacing the offenses of assault and aggravated assault on a public vehicle inspection officer with the revised offensive physical contact statute results in several additional changes to District law. First, under the revised offensive physical contact statute, unlike current law,[81] there is no longer an automatic civil penalty of loss of a license to operate public vehicles-for-hire upon conviction of offensive physical contact of a vehicle inspection officer. Second, the revised offensive physical contact statute does not enhance offensive physical contact against family members of vehicle inspection officers because of their relation to the public vehicle inspection officers, which is part of the repeal of the general provision regarding targeting family members of District officials and employees in D.C. Code § 22-851.[82] Third, the revised offensive physical contact statute does not bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority.[83] This change clarifies the

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for-hire service to ensure the proper provision of service and to support safety through street enforcement efforts, including traffic stops of public and private vehicles-for-hire, pursuant to protocol prescribed under this act and by regulation."). The VFHIAA legislative history does not appear to include reference to the assault on a public vehicle inspection officer offenses in D.C. Code §§ 22-404.02 and 22-404.03 or discuss how those offenses might be affected by the elimination of the term "public vehicle inspection officer."

[80] Depending on the facts of the case, intent-to-frighten assaults and incomplete batteries against vehicle inspection officers may be punishable under the revised criminal threats statute (RCC § 22E-1204), which has a "protected person" penalty enhancement, or attempted assault or attempted physical contact under the RCC general attempt provision in RCC § 22E-301.

[81] D.C. Code §§ 22-404.02(b)(2), 22-404.03(b)(2) (stating that upon conviction for assault or aggravated assault of a public vehicle inspection officer, an individual "shall" "have his or her license or licenses for operating a public vehicle-for-hire, as required by the Commission pursuant to subchapter I of Chapter 3 of Title 50, revoked without further administrative action by the Commission.").

[82] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee" on account of the District official or employee's performance of official duties. "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d). Vehicle inspection officers, as defined in D.C. Code § 50-301.03(30B), are District employees and therefore D.C. Code § 22-851 criminalizes targeting their families because of their relationship.

[83] The current assault on a public vehicle inspection officer statutes bar justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority. D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such

revised offensive physical contact statute and reduces unnecessary overlap with other provisions that specially penalize assaults on District officials.

Eighth, the RCC definition of "protected person," discussed in the commentary to RCC § 22E-701, results in several changes to the scope of enhanced offensive physical contact. First, through the definition of "protected person," offensive physical contact against complainants under the age of 18 years or against complainants 65 years of age or older receive enhanced penalties in the revised offensive physical contact offense, but only if certain age requirements are met. Current District law enhances various assault offenses against complainants under the age of 18 years if there is at least a two year age gap between the complainant and an actor that is 18 years of age or older,[84] and against all complainants 65 years of age or older.[85] In contrast, the "protected person" penalty enhancement in the revised offensive physical contact statute requires at least a four year age gap between a complainant under 18 years of age and an actor that is 18 years of age or older, and require that the actor be under the age of 65 years and at least 10 years younger than a complainant that is 65 years of age or older. With respect to minors, these age requirements are consistent with other offenses in current District law[86] and the age gap for seniors,[87] while new to District law, reserve the enhanced penalties for predatory

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enforcement action is lawful."). The RCC assault statute deletes this provision and bar to self-defense against a public vehicle inspection officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a public vehicle inspection officer's use of force that either is not lawful or when the actor is not reckless as to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the public vehicle inspection officer's conduct being lawful.

[84] D.C. Code § 22-3611(a) ("Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both."); 22-3611(c)(1), (c)(3) (defining "adult" as "a person 18 years of age or older at the time of the offense" and a "minor" as "a person under 18 years of age at the time of the offense.").

[85] D.C. Code § 22-3601(a) ("Any person who commits any offense listed in subsection (b) of this section against an individual who is 65 years of age or older, at the time of the offense, may be punished by a fine of up to 1 1/2 times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 1/2 times the maximum term of imprisonment otherwise authorized for the offense, or both.").

[86] Many of the District's offenses against complainants under the age of 18 years require at least a four year age gap between the actor and the complainant. *See, e.g.*, D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (child sexual abuse statutes and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010, 22-3001(3) (enticing a child statute and defining "child" as "a person who has not yet attained the age of 16 years."); 22-3010.02 (arranging for a sexual contact with a real or fictitious child and defining "child" as "a person who has not yet attained the age of 16 years."); 22-811(a), (f)(1), (f)(2) (contributing to the delinquency of a minor statute and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.").

[87] None of the District's offenses targeting harms against complainants that are over the age of 65 years require any age gap between the actor and the complainant. See D.C. Code §§ 22-932, 22-933, 22-933.01, 22-934. However, requiring at least a ten year age gap between the actor and a complainant that is 65 years of age is consistent with requiring an age gap in the offenses against complainants that are under 18 years

behavior. Second, offensive physical contact against a driver of a private vehicle-for-hire, a "vulnerable adult," and a "public safety employee" receive new enhanced penalties in the revised offensive physical contact statute through the definition of a "protected person." A driver of a private vehicle-for-hire does not receive any enhanced penalties under current District law, and a vulnerable adult[88] or "public safety employee"[89] receives enhanced penalties in a few non-assault offenses. In contrast, the "protected person" penalty enhancement in the revised offensive physical contact statute recognize the prevalence of drivers of private vehicles-for-hire and the special status elsewhere under current District law for vulnerable adults and public safety employees. Third, offensive physical contact against a "citizen patrol member"[90] or a "District employee" no longer receive enhanced penalties in the revised offensive physical contact offense as they do under current District law.[91] The breadth of these current enhancements is inconsistent as compared to other penalty enhancements in current District law.

The RCC definition of "protected person" also makes broader changes to the revised offensive physical contact statute. First, the "protected person" penalty enhancement applies to each type of offensive physical contact, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[92] the "assault with intent to" offenses,[93] and the various felony assault offenses,[94] resulting in

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of age. The 10 year age gap recognizes that both the complainant and the actor are adults, as opposed to teenagers.

[88] D.C. Code §§ 22-933 (criminal abuse of a vulnerable adult statute); 22-933.01 (financial exploitation of a vulnerable adult statute); 22-934 (criminal neglect of a vulnerable adult statute).

[89] D.C. Code § 22-2016 (murder of a law enforcement officer statute).

[90] D.C. Code § 22-3602.

[91] D.C. Code § 22-851(d).

[92] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

[93] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[94] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

disproportionate penalties for similar conduct. Second, the revised offensive physical contact statute applies a mental state of "recklessness" to whether the complainant is a "protected person." None of the separate penalty enhancements under current District law specify a culpable mental state, but the penalty enhancements for senior citizens[95] and minors[96] have affirmative defenses for a reasonable mistake of age. The "reckless" culpable mental state in the protected person penalty enhancement preserves the substance of these affirmative defenses[97] and establishes a consistent culpable mental state requirement for each category of complainant in the RCC definition of "protected person." Finally, the RCC offensive physical contact statute prohibits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[98]

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for enhancement for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

[95] D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[96] D.C. Code § 22-3611(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence.").

[97] The current enhancement for crimes against senior citizens makes it a defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, the current enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). In the RCC, it must be proven that an actor was reckless that the complainant was 65 years or older or under 18 years of age. The actor must consciously disregard a substantial risk that a circumstance (here the fact that the complainant is over 65 or under 18) exists. Per RCC § 22E-206, a reasonable mistake as to the complainant's age would negate the recklessness required for an age-based gradation enhancement for assault. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element. However, given the inherent difficulty in judging the age of another person, an actor who assesses a person's age based on appearance alone likely would be reckless as to the person being over 65 or under 18 if the actor judges a person to be very close in age to the 65 and 18 year old thresholds. For example, if an actor assessed the complainant's age to be in their early 60s based on appearance alone, the actor is likely aware of a substantial risk that the complainant is actually 65 years or older. Whether the actor's disregard of such risk is a gross deviation from the standard of conduct will depend on why the risk was ignored. For example, an assault based on the actor's allegedly knocking down and harming a complainant, reckless that they were 67 year old might reach different conclusions as to the deviation from the standard of conduct depending on whether the actor was running to a hospital to see a family member versus an actor who was running to the front of a line to see a sports star. Ultimately it is up to the factfinder to determine whether an actor's alleged mistake as to age of the complainant is reasonable given the facts of the case.

[98] Current District statutory law does not prevent stacking of such enhancements, and case law has not addressed the stacking of enhancements based on the categories covered in the RCC definition of protected

Collectively, these changes provide a consistent enhanced penalty for offensive physical contact against categories of individuals included in the definition of "protected person," removing gaps in the current patchwork of separate enhancements, clarifying the law, and improving the proportionality of offenses.

Ninth, the revised offensive physical contact statute enhances the penalty for offensive physical contact committed against LEOs, public safety employees, or District officials when the assault is committed with the "purpose of harming the complainant because of the complainant's status." Current District law has separate penalty enhancements or enhanced penalties for committing assault-type offenses because of the complainant's status as a LEO,[99] a member of a citizen patrol,[100] a District "official or employee,"[101] or a "family member" of a District "official or employee."[102] Current District law also enhances the penalty for the murder of a "public safety employee"[103] on account of the complainant's status. In contrast, the revised offensive physical contact statute limits this type of enhanced penalty to a "law enforcement officer" and a "District official," and extends it to a "public safety employee," resulting in several changes to current District law. First, as is discussed in the commentary to RCC § 22E-§ 22E-701, the revised definitions of "law enforcement officer," "District official," and "public safety employee" change the scope of the revised enhancements as compared to current District law. Second, offensive physical contact committed against a citizen patrol member, a District "employee," or the "family member" of a District "official or employee" because of the complainant's status no longer receive an enhanced penalty.

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person. However, convictions have been upheld applying both a "while armed" enhancement under D.C. Code § 22-4502 and an enhancement based on the victim's status as a senior or minor.

[99] D.C. Code § 22-405(b), (c) (prohibiting assaulting a LEO, assaulting a LEO with significant bodily injury, or committing a "violent act that creates a grave risk of causing significant bodily injury" to the LEO "on account of . . . the performance of his or her official duties.").

[100] D.C. Code § 22-3602(b) (prohibiting committing specified offenses against a member of a citizen patrol "because of the member's participation in a citizen patrol."); 22-3602(a) (defining "citizen patrol" as "a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to, Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.").

[101] Current D.C. Code § 22-851(c) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any District "official or employee," broadly defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(c), (a)(2).

[102] Current D.C. Code § 22-851(d) prohibits committing specified crimes, including "assault[s]" and "injur[ies]" against any "family member" of a District "official or employee." "Family member" is defined as "an individual to whom the official or employee of the District of Columbia is related by blood, legal custody, marriage, domestic partnership, having a child in common, the sharing of a mutual residence, or the maintenance of a romantic relationship not necessarily including a sexual relationship" and District "official or employee" is defined as "a person who currently holds or formerly held a paid or unpaid position in the legislative, executive, or judicial branch of government of the District of Columbia, including boards and commissions." D.C. Code § 22-851(a), (d).

[103] D.C. Code § 22-2106(a) ("Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties . . . .").

These provisions raise a number of difficult definitional issues[104] and current sentencing practices in the District indicate that these penalty enhancements rarely, if ever, are necessary to proportionate sentences. Third, the enhancement applies consistently to offensive physical contact, whereas the various penalty enhancements in current District law apply inconsistently to simple assault,[105] the "assault with intent to" offenses,[106] and the various felony assault offenses,[107] resulting in disproportionate penalties for similar conduct. Codifying enhanced protection for assaulting individuals based on their status as LEOs, public safety employees, or District officials clarifies the law and improves the proportionality of offenses.

Tenth, the revised offensive physical contact statute deletes the limitation on justification and excuse defenses that is in the current D.C. Code assault on a police

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[104] For example, the enhancement for District employees in D.C. Code § 22-851(b) states that it applies "while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties." However, District case law has held, in construing other statutes, that a law enforcement officer may be considered always on duty, *Mattis v. United States*, 995 A.2d 223, 225 (D.C. 2010). There follows an ambiguity whether any offensive physical contact of a law enforcement officer is subject to heightened liability—regardless whether the offensive physical contact was part of a domestic dispute or the officer was off-duty and not known to the assailant as an officer. The RCC, instead, through a separate reference to law enforcement officers as protected persons, provides heightened penalties where an officer is subjected to offensive physical contact while in the performance of his or her duties.

[105] Only one of the separate penalty enhancements under current District law applies to simple assault—the enhancement for crimes against citizen patrol members. D.C. Code § 22-3602(c). Assaulting or injury a District "official or employee" also receives an enhanced penalty under the protection of District public officials statute. D.C. Code § 22-851(c).

[106] Of the separate penalty enhancements under current District law, only the separate enhancements for crimes against senior citizens and crimes against minors apply to all the AWI offenses. D.C. Code §§ 22-3601(b); 22-3611(c)(2). No AWI offenses are covered in the separate enhancements for crimes against taxicab drives or crimes against transit operators and Metrorail station managers. D.C. Code § 22-3752. The separate enhancement for crimes against citizen patrol members, D.C. Code § 22-3602, only applies to assault with intent to commit "forcible rape," which is an offense that no longer exists after the District's sexual abuse laws were revised in 1995. D.C. Code § 22-4801 (repl.). It is unclear whether assault with intent to commit an offense such as first degree sexual abuse would be covered by the enhancement. The protection of District public officials statute does not specifically mention AWI offenses, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

[107] All the separate penalty enhancements under current District law apply to aggravated assault and ADW, D.C. Code §§ 22-3601(b); 22-3602(c); 22-3611(b)(2); 22-3752, but they do not consistently apply to other felony assault offenses. For example, only the separate enhancement for crimes against minors applies to assault with significant bodily injury. D.C. Code § 22-3611(c)(2). The separate penalty enhancements also apply inconsistently to malicious disfigurement and mayhem, with the citizen patrol enhancement applying only to mayhem, D.C. Code § 22-3602, and the other penalty enhancements applying to both offenses. D.C. Code §§ 22-3601(b); 22-3611(b)(2); 22-3752. The protection of District public officials statute does not specifically mention any felony assault offenses or mayhem or disfigurement, but does include "assault[s]" and "injure[s]." D.C. Code § 22-851(c).

The separate enhancements are also inconsistent in whether they apply to attempts, conspiracies, or solicitations to commit the specified offenses, or some combination thereof. D.C. Code §§ 22-3601 (senior citizen enhancement applying to attempt or conspiracy); 22-3602 (citizen patrol enhancement applying to conspiracy); 22-3611 (crimes against minors enhancement applying to attempt, conspiracy, or solicitation); 22-3752 (statute enumerating offenses for taxicab drivers, transit operators, and Metrorail station managers applying to attempt and conspiracy).

officer (APO) statute.[108] The current D.C. Code APO statute states "[i]t is neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."[109] This provision is a categorical bar to self-defense against the use of force that is not excessive by a law enforcement officer (LEO).[110] In contrast, the RCC offensive physical conctact statute deletes this provision and bar to self-defense against a law enforcement officer, and instead relies on the provision in RCC § 22E-403(b)(3). RCC § 22E-403(b)(3) provides an exception to defense of self or others when "The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct." RCC § 22E-403(b)(3) allows an actor who otherwise meets the requirements for self-defense to use force to oppose a law enforcement officer's use of force that either is not lawful or when the actor is not reckless as to the lawfulness. The RCC continues to bar a claim of self-defense whenever an actor is reckless as to the law enforcement officer's conduct being lawful. By eliminating the special bar on self-defense against an unlawful arrest, the RCC effectively reverts to the common law rule regarding defense against a law enforcement officer which existed in the District until Congress passed a new statute with a new policy in 1970.[111] This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these ten changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the RCC offensive physical contact statute limits liability to contacts that are intended to be, and objectively are, "offensive." Current District assault statutes are silent as to whether physical contacts that are merely offensive to another person are sufficient for liability.[112] DCCA case law generally establishes that a simple assault includes any completed battery where the accused inflicts an unwanted touching on the complainant,[113] but contains conflicting statements as to whether there is any requirement

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[108] As is discussed earlier in this commentary, "assault" in current District law includes a broad range of conduct that does not require "bodily injury" like the RCC assault statute does. Thus, the limitation on justification and excuse defenses in the current D.C. Code APO statute would apply to conduct that is criminalized as offensive physical contact in the RCC.

[109] D.C. Code § 22-405(d).

[110] Current D.C. Code § 22-405 and § 22-405.01 provide that it is: "neither justifiable nor excusable cause for a person to use force to resist an arrest when such an arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful."

[111] As explained by the DCCA in McDonald v. United States, "The legislative history indicates that Congress intended to adopt 'the modern rule' in recognition that it is no longer necessary for a citizen to resist what he suspects may be an illegal arrest since criminal procedural rights (such as prompt presentment, Fed. R. Crim. Proc. 5(b) & (c)) as well as civil remedies under the Civil Rights Act of 1871, 42 U.S.C. § 1983) are readily available. H.R.Rep. No. 907 at 71–72." McDonald v. United States, 496 A.2d 274, 276 (D.C. 1985).

[112] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults . . . another . . . shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[113] *See, e.g.*, *Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least

that the battery be objectively "offensive."[114] In addition, under DCCA case law, a simple assault consisting of conduct undertaken with intent to frighten another person has been held to require proof that the defendant's conduct would induce fear in "a person of reasonable sensibility."[115] Following this case law, District practice appears to require that for assault liability, physical contact must be "offensive to a person of reasonable sensibility."[116] Resolving this ambiguity, the RCC offensive physical contact statute clearly establishes that the contact in question must be "offensive" as evaluated from the perspective of a reasonable person in the complainant's position, and that the accused must have at least believed to a practical certainty that the contact was "offensive." This change improves the clarity of the law by specifying the requisite culpable mental state, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[117]

Second, the RCC offensive physical contact statute requires a culpable mental state of "knowingly" as to causing the physical contact and the fact that bodily fluid or excrement is used, and "intent" as to the offensive nature of the contact. The current D.C. Code is silent as to the culpable mental states required for simple assault.[118] Current

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prima facie, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990); *Dunn v. United States*, 976 A.2d 217, 218-19, 220, 221 (D.C. 2009) (stating that the injury resulting from an assault "may be extremely slight," requiring "no physical pain, no bruises, no breaking of the skin, no loss of blood, no medical treatment" and finding the evidence sufficient for assault when appellant "shoved" the complainant because the contact was "offensive."). However, a panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[114] *Compare, e.g., Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) *with* Ray v. United States, 575 A.2d 1196, 1198–99 (D.C. 1990) ("What we distill from these cases, particularly *Harris*, is that an assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.") *and Comber v. United States*, 584 A.2d 26, 50 (D.C. 1990) ("Although some misdemeanors, at least when viewed in the abstract, prohibit activity which seems inherently dangerous, they may also reach conduct which might not pose such danger. A special difficulty arises in the case of simple assault, as presented here, because that misdemeanor is designed to protect not only against physical injury, but against all forms of offensive touching…."). However, a panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[115] *Antony v. United States*, 361 A.2d 202, 206 (D.C. 1976).

[116] D.C. Crim. Jur. Instr. § 4.100. See also, *id.,* cmt. 4-5 ("The instruction explains that 'injury' includes an offensive touching. [citations omitted] To ensure the jury uses an objective standard of judging "offensive," the Committee borrowed the "reasonable sensibility" standard from *Anthony v. U.S.,* [citation omitted], where it was used in a related context.").

[117] Without requiring that a non-consensual physical contact be "offensive," even the most casual touching of another person—e.g., brushing elbows on a bus or a pat on a colleague's back—could be potentially be subject to criminal liability.

[118] D.C. Code § 22-404(a)(1).

District case law suggests that recklessness may suffice for simple assault.[119] However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient,[120] and, in the context of intent-to-frighten assault, has suggested that a higher culpable mental state than recklessness is required.[121] Resolving this ambiguity, the RCC offensive physical contact statute clearly establishes that knowledge is required as to causing the physical contact and the fact that bodily fluid or excrement is used, and "intent" as to the offensive quality of the contact. This change improves the clarity of the law by specifying the requisite culpable mental states, and improves the proportionality of the statute by excluding conduct that is ordinarily considered non-criminal.[122]

Third, the revised offensive physical contact statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. The District's current assault statutes do not address whether consent of the complainant is a defense to liability, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[123] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly

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[119] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."); 22-404.01(a)(2) (aggravated assault statute requiring "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person and thereby causes serious bodily injury.").

[120] Recently, the DCCA explicitly declined to decide whether assault requires recklessness or a higher culpable mental state like intent to injure, stating "[e]ven if the greater proof was necessary, the jury could permissibly infer such intent from [appellant's] extremely reckless conduct, which posed a high risk of injury to those around him. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[121] *Powell v. United States*, 238 A.3d 954, 959 (D.C. 2020) ("Our additional concern is whether the evidence proved that appellant had the *mens rea* required for intent-to-frighten assault: a 'purposeful design ... to engender fear' or 'create apprehension.') (quoting *Parks v. United States*, 627 A.2d 1, 5 (D.C. 1993); *id.* at 959 ("For similar reasons, we conclude that the evidence was insufficient for conviction even if we assume *arguendo* that the *mens rea* for intent-to-frighten assault can be satisfied by evidence of recklessness.").

[122] A culpable mental state of recklessness as to the physical contact and its offensive nature may, for instance, criminalize a person's efforts to pass through a crowded Metro car in which it is likely the person will brush against other passengers in a way they would find offensive. While such conduct may be rude, it is not ordinarily considered criminal absent some intent to cause offense by such action.

[123] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

declined to rule on the effect of consent in other circumstances.[124] Another court ruling is pending regarding the elements of assault that may expand upon the requirement of lack of consent.[125] To resolve this ambiguity, the revised offensive physical contact statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. The revised statute's effective consent defenses specifically addresses situations where the person giving effective consent is an adult or under 18 years of age. This change improves the clarity of the law and, to the extent it may result in a change, improves the proportionality of the offense by ensuring that consensual and legal activities are not criminalized.

Fourth, the revised offensive physical contact statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current assault statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for assault. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[126] This change improves the clarity, consistency, and proportionality of the revised statute.

[124] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).
[125] *Perez Hernandez v. United States*, 207 A.3d 594, 602–03 (D.C.), *vacated,* 207 A.3d 605 (D.C. 2019)]
[126] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

RCC § 22E-1301. Sexual Assault.

Explanatory Note. *The RCC sexual assault offense prohibits engaging in a sexual act or sexual contact with a complainant or causing a complainant to engage in or submit to specified acts of sexual penetration or sexual touching by means of physical force, threats, nonconsensual intoxication of the complainant, or when the complainant is physically or mentally impaired. The penalty gradations are based on the nature of the sexual conduct, as well as the means by which the actor engages in the sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to the sexual conduct. The revised sexual assault offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse,[1] second degree sexual abuse,[2] third degree sexual abuse,[3] and fourth degree sexual abuse.[4] The revised sexual assault offense also replaces in relevant part four distinct provisions for the sexual abuse offenses in the current D.C. Code: the consent defense,[5] the attempt statute,[6] the limitation on prosecutorial immunity,[7] and the aggravating sentencing factors.[8] Insofar as they are applicable to first degree through fourth degree sexual abuse, the revised sexual assault offense also replaces the penalty enhancement for committing an offense "while armed,"[9] the penalty enhancement for committing an offense against minors,[10] the penalty enhancement for committing an offense against senior citizens,[11] certain minimum statutory penalties,[12] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

Subsection (a) specifies the various types of prohibited conduct in first degree sexual assault, the highest gradation of the revised sexual assault offense. Paragraph (a)(1) specifies part of the prohibited conduct—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(1) specifies a culpable

[1] D.C. Code § 22-3002.
[2] D.C. Code § 22-3003.
[3] D.C. Code § 22-3004.
[4] D.C. Code § 22-3005.
[5] D.C. Code § 22-3007.
[6] D.C. Code § 22-3018.
[7] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexual assault statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[8] D.C. Code § 22-3020.
[9] D.C. Code § 22-4502.
[10] D.C. Code § 22-3611.
[11] D.C. Code § 22-3601.
[12] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she will engage in a sexual act with the complainant or cause the complainant to engage in or submit to a sexual act.

Paragraph (a)(2) and subparagraphs (a)(2)(A), (a)(2)(B), and (a)(2)(C) specify the prohibited means by which the actor must engage in a sexual act with the complainant or cause the complainant to engage in or submit to the sexual act. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to paragraph (a)(2) and each type of prohibited conduct in subparagraphs (a)(2)(A), (a)(2)(B), and (a)(2)(C). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual with the complainant in a prohibited manner or that he or she causes the complainant to engage in or submit to a sexual act in a prohibited manner.

For paragraph (a)(2) and subparagraph (a)(2)(A), the actor must be "practically certain" that he or she engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act "by causing bodily injury" to the complainant, or "by using physical force that moves or immobilizes" the complainant. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." The bodily injury, movement, or immobilization must cause the sexual act.[13]

Paragraph (a)(2), subparagraph (a)(2)(B), and sub-subparagraphs (a)(2)(B)(i) and (a)(2)(B)(ii) specify the prohibited threats for first degree of the revised sexual assault statute. Subparagraph (a)(2)(B) and sub-subparagraph (a)(2)(B)(i) require that the actor "communicat[e]" to the complainant, explicitly or implicitly, that the actor will cause the complainant to suffer bodily injury, confinement, or death. The verb "communicates" is intended to be broadly construed, encompassing all speech[14] and other messages,[15] which includes gestures or other conduct,[16] that are received and understood by another person.

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[13] For example, if, in a consensual adult sexual encounter, the actor tells the sexual partner that the sex may hurt, and the sex does hurt the sexual partner, or cause a tear or bruise, the actor may have caused "bodily injury," as defined in RCC § 22E-701, but the bodily injury did not cause the sexual act and there is no liability for sexual assault. However, consensual sexual activity can transform into non-consensual criminal activity at any time. If, in the course of sexual activity, the actor inflicts bodily injury or moves or immobilizes the complainant without effective consent and thereby causes the complainant to engage in or submit to a sexual act, there would be liability for sexual assault even though the encounter began as consensual.

[14] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[15] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[16] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute communication, if it communicates that harm will continue in the future.

"Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." Given the "knowingly" culpable mental state in paragraph (a)(1), discussed above, the actor must be "practically certain" that he or she causes the complainant to engage in or submit to a sexual act by communicating, explicitly or implicitly, that the actor will cause the complainant to suffer a bodily injury, confinement, or death.

Paragraph (a)(2), subparagraph (a)(2)(B), and sub-subparagraph (a)(2)(B)(ii) require that the actor communicate to the complainant, explicitly or implicitly, that the actor will cause a third party to suffer bodily injury, a sexual act, a sexual contact, confinement, or death. "Bodily injury," "sexual act," and "sexual contact" are defined terms in RCC § 22E-701. Given the "knowingly" culpable mental state in paragraph (a)(1), discussed above, the actor must be "practically certain" that the actor causes the complainant to engage in or submit to a sexual act by communicating, explicitly or implicitly, that the actor will cause a third party to suffer a bodily injury, sexual act, sexual contact, confinement, or death. The verb "communicates" is intended to be broadly construed, encompassing all speech[17] and other messages,[18] which includes gestures or other conduct,[19] that are received and understood by another person.

For paragraph (a)(2) and subparagraph (a)(2)(C), the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act by administering or causing to be administered to the complainant an intoxicant or other substance without the complainant's "effective consent." "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express willingness or unwillingness to engage in the sexual act (sub-subparagraph (a)(2)(C)(i)). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that administering the intoxicant or other substance would impair the complainant's willingness or unwillingness to engage in the sexual act. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the drug or intoxicant impaired the complainant's ability to express willingness or unwillingness to engage in the sexual act, only that the defendant believed to a practical

[17] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[18] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[19] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute communication, if it communicates that harm will continue in the future.

certainty that it would. However, sub-subparagraph (a)(2)(C)(ii) does require that the intoxicant or other substance have a specified effect on the complainant. The intoxicant or other substance must, "in fact," render the complainant asleep, unconscious, substantially paralyzed, or passing in and out of consciousness (sub-subparagraph (a)(2)(C)(ii)(I)), "substantially incapable of appraising the nature of the sexual act" (sub-subparagraph (a)(2)(C)(ii)(II)), or "substantially incapable of communicating willingness or unwillingness" to engage in the sexual act (sub-subparagraph (a)(2)(C)(ii)(III)). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to a given element, here the required effect of the intoxicant or other substance on the complainant.

Subsection (b) specifies the various types of prohibited conduct in second degree sexual assault. Like first degree sexual assault, second degree sexual assault requires the actor to "knowingly" engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act," but the prohibited means of doing so differ. Paragraph (b)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (b)(1) applies to each of the prohibited means of engaging in a sexual act with the complainant or causing the complainant to engage or submit to the "sexual act" in paragraph (b)(2), subparagraph (b)(2)(A), subparagraph (b)(2)(B), and sub-subparagraphs (b)(2)(B)(i), (b)(2)(B)(ii), and (b)(2)(B)(iii). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual act or causes the complainant to engage in or submit to a sexual act in the prohibited manner. For paragraph (b)(2) and subparagraph (b)(2)(A), the actor must be "practically certain" that he or she engages in a sexual act with the complainant or causes the complainant to engage in or submit to the sexual act by making an explicit or implicit "coercive threat." "Coercive threat" is a defined term in RCC § 22E-701 that prohibits "communicat[ing]" specified harms such as accusing someone of a criminal offense, as well as sufficiently serious harms that would cause a reasonable person to comply. The verb "communicates" is intended to be broadly construed, encompassing all speech[20] and other messages,[21] which includes gestures or other conduct,[22] that are received and understood by another person.

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[20] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[21] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[22] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute communication, if it communicates that harm will continue in the future.

Under paragraph (b)(2), subparagraph (b)(2)(B), and sub-subparagraph (b)(2)(B)(i), the actor must be "practically certain" that the complainant is asleep, unconscious, or passing in and out of consciousness. Under paragraph (b)(2), subparagraph (b)(2)(B), and sub-subparagraph (b)(2)(B)(ii), the actor must be "practically certain" that the complainant is "incapable of appraising the nature of the sexual act" or of understanding the right to give or withhold consent to the sexual act. In addition, the actor must be "practically certain" that the complainant's inability is either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.

Under paragraph (b)(2), subparagraph (b)(2)(B), and sub-subparagraph (b)(2)(B)(iii), the actor must be "practically certain" that the complainant is incapable of communicating[23] willingness or unwillingness to engage in the sexual act. Sub-subparagraph (b)(2)(B)(iii) includes paralyzed individuals who are able to appraise the nature of the sexual act or of understanding the right to give or withhold consent to the sexual act under sub-subparagraph (b)(2)(B)(ii), but are unable to communicate willingness or unwillingness. Under paragraph (b)(2), subparagraph (b)(2)(B), and sub-subparagraph (b)(2)(B)(iv), the actor must be "practically certain" that the complainant is "substantially paralyzed." Sub-subparagraph (b)(2)(B)(iv) includes paralyzed individuals who are able to appraise the nature of the sexual act or of understanding the right to give or withhold consent to the sexual act under sub-subparagraph (b)(2)(B)(ii) and are able to communicate willingness or unwillingness under sub-subparagraph (b)(2)(B)(iii), but are otherwise paralyzed.

Subsection (c) specifies the various types of prohibited conduct in third degree sexual assault. Paragraph (c)(1) specifies part of the prohibited conduct—engaging in a "sexual contact" with the complainant or causing the complainant to engage in or submit to a "sexual contact." "Sexual contact" is a defined term in RCC § 22E-701 that means touching specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (c)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to sexual contact. Paragraph (c)(2) and subparagraphs (c)(2)(A), (c)(2)(B), and (c)(2)(C) specify the prohibited the means by which the actor must engage in a sexual contact with the complainant or cause the complainant to engage in or submit to the sexual contact. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (c)(1) applies to each type of prohibited conduct in paragraph (c)(2) and subparagraphs (c)(2)(A), (c)(2)(B), and (c)(2)(C). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in

[23] If the complainant is unable to communicate verbally or orally, but is able to make gestures, facial expressions, or engage in other conduct, the person may be capable of communicating and this element may not be satisfied.

or submit to sexual contact in a prohibited manner. The prohibited means are the same as they are for first degree sexual assault.

Subsection (d) specifies the various types of prohibited conduct in fourth degree sexual assault. Like third degree sexual assault, fourth degree sexual assault requires the actor to "knowingly" engage in a "sexual contact" with the complainant or cause the complainant to engage in or submit to "sexual contact," but the prohibited means of doing so differ. Paragraph (d)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (d)(1) applies to each of the prohibited means of engaging in a sexual contact with the complainant or causing the complainant to engage or submit to the sexual contact in paragraph (d)(2), subparagraph (d)(2)(A), subparagraph (d)(2)(B), and sub-subparagraphs (d)(2)(B)(i), (d)(2)(B)(ii), and (d)(2)(B)(iii). Per the definition in RCC § 22E-206, "knowingly" here means that the actor must be "practically certain" that he or she engages in a sexual contact or causes the complainant to engage in or submit to sexual contact in the prohibited manner. The prohibited means are the same as they are for second degree sexual assault.

Subsection (e) codifies a defense to the revised sexual assault offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. Under RCC § 22E-201, if there is any evidence of the defense at trial, the government must prove the absence of all elements of the defense beyond a reasonable doubt.

The defense applies to subparagraphs (a)(2)(A), (a)(2)(B), (b)(2)(A), (b)(2)(B), (c)(2)(A), (c)(2)(B), (d)(2)(A), and (d)(2)(B) of the offense—all prohibited conduct in the revised sexual assault statute except involuntary intoxication in first degree and third degree (subparagraphs (a)(2)(C) and (c)(2)(C)), which require the lack of effective consent as an element. The defense in subsection (e) requires that the actor reasonably believes[24] that the complainant gives "effective consent," as that term is defined in RCC § 22E-701, to the actor to engage in the conduct constituting the offense. Subsection (e) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element of the defense in subsection (e), and no culpable mental state, as defined in RCC § 22E-205, applies to the defense. For example, it is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of the complainant. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[25] There is no effective consent defense

[24] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[25] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care

when the actor makes an unreasonable mistake as to the effective consent of the complainant.

While the defense extends to incapacitated and intoxicated complainants in second degree and fourth degree sexual assault (subparagraphs (b(2)(B) and (d)(2)(B)), in practice such complainants will generally not be able to give "effective consent," as defined in RCC § 22E-701, and the defense will usually not apply.[26] The RCC definition of "effective consent" requires "consent," defined in RCC § 22E-701, which precludes consent given by a person who is legally unable or, because of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct constituting the offense or to the result thereof. Whether the actor reasonably believes that person, particularly a young person, is able to consent to conduct that otherwise satisfies the RCC sexual assault statute is a fact-specific inquiry. In addition, even if the sexual assault effective consent defense does apply, there may still be liability under another RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302).[27]

In addition, even if the effective consent defense precludes liability for sexual assault, an actor may have liability under an RCC offense against persons or an RCC weapons offense if the actor's conduct goes beyond the complainant's effective consent or if the resulting harm is one that cannot be consented to in the RCC. For example, if the complainant gives effective consent to being slapped during sex, but in doing so the actor causes the complainant serious bodily injury, there would be no liability for sexual assault, but there may be liability under the RCC assault statute (RCC § 22E-1202), depending on the actor's culpable mental state. Similarly, if the complainant gives effective consent to the actor choking the complainant during sex and in doing so the actor causes death, there would be no liability for sexual assault, but there may be liability for an RCC homicide offense, depending on the actor's culpable mental state.

Subsection (f) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subparagraph (f)(5) codifies several penalty enhancements for the revised sexual assault offense and specifies that if one or more of the penalty enhancements applies, the penalty classification for the offense is increased by one class. Subparagraph (f)(5)(A)

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that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[26] However, in some situations under subparagraphs (b)(2)(B) and (d)(2)(B), the defense will apply, and there is no liability for sexual assault. For example, if the actor reasonably believes that the complainant gives the actor effective consent to engage in a sexual contact at a later time, after the complainant takes an intoxicant or when the complainant is asleep, the effective consent eliminates liability for sexual assault.

[27] For example, consider a situation where during sexual intercourse a 20 year old actor reasonably believes that a 15 year old complainant gives valid effective consent to the actor to slap the complainant. The effective consent defense applies to first degree sexual assault, and there would be no liability for first degree sexual assault. However, the actor still would be guilty of second degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302), unless the reasonable mistake of age affirmative defense to the RCC sexual abuse of a minor offense applied.

codifies a penalty enhancement for recklessly causing the sexual act or sexual contact by displaying or using what, in fact, is a "dangerous weapon" or "imitation dangerous weapon." "Displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch. Per the rules of interpretation in RCC § 22E-207, the culpable mental state of recklessly applies to both causing the sexual act or sexual contact and causing the sexual act or sexual contact by displaying or using an object. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (f)(5)(B) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact.

Subparagraph (f)(5)(C) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Subparagraph (f)(5)(D) and sub-subparagraphs (f)(5)(D)(i), (f)(5)(D)(ii), (f)(5)(D)(iii), (f)(5)(D)(iv), and (f)(5)(D)(v) codify penalty enhancements based on the age of the complainant or whether the complainant is a "vulnerable adult." These penalty enhancements use the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element, and the culpable mental state of "reckless." "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk of a given element.

For the penalty enhancement in sub-subparagraph (f)(5)(D)(i), the complainant must be under the age of 12 years and the actor must be at least four years older the complainant. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in sub-subparagraph (f)(5)(D)(i) applies to every element in that sub-subparagraph and there is no culpable mental state requirement for either the age of the complainant or the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(ii), the actor must be "reckless" as to the fact that the complainant is under 16 years of age and, "in fact," the actor must be at least four years older than the complainant. The actor must be aware of a substantial risk that the complainant was under the age of 16 years, but there is no mental state requirement for the required age gap. For the penalty enhancement in sub-subparagraphs (f)(5)(D)(iii), the actor must be "reckless" as to the fact that the complainant is under 18 years of age and the fact that the actor is in a "position of trust with or authority over" the complainant, and, "in fact," the actor must be at least four years older than the complainant. "Position of trust with or authority

over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. The actor must be aware of a substantial risk that the complainant is under the age of 18 years and that the actor is in a "position of trust with or authority over" the complainant, but there is no mental state requirement for the required age gap. For the penalty enhancement in sub-subparagraph (f)(5)(D)(iv), the actor must be "reckless" as to the fact that the complainant is 65 years of age or older and, "in fact," the actor must be under the age of 65 years and at least ten years younger than the complainant. The actor must be aware of a substantial risk that the complainant was 65 years of age or older, but there is no culpable mental state requirement for the required age of the complainant or the age gap. Finally, the penalty enhancement in sub-subparagraph (f)(5)(D)(v) requires that the actor be "reckless" as to the fact that the complainant was a "vulnerable adult." The actor must be aware of a substantial risk that the complainant was a "vulnerable adult" as that term is defined in RCC § 22E-701.

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised sexual assault statute clearly changes current District law in fourteen main ways.*

First, first degree and third degree of the revised sexual assault statute prohibit threats of "bodily injury," as that term is defined in RCC § 22E-701. The current D.C. Code first degree[28] and third degree[29] sexual abuse statutes prohibit threats of "bodily injury," currently defined for the sexual abuse statutes as an "injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain."[30] There is no DCCA case law interpreting the definition of "bodily injury" for the current D.C. Code sexual abuse statutes. In contrast, first degree and third degree of the revised sexual assault statute prohibit threats of "bodily injury," as that term is defined in RCC § 22E-701—"physical pain, physical injury, illness, or impairment of physical condition." The RCC definition of "bodily injury" leads to two changes to the scope of prohibited threats in first degree and third degree of the RCC sexual assault as compared to current D.C. Code first degree and third degree sexual abuse.[31] First, first degree and third degree of

[28] D.C. Code § 22-3002(a)(2) ("(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: . . . (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

[29] D.C. Code § 22-3004(2) ("A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: . . . (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").

[30] D.C. Code § 22-3001(2).

[31] The RCC definition of "bodily injury" makes two additional changes to the current D.C. Code definition of "bodily injury." First, the RCC definition of "bodily injury" requires either "physical injury" or "impairment of physical condition." The current D.C. Code definition of "bodily injury" includes "loss or impairment of the function of a bodily member [or] organ" or "physical disfigurement." It is unclear what level of physical harm is required and there is no DCCA case law on this issue. However, the current D.C. Code sexual abuse statutes define "serious bodily injury" as "bodily injury that involves . . . protracted and

the revised sexual assault statute no longer include threats of impairment of a "mental faculty," unless the threatened harms otherwise satisfy the RCC definition of "bodily injury." It is unclear whether "mental faculty" in the current D.C. Code definition of "bodily injury" refers to the physical condition of the brain or more generally to psychological distress. Second, first degree and third degree of the revised sexual assault statute include threats of *any* physical pain, as opposed to threats of "an injury involving significant pain," as required by the current D.C. Code definition of "bodily injury." It is difficult, if not impossible, to assess whether a threat is a threat of "significant physical pain," as opposed to a threat of any physical pain. In the RCC sex assault offense, a threat of "bodily injury" that involves any physical pain must still satisfy the causation requirement and the "knowingly" culpable mental state—i.e. the threat must cause the complainant to engage in the sexual act and the actor must be "practically certain" of this fact. This change improves the clarity, completeness, and consistency of the revised statutes.

Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current D.C. Code first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[32] and similar logic would appear to apply to third degree sexual abuse. This case law precludes an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime.[33] This DCCA case law would also likely mean that an actor would be precluded from directly raising—though not necessarily presenting evidence in support of[34]—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third

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obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty," D.C. Code § 22-3001(7), which suggests that "bodily injury" is limited to comparatively less serious harms. It is unclear if this revision changes the scope of threats of "bodily injury" in first degree and third degree of the RCC sexual assault statute as compared to first degree and third degree of the current D.C. Code sexual abuse statutes.

Second, the current D.C. Code sexual offense definition of "bodily injury" includes "disease" or "sickness," which the RCC definition simplifies by referring to "illness." This is a clarificatory change that does not change the scope of threats of "bodily injury" in the RCC sexual assault statute as compared to first degree and third degree of the current D.C. Code sexual abuse statutes.

[32] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[33] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[34] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan*, 32 A.3d at 996 (Ruiz, J., concurring) (discussing *Parker*).

degree sexual abuse.[35] In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute.[36] This change improves the clarity, consistency, and proportionality of the offense.

Third, second degree and fourth degree of the RCC sexual assault statute specify as a discrete basis of liability that the complainant's incapacitation is due to "an intellectual, developmental, or mental disability or mental illness," which excludes age as the sole cause of a complainant's inability. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[37] The language is not statutorily defined, but the DCCA has held that the current fourth degree sexual abuse statute categorically merges into the current second degree child sexual abuse statute,[38] in part because "once the government proves in a sexual assault case that the defendant was four or more years older than the [complainant under the age of 16 years], there is a conclusive presumption that the defendant knew or should have known that the [complainant under the age of 16 years] was incapable of appraising the nature of the sexual conduct."[39] However, such a conclusive presumption categorically convicts defendants of sexual assault that are themselves under the age of 16 years even if they, due to their young age, are also incapable of appraising the nature of the sexual activity. This is inconsistent with the protected status of persons under the age of 16 years in the current D.C. Code sexual abuse statutes. In contrast, in the RCC, a defendant cannot be found guilty of second degree or fourth degree sexual assault based solely on the complainant's age[40] and there is no longer a conclusive presumption that a complainant under the age of 16 years is

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[35] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of offensive physical context.

[36] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[37] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[38] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017) ("[W]e hold that it is impossible to commit second-degree child sexual *166 abuse without also committing fourth-degree sexual abuse. Therefore, appellant's fourth-degree sexual abuse adjudications merge into his second-degree child sexual abuse adjudications.").

[39] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017).

[40] A complainant's young age may be relevant in assessing whether the complainant has an intellectual, developmental, or mental disability or mental illness that makes the complainant incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact. In addition, although this commentary focuses on the young age of a complainant, the age of an older complainant may not be the sole basis of determining whether that complainant is incapable of appraising the nature of the sexual conduct or of understanding the right to give or withhold consent to the sexual conduct. It may, however, be relevant in determining whether an older complainant has an intellectual, developmental, or mental disability or mental illness and otherwise meets the requirements of this provision.

incapable of appraising the nature of the sexual activity when the defendant is at least four years older.[41] Age remains the basis of liability for the RCC sexual abuse of a minor statute (RCC § 22E-1302), which would entirely overlap with the second and fourth degree sexual assault statutes without this change, and age may form the basis of liability for the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the clarity, consistency, and proportionality of the revised sexual assault and sexual abuse of a minor statutes, and reduces unnecessary overlap.

Fourth, the revised sexual assault statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Some or all of the current D.C. Code sex offenses[42] are subject to general penalty enhancements based on the age of the complainant,[43] a general "while armed" penalty enhancement in D.C. Code § 22-4502,[44] as well as the enhancements in the current sex offense aggravators in D.C.

[41] However, a defendant of any age that engages in sexual activity with a complainant under the age of 18 years may still have liability under other provisions of the RCC sexual assault statute.

[42] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[43] Current District law has a general penalty enhancement for committing specified crimes against complainants under the age of 18 years and a general penalty enhancement for committing specified crimes against complainants that are 65 years of age or older. The penalty enhancement for crimes committed against complainants under the age of 18 years applies to child sexual abuse and first degree, second degree, or third degree sexual abuse, and authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized. D.C. Code §§ 22-3611(a), (c). The penalty enhancement for crimes committed against complainants that are 65 years of age or older authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized and applies to first degree, second degree, and third degree sexual abuse. D.C. Code § 22-3601(a), (c).

[44] The current "while armed" enhancement prohibits committing, attempting, soliciting, or conspiring to commit specified offenses, including child sexual abuse and first degree, second degree, and third degree sexual abuse, "while armed" with or "having readily available" any "pistol, or other firearm (or imitation thereof) or other dangerous or deadly weapon." For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

Code § 22-3020.[45] The D.C. Code is silent as to whether or how these different penalty enhancements can be stacked, although case law suggests stacking at least some penalty enhancements is permitted.[46] In contrast, the revised sexual assault statute specifies a single set of enhancements, including age-based and weapon enhancements, that is capped at a penalty increase of one class.[47] Because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance a sexual assault with, for example, both a weapon enhancement and an enhancement based on the identity of the complainant, or to double-stack different weapon penalties[48] and offenses. In addition, the scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[49] and excludes objects the complainant incorrectly perceives as being a dangerous weapon or imitation dangerous weapon.[50] Consolidating the multiple penalty enhancements improves the consistency and proportionality of the revised sexual assault offense.

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[45] The current sexual abuse aggravators apply to all the sex offenses. D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[46] For example, the facts as discussed in several DCCA cases on offenses against persons other than sexual abuse indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[47] Note, however, that subtitle I of the RCC specifies certain penalty enhancements (e.g., hate crime) that may apply *in addition to* the penalty enhancements specified in the revised sexual assault offense.

[48] In addition to the "while armed" enhancement in D.C. Code § 22-4502(a) applicable to child sexual abuse and first degree, second degree, and third degree sexual abuse, the current sex offense aggravators include an aggravator if "the defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon." D.C. D.C. Code § 22-3020(a)(6).

[49] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault statute. However, possessing a dangerous weapon or a firearm during sexual assault, without using or displaying it, may have liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[50] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g.*, *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 exclude these objects.

Fifth, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and the complainant when the complainant is under the age of 12 years, and, by the use of the phrase "in fact," require strict liability for the age gap. The current D.C. Code sex offense aggravators include an aggravator for when the "victim was under the age of 12 at the time of the offense."[51] The aggravator does not require an age gap between the complainant and the actor, unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and a person under the age of 16.[52] In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and a complainant under the age of 12 years. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting very young complainants. An actor with less than a four year age gap that commits a sexual assault against a complainant under the age of 12 years continues to face criminal liability, but the penalty would not be enhanced. The revised enhancement also uses the phrase "in fact" to require strict liability for the age gap, which is consistent with strict liability for the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Sixth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant was under the age of 16 years when the actor, in fact, was at least four years older. The current D.C. Code sex offense aggravators include a penalty aggravator for when "the victim was under the age of 12 years"[53] and when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[54] There is no aggravator for a complainant under the age of 16 years. However, the current D.C. Code first degree and second degree sexual abuse of a child statutes punish sexual acts and sexual contacts when the complainant was under the age of 16 years and the actor was at least four years older.[55] In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor recklessly disregarding the fact that the complainant is under the age of 16 years when the actor is at least four years older than the complainant. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting young complainants. An actor with less than a four year age gap that commits sexual assault against a complainant under the age of 16 years continues to face criminal liability, but the penalty would not be enhanced. The "recklessly" culpable mental state for the complainant's age is consistent with this element in the other revised age-based penalty enhancements. Using "in fact" to require strict liability for the age gap is consistent with the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

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[51] D.C. Code § 22-3020(a)(1).
[52] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[53] D.C. Code § 22-3020(a)(1).
[54] D.C. Code § 22-3020(a)(2).
[55] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

Seventh, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and a complainant under the age of 18 years when the actor is in a position of trust with our authority over the complainant, and, by use of the phrase "in fact," require strict liability for the age gap. The current D.C. Code sex offense aggravators include an aggravator for when the "victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[56] The current aggravator does not specify any culpable mental states and there is no DCCA case law on this issue. In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and the complainant and, by use of the phrase "in fact," specifies that there is no culpable mental state for this element. A four year age gap ensures that the revised enhancement is reserved for predatory behavior targeting complainants under the age of 18 years. Strict liability for the age gap is consistent with the age gap in the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the consistency and proportionality of the revised sexual assault offense.

Eighth, the current D.C. Code penalty enhancement for crimes committed against minors no longer applies to the revised sexual assault statute. Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes, including first degree, second degree, and third degree sexual abuse, when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant.[57] In contrast, the revised sexual assault statute limits the age-based penalty enhancements when the complainant is a minor to situations that mirror the requirements for liability in the RCC sexual abuse of minor statute (RCC § 22E-1302): 1) the complainant is under the age of 12 years and the actor is at least four year older; 2) the complainant is under the age of 16 years and the actor is at least four years older; and 3) the complainant is under the age of 18 years and the actor is at least four years older, and in a position of trust with or authority over the complainant. This change improves the consistency of the RCC sexual assault and sexual abuse of a minor statutes and improves the proportionality of the penalties.

Ninth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is 65 years of age or older when the actor is, in fact, under the age of 65 years and at least 10 years younger than the complainant. Current D.C. Code § 22-3601 provides a general penalty enhancement for any actor, regardless of age, committing specified crimes against complainants 65 years of age or older, including first degree, second degree, or third degree sexual abuse.[58] The penalty enhancement does not specify any culpable mental states, but there is an affirmative defense if the actor "knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed."[59] There is no DCCA case law on this issue. In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor that was reckless as to the fact that the complainant was

[56] D.C. Code § 22-3020(a)(2).
[57] D.C. Code §§ 22-3611(a), (c).
[58] D.C. Code § 22-3601(a), (b).
[59] D.C. Code § 22-3601(c).

65 years of age or older when the actor, in fact, is under the age of 65 years and at least 10 years younger than the complainant. The revised penalty enhancement applies to all gradations of the revised sexual assault statute, including fourth degree sexual assault. The "reckless" culpable mental state preserves the substance of the current affirmative defense for the senior citizen enhancement[60] and is consistent with the culpable mental states in several of the other revised age-based penalty enhancements. Requiring at least a ten year age gap between the actor and the complainant reserves the enhancement for predatory behavior targeting the elderly, rather than violence between elderly persons. Strict liability for the age of the actor is consistent with several of the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22E-1302). The revised penalty enhancement improves the consistency and proportionality of the revised offense.

Tenth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding the fact that the complainant is a "vulnerable adult." The current D.C. Code sexual abuse statutes do not have specific offenses or enhanced penalties for complainants that are "vulnerable adult[s]," as that term is defined in RCC § 22E-701, although some current District statutes prohibit the abuse[61] or neglect[62] of a "vulnerable adult" without specifically addressing sexual violence against these complainants. In contrast, the revised sexual assault statutes codify a penalty enhancement for an actor recklessly disregarding the fact that the complainant was a vulnerable adult, as that term is defined in RCC § 22E-701. The "recklessly" culpable mental state matches the culpable mental state required for several of the other sexual assault penalty enhancements. This change improves the consistency and proportionality of the revised statute.

Eleventh, the revised sexual assault penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" an object that, in fact, is a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[63] No culpable mental state is specified, and there is no DCCA case law interpreting the current weapons aggravator.[64]

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[60] In the RCC, an actor that knew or reasonably believed that the complainant was not 65 years or older or an actor that could not have known or determined the age of the complainant, as is required in the current affirmative defense, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[61] D.C. Code § 22-933. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code § 22-936.

[62] D.C. Code § 22-934. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code § 22-936.

[63] D.C. Code § 22-3020(a)(6).

[64] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly

In addition to the sex offense weapons aggravator, current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[65] "while armed" or "having readily available" a dangerous weapon.[66] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" an object that, in fact, is a dangerous weapon or imitation weapon.[67] The revised enhancement is narrower than the current D.C. Code sex offense aggravator because it requires the use or display of the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fourth degree of the revised sexual assault statute for a "coercive threat." The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual assault statute.

Twelfth, the revised sexual assault penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes

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weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C. Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

[65] D.C. Code §§ 22-4501(1); 22-4502(a).

[66] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

[67] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 specifically include firearms and imitation firearms.

rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current D.C. Code sex offense aggravator for causing serious bodily injury[68] incorporates the current D.C. Code definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[69] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ, or a protracted loss of consciousness. This change improves the consistency and proportionality of the revised sex offenses.

Thirteenth, first degree sexual assault[70] is no longer subject to the heightened penalties and aggravating circumstances in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse and first degree sexual abuse while armed if specified procedural requirements are met[71] and "one or more aggravating circumstances exist beyond a reasonable doubt."[72] In

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[68] D.C. Code § 22-3020(a)(3).

[69] D.C. Code § 22-3001(7).

[70] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse and first degree sexual abuse while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a sexual assault "while armed" offense. Depending on the facts of the case, the equivalent offense would be first degree sexual assault with a weapons enhancement under subsection (g) of the revised sexual assault statute or first degree sexual assault with additional liability under RCC §§ 22E-4104, possession of a dangerous weapon during a crime. For clarity, the commentary for this entry refers only to first degree sexual assault when discussing the relevant RCC statute, even though the various forms of liability for first degree sexual assault committed with the use or presence of a weapon are also affected by the revision.

[71] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

[72] The aggravating circumstances that apply to first degree sexual abuse are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that apply to "all offenses." It is unclear whether first degree sexual abuse is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse while armed is included in the reference to first degree sexual abuse and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse and first degree sexual abuse while

contrast, the revised sexual assault statute is subject to a single set of aggravators in subsection (f) of the revised statute, as well as the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (RCC § 22E-608). As a result, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual assault, although several of them are covered by other provisions in the RCC.[73] The special procedures in D.C. Code § 24-403.01(b-2) to give notice to a defendant are unnecessary because aggravating circumstances must be charged in the criminal indictment per Supreme Court case law decided after passage of the District statute.[74] This revision improves the consistency and proportionality of the revised sexual assault statute.

Fourteenth, the revised sexual assault statute replaces certain minimum statutory penalties for first degree sexual abuse, second degree sexual abuse, and child sexual abuse in D.C. Code § 24-403.01(e).[75] These minimum statutory penalties require

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armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

[73] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).

In the RCC, none of these aggravating circumstances apply to the revised first degree sexual assault offense. However, the offense is subject to several penalty enhancements that are substantially similar to several of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607, the sexual assault penalty enhancement for recklessly disregarding that the complainant was a "vulnerable adult" (RCC § 22E-1301), and the sexual assault penalty enhancement for recklessly causing serious bodily injury to the complainant (RCC § 22E-1301). In addition, the revised sexual assault statute continues to enhance penalties for complainants under the age of 12 years (RCC § 22E-1301) and for an elderly complainant (RCC § 22E-1301), but has additional requirements for these enhancements that differ from D.C. Code § 24-403.01(b-2)(2).

The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was serious because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to the revised first degree sexual assault offense, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

[74] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

[75] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual

specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[76] apply, if at all, to these provisions. In contrast, the revised sexual assault statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. This change improves the consistency and proportionality of the revised offense.

Beyond these fourteen changes to current District law, twenty-one other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised sexual assault statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current D.C. Code sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[77] This variation creates different plain language readings of the current D.C. Code sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[78] In addition to case law, District practice does not appear to follow

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abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

[76] D.C. Code §§ 22-1804; 22-1804a.

[77] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[78] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

the variations in statutory language.[79] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised sexual assault statute prohibits using physical force that "moves" or "immobilizes" the complainant. The current D.C. Code first degree[80] and third degree[81] sexual abuse statutes prohibit the use of "force" against the complainant, currently defined to include "the use of such physical strength or violence as is sufficient to overcome, [or] restrain . . . a person"[82] and "the use of a threat of harm sufficient to coerce or compel submission by the victim."[83] It is unclear whether "force" includes the use of physical force that moves, but does not injure, the complainant, such as a shove. There is no DCCA case law interpreting the current D.C. Code definition of "force." Resolving this ambiguity, the revised sexual assault statute prohibits the use of physical force that "moves" or "immobilizes" the complainant. The term "overcomes" in the current D.C. Code definition of "force" may erroneously imply that the complainant must be actively opposing the use of force. Instead, "moves" in first and third degree of the revised sexual assault statute covers forceful conduct such as pushing. The term "restrains" in the current D.C. Code definition of "force" may erroneously imply that non-physical control is included. First degree and third degree of the revised sexual assault statute cover conduct such as a hug or hold, instead, by the word "immobilizes." As a whole, "moves" and "immobilizes" clarify that first degree and third degree of the revised sexual assault statute prohibit certain use of physical force that falls short of causing "bodily injury," as defined in RCC § 22E-701.[84] It is consistent and proportionate to include this forceful conduct in first degree and third degree of the revised sexual assault statute. This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.

Third, first degree and third degree of the revised sexual assault statute prohibit the actor threatening to harm the complainant or a third party, and exclude the actor threatening to harm himself or herself. The current D.C. Code first degree[85] and third

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[79] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[80] D.C. Code § 22-3002(a)(1).

[81] D.C. Code § 22-3004(1).

[82] D.C. Code § 22-3001(5).

[83] D.C. Code § 22-3001(5).

[84] "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition."

[85] D.C. Code § 22-3002(a)(2).

degree[86] sexual abuse statutes prohibit the actor threatening to subject "any person" to death, bodily injury, or kidnapping. It is unclear whether "any person" would include the actor threatening to harm himself or herself and there is no DCCA case law on this issue. In addition, the current D.C. Code first degree[87] and third degree[88] sexual abuse statutes prohibit the use of "force" against the complainant, currently defined to include "the use of a threat of harm sufficient to coerce or compel submission by the victim"[89] It is unclear whether this provision in the definition of "force" would include the actor threatening to harm himself or herself and there is no DCCA case law on this issue. Resolving this ambiguity, first degree and third degree of the revised sexual assault statute limit threats of the actor harming the complainant or a third party. An actor that threatens to harm himself or herself may have liability for second degree or fourth degree sexual assault for an explicit or implicit coercive threat provided the other requirements of the offense are met. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, first degree and third degree of the revised sexual assault statute prohibit threatening to inflict a "sexual act" or "sexual contact" against a third party. The current D.C. Code first degree[90] and third degree[91] sexual abuse statutes prohibit threats of death, bodily injury, or kidnapping. The current D.C. Code definition of "bodily injury" for the sexual abuse statutes is "injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain."[92] It is unclear whether the current D.C. Code definition of "bodily injury" includes threats of sexual penetration or sexual touching, and there is no DCCA case law interpreting this definition. In addition, the current D.C. Code first degree[93] and third degree[94] sexual abuse statutes prohibit the use of "force" against the complainant, currently defined to include "the use of a threat of harm sufficient to coerce or compel submission by the victim"[95] It is unclear whether this provision in the definition of "force" would include the actor threatening to inflict a "sexual act" or "sexual contact" against a third party. Resolving this ambiguity, first degree and third degree of the revised sexual assault statute prohibit threats to inflict a "sexual act" or "sexual contact," as those terms are defined in RCC § 22E-701, against a third party. A sexual act or sexual contact is a serious harm that may fall outside the current D.C. Code and RCC[96] definitions of "bodily injury" and should be included in first degree and third degree of the revised statute.[97] First degree and third degree of the RCC sexual assault

[86] D.C. Code § 22-3004(2).
[87] D.C. Code § 22-3002(a)(1).
[88] D.C. Code § 22-3004(1).
[89] D.C. Code § 22-3001(5).
[90] D.C. Code § 22-3002(a)(2).
[91] D.C. Code § 22-3004(2).
[92] D.C. Code § 22-3001(2).
[93] D.C. Code § 22-3002(a)(1).
[94] D.C. Code § 22-3004(1).
[95] D.C. Code § 22-3001(5).
[96] RCC § 22E-701 defines "bodily injury" as "physical pain, physical injury, illness, or impairment of physical condition."
[97] The explanatory note to this offense discusses the threats provision in first degree and third degree sexual assault in more detail.

statute limit threats of a "sexual act" or "sexual contact" to a third party consistent with the other requirements of the revised sexual assault statute.[98] This change improves the clarity, consistency, and proportionality of the revised statute, and may remove a possible gap in liability.

Fifth, first and third degree of the revised sexual assault statute prohibit causing the complainant to engage in or submit to sexual activity "by" causing the nonconsensual intoxication of the complainant. The current D.C. Code first degree[99] and third degree[100] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor involuntarily intoxicates the complainant. There is no DCCA case law interpreting the current intoxication provision. It is unclear whether a causal connection is required between the sexual conduct and the involuntary intoxication of the complainant, although the legislative history suggests that such a causation requirement may have been intended.[101] Resolving this ambiguity, the revised sexual assault statute clarifies that involuntary intoxication of the complainant must be causally related (a "but for" condition) to the sexual conduct. The causation requirement, in addition to the culpable mental states in the revised intoxication provision discussed elsewhere in this commentary, ensures that the intoxication provision applies only to actors that knowingly cause a sexual act or sexual contact by administering an intoxicant or causing an intoxicant to be administered.[102] This change improves the clarity and consistency of the revised sexual assault offense.

Sixth, the intoxication provision in first and third degree of the revised sexual assault statute specifies the required effect of the intoxicant. The intoxication provision in the current D.C. Code first degree and third degree sexual abuse requires that the intoxicant "substantially impairs the ability of that other person to appraise or control his

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[98] As is discussed elsewhere in this commentary, threats of the actor engaging in self-harm, or, in this case, a sexual act or sexual contact, are included in second degree and fourth degree of the revised sexual assault statute as a "coercive threat," if the other requirements of the offense are met. Including threats to inflict a sexual act or sexual contact against the complainant in first degree and third degree of the revised sexual assault statute may, by nature of the offense, elevate every sexual assault into first degree or third degree, which is inconsistent with the current D.C. Code sexual abuse statutes and the RCC sexual assault statute, which distinguish the gradations, in part, based on the type of threat.

[99] D.C. Code § 22-3002(a)(4).

[100] D.C. Code §§ 22-3004(4).

[101] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").

[102] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

or her conduct."[103] This language is not further statutorily defined and there is no DCCA case law interpreting it. The language is similar to one basis of liability in the current D.C. Code second degree and fourth degree sexual abuse statutes for sexual conduct with a complainant that is "incapable of appraising the nature of the conduct,"[104] but the current D.C. Code intoxication provision does not mirror the other types of incapacitation referenced in second degree and fourth degree sexual abuse—"incapable of declining participation in" the sexual act or sexual contact[105] and "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[106] Resolving these ambiguities, the revised intoxication provision in first and third degree of the revised sexual assault statute makes two changes to the current intoxication provision to clarify its scope. First, the revised intoxication provision specifies that an intoxicant that renders the complainant "[a]sleep, unconscious, substantially paralyzed, or passing in and out of consciousness" is sufficient. These conditions mirror the required physical incapacitation in second degree and fourth degree of the revised sexual assault statute and satisfy the current intoxication provision's requirement that the intoxicant "substantially impairs the ability" of the complainant to "appraise or control his or her conduct." Second, the revised intoxicant includes an intoxicant that renders the complainant "[s]ubstantially incapable of appraising the nature of" the sexual act or sexual contact or "[s]ubstantially incapable of communicating willingness or unwillingness to engage in" the sexual act or sexual contact. This language is similar to the language in second degree and fourth degree of the revised sexual assault statute and establishes other types of incapacitation that may not fall within the conditions specified elsewhere in the intoxication provision, e.g., asleep, unconscious, etc. This change improves the clarity and consistency of the revised statute and removes possible gaps in liability.

Seventh, first degree and third degree of the RCC sexual assault statute delete "after rendering [the complainant] unconscious" as a discrete form of liability. The current D.C. Code first degree[107] and third degree[108] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor "render[s] that other person unconscious."[109] There is no DCCA case law interpreting this provision. It is unclear whether a causal connection is required between the actor rendering the complainant unconscious and the sexual conduct. Requiring a causal connection would render the provision surplusage because the current first degree and third degree sexual abuse statutes separately prohibit "[b]y" using force against the complainant,[110] which would include rendering the complainant unconscious.[111] Without a causal connection, however, the provision overlaps with second degree and fourth degree sexual abuse, which prohibit a sexual act

[103] D.C. Code §§ 22-3002(a)(4); 22-3004(4)
[104] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).
[105] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).
[106] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).
[107] D.C. Code § 22-3002(a)(4).
[108] D.C. Code §§ 22-3004(4).
[109] D.C. Code §§ 22-3002(a)(3); 22-3004(3).
[110] D.C. Code §§ 22-3002(a)(1); 22-3004(1)
[111] D.C. Code § 22-3001(5) (defining "force" to include "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure" the complainant).

or sexual contact with an incapacitated complainant.[112] Resolving this ambiguity, first degree and third degree of the RCC sexual assault statute include engaging in or causing a complainant to engage in or submit to a sexual act "by causing bodily injury to the complainant." The RCC definition of "bodily injury" in RCC § 22E-701 would extend to unconsciousness ("physical pain, physical injury, illness, or impairment of physical condition."). If the actor renders the complainant unconscious and then later decides to sexually assault the complainant, without the causal connection that first degree and third degree require, there is liability in second degree and fourth degree sexual assault for engaging in a sexual act or sexual contact with an "unconscious" complainant. This change improves the clarity, consistency, and proportionality of the revised statute.

Eighth, first degree and third degree of the revised sexual assault offense require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by causing bodily injury, a specified use of physical force, specified threats, or involuntary intoxication of the complainant. The current D.C. Code first degree[113] and third degree[114] sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[115] and similarly logic would appear to apply to third degree sexual abuse. However, it is unclear what general intent means in terms of required culpable mental states.[116] Resolving this ambiguity, first degree and third degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by the specified use of physical force, specified threats, or involuntary intoxication of the complainant. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[117] A "knowingly" culpable mental state is consistent with current District law for threats[118] and the RCC criminal threats statute (RCC § 22E-1204) and also may clarify that second degree and fourth degree sexual assault are lesser included offenses, which is an unresolved issued in current DCCA case law.[119] This change improves the clarity and consistency of the revised offense.

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[112] D.C. Code §§ 22-3003; 22-3005.

[113] D.C. Code § 22-3002.

[114] D.C. Code § 22-3004.

[115] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[116] The DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'" *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

[117] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[118] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes. See commentary to RCC § 22E-1204.

[119] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-

Ninth, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by "a coercive threat" or with a physically or mentally impaired complainant. The current D.C. Code second degree[120] and fourth degree[121] sexual abuse statutes do not specify any culpable mental states. However, DCCA case law appears to have required specific intent for second degree sexual abuse in one recent case,[122] and the DCCA also has been clear that the statutory definition of "sexual contact" requires specific intent.[123] Resolving this ambiguity, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[124] A "knowingly" culpable mental state is consistent with current District law for threats[125] and the RCC criminal threats statute (RCC § 22E-1204) and may also clarify that second degree and fourth degree sexual assault are lesser included offenses of

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degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]). *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a specific intent "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9) does. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state and the revised definition of "sexual act" in RCC § 22E-701 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[120] D.C. Code § 22-3003.

[121] D.C. Code §§ 22-3006.

[122] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) ("There was also evidence from which a reasonable fact-finder could conclude that appellant had the specific intent to obtain sex by placing [the complainant] in fear of arrest."). Older District case law predating the 1994 Anti-Sexual Abuse Act that enacted first degree through fourth degree sexual abuse, characterized rape as a general intent offense. *See, e.g.*, *United States v. Thornton*, 498 F.2d 749, 753 (D.C. Cir. 1974) (internal quotations omitted).

[123] *See, e.g.*, *In re E.H.*, 967 A.2d 1270, 1271, 1275 n.9 (D.C. 2009) ("[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]).").

[124] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[125] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes. See commentary to RCC § 22E-1204.

first degree and third degree, which is an unresolved issue in current DCCA case law.[126] This change improves the clarity and consistency of the revised offense.

Tenth, the revised first degree and third degree sexual assault statutes no longer include the "use of a threat of harm sufficient to coerce or compel submission by the victim." The current D.C. Code first degree[127] and third degree[128] sexual abuse offenses prohibit the use of "force" against the complainant, and the current definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim."[129] The DCCA has never interpreted the threats part of the current definition of "force." However, inclusion of any type of threat in the current D.C. Code first and third degree sexual abuse statutes appears to render moot the overall statutory framework in the current felony sexual abuse statutes, which purports to differentiate threats by the severity of harm involved.[130] Resolving this ambiguity, first degree and third degree of the revised sexual assault are limited to specified threats against the complainant and specified threats against a third party. Any other threat may lead to liability under second degree and fourth degree of the revised sexual assault statute as a "coercive threat." This change improves the consistency and proportionality of the revised statutes.

Eleventh, first degree and third degree of the revised sexual assault statute no longer include "the use or threatened use of a weapon" as a discrete basis of liability. The current D.C. Code definition of "force" in the sexual abuse statutes prohibits "the use

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[126] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]). *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a "specific intent" "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9). The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).
Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state, and the revised definition of "sexual act" in RCC § 22E-701 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[127] D.C. Code § 22-3002(a)(1).

[128] D.C. Code § 22-300(1).

[129] D.C. Code § 22-3001(5).

[130] The current first degree and third degree sexual abuse statutes prohibit threats to subject any person to "death, bodily injury, or kidnapping." D.C. Code §§ 22-3002(a)(2); 22-3004(2). The current second degree and fourth degree sexual abuse statutes prohibit threats "other than" threats of death, bodily injury, or kidnapping. D.C. Code §§ 22-3003(1); 22-3005(1).

or threatened use of a weapon,"[131] but "weapon" is not defined statutorily and there is no DCCA case law interpreting the term. It is unclear how a "weapon" in the current D.C. Code definition of "force" differs from a "deadly or dangerous weapon" in the current sexual abuse aggravators.[132] Resolving this ambiguity, the RCC sexual assault statute deletes "the use or threatened use of a weapon" as a discrete basis of liability. The use or threatened use of a weapon is sufficient for first degree or third degree of the revised sexual assault statute if it causes bodily injury to the complainant, accompanies physical force that moves or immobilizes the complainant, or if it constitutes a specified threat, provided the other requirements of the offense are met. If the use or threatened use of a weapon does not satisfy the requirements for liability for first degree or third degree sexual assault, there may be liability for second degree or fourth degree sexual assault for an explicit or implicit coercive threat (subparagraphs (b)(2)(A) and (d)(2)(A)), provided the other requirements of the offense are met. This change improves the clarity of the revised statute.

Twelfth, the intoxication provision in first degree and third degree of the revised sexual assault statute specifies several culpable mental states. The intoxication provision in current D.C. Code first degree and third sexual abuse does not specify any culpable mental states,[133] although the legislative history references a specific intent to engage in the sexual activity.[134] DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[135] and similar logic would appear to apply to third degree sexual abuse. It is unclear what general intent means in terms of required culpable mental states, but the DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'"[136] Resolving this ambiguity, the revised intoxication provision specifies several culpable mental states. First, a "knowingly" culpable mental state applies to administering or causing to be administered an intoxicant, doing so without the complainant's "effective consent," and the fact that the substance is an intoxicant. The "knowingly" culpable mental state also applies to the required causation between administering the intoxicant and the sexual conduct. Second, the actor must act "with intent to impair the complainant's ability to express willingness or unwillingness" to engage in the sexual act or sexual contact. Finally, the revised intoxication provision, by

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[131] D.C. Code § 22-3001(5) (defining "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

[132] D.C. Code § 22-3001(6) ("The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[133] D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[134] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").

[135] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[136] *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

the use of "in fact," requires strict liability for the effects of the intoxicant because administering an intoxicant without the complainant's "effective consent" is an assault. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[137] However, an actor may be held strictly liable for elements of an offense that aggravate what is already illegal conduct.[138] If an actor fails to satisfy any of the culpable mental states in the revised intoxication provision, there may still be liability for sexual activity with an intoxicated or incapacitated complainant in second degree or fourth degree of the revised sexual assault statute. This change improves the clarity and consistency of the revised sexual assault statute.[139]

Thirteenth, second degree and fourth degree of the revised sexual assault statute prohibit sexual assault by making a "coercive threat," as that term is defined in RCC § 22E-701. The current D.C. Code second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact by "threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[140] There is no apparent statutory limit to the type of threats or fear, and the legislative history generally notes that the offenses "encompass other types of coercion."[141] The DCCA has sustained convictions for second degree sexual abuse for placing a complainant in reasonable fear

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[137] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[138] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)."). In this instance, administering an intoxicant without consent and with the specified intent is already sufficient to impose assault or attempted assault liability.

[139] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

[140] D.C. Code §§ 22-3003; 22-3005. First degree and third degree sexual abuse prohibit "threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping."). D.C. Code §§ 22-3002; 22-3004.

[141] Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15 ("The first degree offense would encompass any type of physical force, as well as coercion through threats that any person will be subjected to death, bodily injury, or kidnapping. . . The second degree offense would encompass other types of coercion."). The legislative history refers to "the second degree offense," but also applies to what is now fourth degree sexual abuse. In the legislation as introduced, what is now fourth degree sexual abuse was a lower gradation for a sexual contact. *Id.* at 7.

of arrest[142] and reasonable fear of being fired from employment.[143] Instead of a general reference to threats, second degree and fourth degree of the revised sexual assault statute prohibit making a "coercive threat," a defined term in RCC § 22E-701 that is used consistently in the RCC. The RCC definition specifies certain common types of coercive threats, but also has a broad catch-all provision for threats of a harm that is "sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This change improves the clarity and consistency of the revised offense.

Fourteenth, the revised sexual assault statute codifies an effective consent defense to several provisions in the revised statute and, under RCC § 22-201, assigns the government the burden of disproving the defense beyond a reasonable doubt. The current D.C. Code consent defense to the general sexual abuse statutes simply states that "[c]onsent by the victim is a defense to a prosecution" for first degree through fourth degree sexual abuse, and misdemeanor sexual abuse.[144] The statutory definition of "consent"[145] for the sexual abuse statutes further specifies that such consent must be "freely given," but the meaning of this language is unclear and there is no DCCA case law interpreting it.

Under District law, the consent defense to the general sexual abuse statutes was originally an affirmative defense that required the defendant to prove consent by a preponderance of the evidence. However, in 2009,[146] the preponderance requirement was struck due to concerns that it was creating confusion and impermissibly shifting the government's burden of proof on the issue of force. Since the deletion of the preponderance requirement, limited DCCA case law indicates that the consent defense is used to prove the lack of force and the DCCA appears to have approved a jury instruction that requires the government to prove beyond a reasonable doubt that the complainant did not voluntarily consent to the sexual activity.[147]

With respect to limitations on the current consent defense, the DCCA, relying on various indications of legislative intent, has held that the consent defense is not available when the defendant is an adult at least four years older than a complainant under 16 years

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[142] *Way v. United States*, 982 A.2d 1135, 1135, 1137 (D.C. 2009) ("The evidence was sufficient [for second degree sexual abuse] to show that [the complainant] engaged in sexual acts with appellant only because she had a reasonable fear of being arrested.").

[143] *Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (stating that the government's evidence was sufficient for second degree sexual abuse that the complainant "was in reasonable fear of being fired.").

[144] D.C. Code § 22-3007 ("Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.").

[145] D.C. Code § 22-3001(4) (defining "consent" as "words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[146] Omnibus Public Safety and Justice Amendment Act of 2009, 2009 District of Columbia Laws 18-88 (Act 18-189).

[147] *Banks v. United States*, 237 A.3d 90, 103, 107 n.7 (D.C. 2020) ("By contrast, there was no burden shifting here. The court instructed the jury that it could 'consider evidence of consent in deciding whether the Government has proved beyond a reasonable doubt that Demetrius Banks ... used force.' Appellant did not have the burden of proving consent. Rather, the government had to 'prove beyond a reasonable doubt that [T.C.] and [S.T.] did not voluntarily consent to the sexual acts or contacts.' Defense counsel specifically requested that the court issue such a jury instruction.").

of age.[148] Although a complainant under the age of 16 years cannot consent to sexual activity with a defendant that is at least four years older, it is unclear whether the DCCA would also categorically hold that such a complainant could not consent to the use of force in that sexual activity. Although there is no case law is on point, case law on the District's assault statute[149] and dicta in one sexual abuse case[150] suggest that a person may not be able to consent to more severe harms.

The revised sexual assault effective consent defense is generally consistent with DCCA case law interpreting the current D.C. Code consent defense. It requires that the actor reasonably believe[151] that the complainant gives effective consent to the actor to engage in the conduct constituting the offense—which would include the use of force, as well as when consent is the absence of force—as well as the sexual act or sexual contact. The RCC sexual assault defense extends the defense to include the use of threats, as well as to incapacitated or intoxicated complainants in second degree and fourth degree. As the explanatory note discusses, however, the defense may rarely be available in second degree and fourth degree due to the RCC definitions of "effective consent" and "consent." The RCC definition of "effective consent" is generally consistent with the current D.C. Code definition of "consent" and is discussed in the commentary to the definition in RCC § 22E-701. Under RCC § 22E-201, the government must prove the absence of the defense beyond a reasonable doubt, which is consistent with limited DCCA case law.

The RCC sexual assault effective consent defense does not place any limitations on the type or severity of conduct to which a complainant can consent. In the context of

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[148] The DCCA has held that in a prosecution under the current general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3). "Adult" is not statutorily defined in the current sex offenses, and the DCCA does not provide a definition in *Davis*.

Davis was decided when the consent defense was an affirmative defense, but that is immaterial to the court's decision. The court's reasoning was based, in part on current D.C. Code § 22-3011, which states that consent is not a defense to the child sexual abuse statutes, and D.C. Code § 22-3011 remains law. *Davis,* 873 A.2d at 1105 & n.8 (stating that "Section 22–3011 preserves the longstanding rule that a child is legally incapable of consenting to sexual conduct with an adult" and that "By adopting the four-year age differential as an element of the child sexual abuse provisions, it appears that the ASAA does modify the traditional rule so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child.").

In addition, the principle in *Davis* is recognized in other DCCA case law. *See, e.g.*, *In re M.S.*, 171 A.3d 155, 163 (D.C. 2017) ("Our holding in *Davis* that the [the current D.C. Code sexual abuse statutes] retain[] the conclusive presumption that children cannot consent to sexual contact, at least where the defendant is at least four years older than the child, is also a helpful guide for our analysis here.").

[149] The DCCA recently held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

[150] *Hatch,* 35 A.3d at 1120 (noting that "consenting at gunpoint is "an absurd proposition").

[151] It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability for attempted sexual assault under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

sexual activity in the RCC, a complainant can consent to conduct, such as temporary asphyxiation, that creates a risk of, or actually causes, significant bodily injury, serious bodily injury, or death. Similarly, a complainant can consent to conduct that involves the use of a dangerous weapon because objects used in a sexual context may otherwise constitute a "dangerous weapon" as defined in RCC § 22E-701. However, an actor may have liability under an RCC offense against persons or an RCC weapons offense if the actor's conduct goes beyond the complainant's effective consent or if the resulting harm is one that cannot be consented to in the RCC.[152]

The RCC sexual assault defense also does not have any age requirements. The RCC sexual assault statute allows an effective consent defense to the use of force when the complainant is under 16 years of age and the actor is at least four years older. However, in practice, the definitions of "consent" and "effective consent" in RCC § 22E-701 may preclude a defendant from reasonably believing that a young complainant consents to conduct that otherwise satisfies the RCC sexual assault statute While the RCC provides no bright-line as to what age may render a youth unable to give consent under this provision, the flexible standard would allow for sex assault (not just sexual abuse) charges in some cases. In addition, even if the defense is successful and there is no liability for forceful sexual assault, there would still be liability for RCC sexual abuse of a minor,[153] which does not require force, and relies on the ages and relationship between the parties to impose liability.[154]

Lastly, the RCC effective consent defense deletes now unnecessary language "prosecuted alone or in conjunction with charges under § 22-3018 [attempt statute for sex offenses] or §§ 22-401 [assault with intent to commit specified offenses] and 22-403 [assault with intent to commit specified offenses]."[155] This change improves the clarity and consistency of the revised sexual assault statute.

Fifteenth, the revised sexual assault penalty enhancements require that accomplices be "physically present at the time of the sexual act or sexual contact." The

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[152] For example, if the complainant gives effective consent to being slapped during sex, but in doing so the actor causes the complainant serious bodily injury, there would be no liability for sexual assault, but there may be liability under the RCC assault statute (RCC § 22E-1202) if the other elements of that offense are met and there is no other applicable defense. Similarly, if the complainant gives effective consent to the actor choking the complainant during sex but in doing so the actor causes death, there would be no liability for sexual assault, but there may be liability for an RCC homicide offense if the other elements of that offense are met and there is no other applicable defense.

[153] For example, if a 20 year old actor has sex with a 15 year old complainant and the complainant gives effective consent to being tied up during sex, there is no liability for sexual assault, but there would be liability for second degree sexual abuse of a minor.

[154] A similar analysis applies to second and fourth degree sexual assault. As is discussed elsewhere in this commentary as a change in law, age is no longer sufficient as the sole basis of incapacitation in second degree and fourth degree of the RCC sexual assault. However, a young complainant could otherwise satisfy the incapacitation requirements of second degree and fourth degree sexual assault, and the consent defense would apply. In the case of a complainant that is under 16 years of age and an actor that is at least four years older, there would still be liability under the RCC sexual abuse of a minor statute, to which consent is not a defense.

[155] D.C. Code § 22-3007. The RCC sex offenses no longer have their own assault statute and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses. See Commentary to RCC § 22E-1202 (revised assault statute).

accomplice aggravator for the current D.C. Code sexual abuse statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[156] There is no DCCA case law interpreting this aggravator.[157] It is unclear whether the aggravator would apply if an accomplice was not physically present. It is also unclear if the required aiding and abetting is limited to the sexual act or sexual contact, or encompasses the totality of the actor's conduct leading to the sexual act or sexual contact. Resolving this ambiguity, the revised sexual assault penalty enhancement requires that the accomplices must be "physically present at the time of the sexual act or sexual contact." Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

Sixteenth, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The accomplice aggravator for the current D.C. Code sex offenses requires that the "defendant was aided or abetted by 1 or more accomplices."[158] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Resolving this ambiguity, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices that are physically present at the time of the sexual act or sexual contact."[159] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual assault statute.

Seventeenth, the revised sexual assault statute is subject to the RCC general provision enhancement for repeat offenders. The current D.C. Code sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[160] The plain language of the enhancement is unclear[161] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[162] It is unclear how the multiple recidivist

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[156] D.C. Code § 22-3020(a)(4).

[157] However, current District law generally extends aider and abettor liability to accomplices who are not present at the time of the offense. *See, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) (upholding aider and abettor liability where "the jury could reasonably have found that appellant had participated in planning the robbery," and served as getaway driver, but was not physically present during the robbery) (collecting District case law).

[158] D.C. Code § 22-3020(a)(4).

[159] The revised penalty enhancement no longer uses the words "aided or abetted" that are in the current enhancement because they are surplusage. The revised penalty enhancement also no longer specifies that "[i]t is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply" as the current penalty enhancement specifies in D.C. Code § 22-3020(a)(6).

[160] D.C. Code § 22-3020(a)(5). In addition to the specific sexual abuse aggravator, current District law has general penalty enhancements for prior convictions. D.C. Code §§ 22-1805; 22-1805a. It is unclear how the multiple recidivist penalty enhancements apply to the sex offenses, and there is no DCCA case law.

[161] One possible interpretation is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[162] D.C. Code §§ 22-1805; 22-1805a.

enhancements apply to the sex offenses, and there is no case law. Resolving these ambiguities, the revised sexual assault statute is subject to the RCC general recidivist penalty enhancement (RCC § 22E-606), consistent with other RCC offenses. By eliminating overlapping recidivist penalty enhancements, the RCC improves the consistency and proportionality of the revised sexual assault statutes.

Eighteenth, by use of the phrase "in fact," the revised sexual assault penalty enhancements apply strict liability to the age of a complainant when the complainant is under 12 years or age. The current D.C. Code sex offense aggravators include when the "victim was under the age of 12 at the time of the offense."[163] The statute does not specify any culpable mental states and there is no DCCA case law on this issue. However, the current D.C. Code child sexual abuse statutes require strict liability for the age of the complainant.[164] Resolving this ambiguity, the revised penalty enhancement, by use of the phrase "in fact," applies strict liability to the age of a complainant under the age of 12 years. Strict liability for these ages and age gaps is consistent with the strict liability requirement in first degree and third degree of the revised sexual abuse of a minor statute (RCC § 22E-1302) for the age of a complainant that is under the age of 12 years.[165] This change improves the consistency and proportionality of the revised statutes.

Nineteenth, the revised sexual assault penalty enhancements require that the actor "recklessly disregard" the fact that the complainant was under the age of 18 years and that the actor was in a "position of trust with or authority over the complainant." One of the current D.C. Code sex offense aggravators applies when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[166] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states and there is no DCCA case law on this issue. However, the current D.C. Code sexual abuse of a minor statutes require strict liability for the age of the complainant.[167] Resolving this ambiguity, the revised penalty enhancement requires that the actor was reckless as to the fact that the complainant was under the age of 18 years, and the fact that the actor is in a "position of trust with or authority over" the complainant. The RCC definition of "position of trust with or authority over" may differ in scope from the current definition of "significant relationship" and is discussed further in the commentary to RCC § 22E-701. Given that the RCC definition of a "position of trust with or authority over" the complainant includes positions where the actor may not have any prior knowledge or interaction with the complainant, and that sixteen and

[163] D.C. Code § 22-3020(a)(1).
[164] D.C. Code §§ 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child.").
[165] The revised sexual abuse of a minor statute (RCC § 22E-1302) does not have an affirmative defense for mistake of age for complainants under the age of 12 years, unlike the remaining gradations for complainants under the age of 16 years and under the age of 18 years.
[166] D.C. Code § 22-3020(a)(2).
[167] D.C. Code §§ 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.").

seventeen year olds generally are able to consent to sexual encounters under current law and the RCC, requiring some degree of subjective awareness as to the special relationship is appropriate. An actor who is not at least reckless as to being in a position of trust with or authority over the complainant would still be subject to liability for sexual assault, but not this penalty enhancement. These changes improve the consistency and proportionality of the revised statutes.

Twentieth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state and requires that the defendant cause serious bodily injury "immediately before, during, or immediately after" the sexual act or sexual contact. The current sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[168] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states and the scope of "as a result of the offense" is unclear.[169] There is no DCCA case law for these issues. Resolving this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. The "recklessly" culpable mental state consistent with several gradations of the revised assault statute (RCC § 22E-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual assault, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

Twenty-first, there is liability in second degree and fourth degree of the revised sexual assault statute for a sexual act or sexual contact with a mentally incapacitated complainant only if the actor doesn't also have a similarly serious mental disability or illness. The current D.C. Code second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact with a complainant that is: 1) "incapable of appraising the nature of the conduct";[170] 2) incapable of declining participation in" the sexual act or sexual contact;[171] or 3) "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[172] The language is not statutorily defined, and there is no DCCA case law interpreting these provisions when the defendant has a similar disability or illness as the complainant. Resolving this ambiguity, second degree and fourth degree of the revised sexual assault statute establish liability for a sexual act or sexual contact with an incapacitated complainant only if the actor doesn't also have a "similarly serious" disability or illness as the complainant. There may still be liability under other provisions of the RCC sexual assault statute or the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency of the revised statute.

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[168] D.C. Code § 22-3020(a)(3).

[169] It is unclear whether "the offense" refers to the sexual act or sexual contact, or the totality of the defendant's actions leading to the sexual act or sexual contact. It is also unclear how to determine whether an injury is a "result" of the sexual act or sexual contact, particularly if a significant period of time passes between the incident and the development or discovery of the serious bodily injury.

[170] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[171] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

[172] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the RCC sexual assault statute deletes "as is sufficient" from the current D.C. Code definition of "force." The current D.C. Code definition of "force" requires "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person."[173] It is unclear whether "as is sufficient" means the force must actually overcome, restrain, or injure the complainant, or whether the force must be sufficient to overcome, restrain, or injure a "reasonable" or "average" person, regardless of the effect on the complainant. However, independent of the current definition of "force," the current D.C. Code first degree and third degree sexual abuse statutes require that the defendant's use of force actually cause the complainant to engage in a sexual act or sexual contact.[174] Given this causation requirement, first degree and third degree of the revised sexual assault statute no not use this "as is sufficient" language. First degree and third degree of the revised sexual assault statute require that the actor cause bodily injury to the complainant, or use physical force that actually moves or immobilizes the complainant. This change improves the clarity of the revised statute.

Second, the RCC sexual assault statute prohibits "causing bodily injury" to the complainant by any means. The current D.C. Code first degree and third degree sexual abuse statutes prohibit the use of "force" against the complainant[175] and "force" is defined to include "the use of such physical strength or violence as is sufficient to . . . injure a person."[176] It is unclear whether the definition requires that the actor's body injure the complainant—such as hitting the complainant—or if indirect means of causing injury are sufficient—like firing a gun or dropping an object on the complainant. However, the current D.C. Code definition of "force" also includes "the use or threatened use of a weapon"[177] and "the use of a threat of harm sufficient to coerce or compel submission by the victim,"[178] which include indirect ways of causing injury within the definition of "force." The revised statute focuses on whether the actor caused "bodily injury" instead of how. This change improves the clarity of the revised statute.

Third, the revised sexual assault statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C.

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[173] D.C. Code § 22-3001(5) (defining "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

[174] D.C. Code §§ 22-3002(a)(1) (first degree sexual abuse statute stating "if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) (third degree sexual abuse statute stating "if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

[175] D.C. Code §§ 22-3002(a)(1) ("(a) A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) ("A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

[176] D.C. Code § 22-3001(5).

[177] D.C. Code § 22-3001(5).

[178] D.C. Code § 22-3001(5).

Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses. Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[179] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[180] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[181] In the revised sexual assault statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence, as in current D.C. Code § 22-3018. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of revised statutes.

Fourth, the revised sexual assault statute no longer uses the phrase "threatening." Current D.C. Code first degree through fourth degree sexual abuse prohibit "threatening" specified harms.[182] Instead of "threaten," first degree and third degree of the revised sexual assault statute prohibit "communicating" specified harms, explicitly or implicitly, and second degree and fourth degree prohibit making, explicitly or implicitly, a "coercive threat," defined in RCC § 22E-701 to require a "communication." Using the term "communication" instead of "threat" or "threatens" clarifies that proof of the RCC criminal threats offense is not required and that a specified communication is sufficient for liability when it causes the complainant to engage in or submit to the sexual act or sexual contact. This change improves the clarity and consistency of the revised statutes.

Fifth, the revised sexual assault statute no longer uses the phrase "placing . . . in reasonable fear." Current D.C. Code first degree through fourth degree sexual abuse

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[179] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[180] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[181] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse, second degree sexual abuse, and third degree sexual abuse are "crimes of violence" and would have a maximum term of imprisonment of five years. Fourth degree sexual abuse is not "crime of violence," however, and would have a maximum term of imprisonment of 180 days.

[182] D.C. Code §§ 22-3002(a)(2); 22-3003(1); 22-3004(2); 22-3005(1).

prohibit "threatening or placing the other person in reasonable fear."[183] DCCA case law has interpreted "placing the other person in reasonable fear" as covering implicit threats.[184] First degree and third degree of the revised sexual assault statute prohibit "communicating" specified harms, explicitly or implicitly, and second degree and fourth degree prohibit making, explicitly or implicitly, a "coercive threat," defined in RCC § 22E-701 to require a "communication." The revised sexual assault statute omits "placing in . . . reasonable fear" and specifically prohibits both explicit and implicit communications of specified harms. This change improves the clarity of the revised statute.

Sixth, the revised intoxication provision in first degree and third degree sexual assault specifically includes "causes [an intoxicant] to be administered." The intoxication provision in the current D.C. Code first degree and third degree sexual abuse statutes prohibits "administering" an intoxicant.[185] It is unclear from the statute whether the defendant has to personally administer the intoxicant and there is no DCCA case law on point. For clarification, the revised intoxication provision includes the actor personally administering or causing the intoxicant to be administered. This change clarifies the revised statutes.

Seventh, first degree and third degree of the revised sexual assault statute provide liability for sexual conduct caused by administering an intoxicant without "effective consent." The intoxication prong in the current D.C. Code first degree and third degree sexual abuse statutes prohibits administering an intoxicant to the complainant by "force or threat of force, or without the knowledge or permission" of the complainant.[186] "Force" is statutorily defined in the current sex offenses,[187] but the other terms in the current intoxication provision are not. There is no DCCA case law on the intoxication provision. For clarification, the revised intoxication provision in first degree and third degree of the revised sexual assault statute requires the intoxicant to be administered "without the complainant's effective consent." The definition of "effective consent" in RCC § 22E-701 appears to include conduct that constitutes "force or threat of force"[188] or "without the knowledge or permission"[189] in the current intoxication provision and is a

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[183] D.C. Code §§ 22-3002(a)(2); 22-3003(1); 22-3004(2); 22-3005(1).

[184] *See, e.g.*, *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

[185] The intoxication provision in the current first degree sexual abuse and third degree sexual abuse statutes is "After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct." D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[186] D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[187] D.C. Code § 22-3001(5) ("'Force' means "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

[188] "Effective consent" is defined in RCC § 22E-701 as "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

[189] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. If an actor obtains a complainant's consent to consume an intoxicant by lying about the presence of an intoxicant or without telling the

term that is used consistently throughout the RCC. This change clarifies the revised statutes.

Eighth, second degree and fourth degree sexual assault specify as a basis for liability that a complainant's inability to appraise the nature of the sexual act or sexual contact or give or withhold consent is due to "a drug, intoxicant, or other substance." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[190] This language is not statutorily defined, and there is no DCCA case law on point. However, the DCCA has stated in dicta that "incapable of appraising the nature of the conduct" for "an adult victim . . . might involve proof of the victim's intoxication or general mental incapacity."[191] This change improves the clarity consistency, and proportionality of the revised statute.

Ninth, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) of second degree and fourth degree of the revised sexual assault statute include a complainant that is incapable of "understanding the right to give or withhold consent to" the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct,"[192] as well as "incapable of declining participation in that [sexual act or sexual contact]."[193] The language is not statutorily defined and there is no DCCA case law that interprets the meaning of "the nature of the conduct" or "declining participation." The revised language clarifies that understanding the right to give or withhold consent is a crucial part of sexual conduct and a complainant's mental inability to understand this right can be a basis for liability in second degree and fourth degree of the RCC sexual assault statute. This change improves the clarity, consistency, and proportionality of the revised statute.

Tenth, second and fourth degree of the revised sexual assault statute specifically include a complainant that is "[a]sleep, unconscious, or passing in and out of consciousness." The current D.C. Code second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact with a complainant that is "incapable of declining participation in" the sexual act or sexual contact.[194] This language is not statutorily defined further and there is no DCCA case law. The revised language clearly specifies situations when a complainant would satisfy these requirements. This change improves the clarity of the revised statute.

Eleventh, by the use of the phrase "in fact," the revised weapon penalty enhancement for the sexual assault statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The current D.C. Code sex offense aggravators include that the "defendant was armed with, or had readily available,

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complainant that an intoxicant is present, this would not be "effective consent" because it was obtained by "deception," as defined in RCC § 22E-701.

[190] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[191] In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).

[192] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[193] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

[194] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[195] The sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[196] and the "while armed" enhancement in D.C. Code § 22-4502[197] support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Twelfth, the revised sexual assault penalty enhancements consistently refer to the "sexual act or sexual contact" as opposed to "the offense." Several of the current D.C. Code sexual abuse aggravators refer to "at the time of the offense"[198] or "as a result of the offense."[199] The revised penalty enhancements consistently refer to the sexual act or sexual contact, improving the clarity of the revised statute.

Thirteenth, second degree and fourth degree of the revised sexual assault statute include a complainant that is incapable of communicating "willingness or unwillingness to engage in" the sexual act or sexual contact and a complainant that is "substantially paralyzed." The current D.C. Code second degree[200] and fourth degree[201] sexual abuse statutes include complainants that are "[i]ncapable of communicating unwillingness to engage in" the sexual act or sexual contact. This language is not statutorily defined, and there is no DCCA case law on point. The revised language clarifies that the relevant determination is whether the complainant is incapable of communicating in the context of sexual activity, not whether the complainant specifically unable to decline sexual activity, physically resist, or otherwise communicate unwillingness, and includes complainants that are substantially paralyzed. This change improves the clarity of the revised statutes.

Fourteenth, first degree and third degree of the revised sexual assault statute prohibit threats of "confinement" as opposed to threats of "kidnapping." The current

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[195] D.C. Code § 22-3020(a)(6) (authorizing a possible "penalty up to 1 ½ times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse if" the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[196] *See, e.g.*, *Perry v. United States*, 36 A.3d 799, 812 (D.C. 2011) ("[Whether the actor used the object in a dangerous manner] is an objective test, and has nothing to do with the actor's subjective intent to use the weapon dangerously."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (rejecting appellant's argument that "unless one is possessed with the specific intent to use an object offensively, it is not a dangerous weapon.").

[197] *See, e.g.*, *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) (stating "[t]his court has traditionally looked to the use to which an object was put during an assault in determining whether that object was a dangerous weapon" and citing the objective tests used to determine if an object is a dangerous weapon in ADW).

[198] D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense."); (a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[199] D.C. Code § 22-3020(a)(3) ("The victim sustained serious bodily injury as a result of the offense.").

[200] D.C. Code § 22-3003(2)(C).

[201] D.C. Code § 22-3005(2)(C).

D.C. Code first degree[202] and third degree[203] sexual abuse statutes require threats of "kidnapping" and it is unclear whether this refers to and incorporates the elements of the current kidnapping statute in D.C. Code § 22-2001. The RCC kidnapping offense (RCC § 22E-1401), however, requires confinement with intent to inflict an additional harm on the complainant, and narrows the scope. The word "confinement" more clearly communicates that threats of confinement are sufficient for first degree and third degree of the revised sexual assault statute, without reference to the specific elements of the RCC kidnapping offense. This change improves the clarity of the revised statutes.

[202] D.C. Code § 22-3002(a)(2)(A) ("By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.").
[203] D.C. Code § 22-3002(2)(A) ("By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping.")

RCC § 22E-1302. Sexual Abuse of a Minor.

Explanatory Note. *The RCC sexual abuse of a minor offense prohibits specified acts of sexual penetration or sexual touching when the complainant is under the age of 18 years. The penalty gradations are primarily based on the nature of the sexual conduct, as well as the age of the complainant. The revised sexual abuse of a minor offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse of a child,[1] second degree sexual abuse of a child,[2] first degree sexual abuse of a minor,[3] and second degree sexual abuse of a minor.[4] The revised sexual abuse of a minor offense also replaces in relevant part five distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[5] the state of mind proof requirement,[6] the attempt statute,[7] the limitation on prosecutorial immunity,[8] and the aggravating sentencing factors.[9] Insofar as they are applicable to sexual abuse of a child and sexual abuse of a minor, the revised sexual abuse of a minor offense also replaces the enhancement for committing offenses while armed,[10] the enhancement for committing offenses against minors,[11] certain minimum statutory penalties,[12] and the heightened penalties and aggravating circumstances in D.C. Code § 24-403.01(b-2).*

First degree sexual abuse of a minor (subsection (a)), second degree sexual abuse of a minor (subsection (b)), and third degree sexual abuse of a minor (subsection (c)), each require that the actor engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Paragraph (a)(1) specifies the prohibited conduct for first degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means

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[1] D.C. Code § 22-3008.
[2] D.C. Code § 22-3009.
[3] D.C. Code § 22-3009.01.
[4] D.C. Code § 22-3009.02.
[5] D.C. Code § 22-3011.
[6] D.C. Code § 22-3012.
[7] D.C. Code § 22-3018.
[8] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexual abuse of a minor statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[9] D.C. Code § 22-3020.
[10] D.C. Code § 22-4502.
[11] D.C. Code § 22-3611.
[12] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (a)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in subparagraph (a)(2)(A) and subparagraph (a)(2)(B). Subparagraph (a)(2)(A) specifies that the complainant must be under 12 years of age and subparagraph (a)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Paragraph (b)(1) specifies the prohibited conduct for second degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (b)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (b)(2) uses the phrase "in fact," a defined term that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in subparagraph (b)(2)(A) and subparagraph (b)(2)(B). Subparagraph (b)(2)(A) specifies that the complainant must be under 16 years of age and subparagraph (b)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Paragraph (c)(1) specifies the prohibited conduct for third degree sexual abuse of a minor—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (c)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she engages in a "sexual act" with the complainant or causes the complainant to engage in or submit to a "sexual act." Paragraph (c)(2) requires that the actor be in a "position of trust with or authority over the" the complainant. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (c)(1) applies to this element. "Knowingly," a defined term in RCC § 22E-206, here requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. Paragraph (c)(3) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to the elements in subparagraph (c)(3)(A) and subparagraph (c)(3)(B). Subparagraph (c)(3)(A) specifies that the complainant must be under 18 years of age and subparagraph (c)(3)(B) specifies that the actor must be 18 years of age or older and at least four years older than the complainant. There is no culpable mental state required for the age of the complainant, the age of the actor, or the age gap.

Fourth degree sexual abuse of a minor (subsection (d)), fifth degree sexual abuse of a minor (subsection (e)), and sixth degree sexual abuse of a minor (subsection (f)), are identical to first degree sexual abuse of a minor, second degree sexual abuse of a minor, and third degree sexual abuse of a minor except that they require that the actor engage in

a "sexual contact" with the complainant or cause the complainant to engage in or submit to "sexual contact" instead of "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (d)(1), paragraph (e)(1), and paragraph (f)(1) each specify a culpable mental state of "knowingly" for engaging in a "sexual contact" with the complainant or causing the complainant to engage in or submit to "sexual contact." "Knowingly," a defined term in RCC § 22E-206, means here that the actor must be "practically certain" that he or she engages in a "sexual contact" with the complainant or causes the complainant to engage in or submit to "sexual contact." The requirements for the complainant and the actor in fourth degree sexual abuse of a minor (paragraph (d)(2), subparagraph (d)(2)(A), subparagraph (d)(2)(B)) are the same as the requirements in first degree sexual abuse of a minor (paragraph (a)(2), subparagraph (a)(2)(A), subparagraph (a)(2)(B)). The requirements for the complainant and the actor in fifth degree sexual abuse of a minor (paragraph (e)(2), subparagraph (e)(2)(A), subparagraph (e)(2)(B)) are the same as the requirements in second degree sexual abuse of a minor (paragraph (b)(2), subparagraph (b)(2)(A), subparagraph (b)(2)(B)). The requirements for the complainant and the actor in sixth degree sexual abuse of a minor (paragraph (f)(2)), paragraph (f)(3), subparagraph (f)(3)(A), subparagraph (f)(3)(B)) are the same as the requirements in third degree sexual abuse of a minor paragraph (c)(2)), paragraph (c)(3), subparagraph (c)(3)(A), subparagraph (c)(3)(B)).

Subsection (g) codifies three affirmative defenses for the revised sexual abuse of a minor statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Paragraph (g)(1) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant are, "in fact," in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact.

Paragraph (g)(2) codifies an affirmative defense for a reasonable mistake of age for second degree sexual abuse of a minor (subsection (b)) and fifth degree sexual abuse of a minor (subsection (e)). There are several requirements for the affirmative defense. Per subparagraph (g)(2)(A), the actor must reasonably believe[13] that the complainant is 16 years of age or older at the time of the sexual act or sexual contact. Paragraph (g)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(2) applies to subparagraph (g)(2)(A), and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (g)(2)(A). However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that

[13] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

must take into account certain characteristics of the actor but not others.[14] Subparagraph (g)(2)(B) requires that the actor's reasonable belief be based on an oral or written statement that the complainant made to the actor about the complainant's age. Subparagraph (g)(2)(C) requires that the complainant is 14 years of age or older at the time of the sexual act or sexual contact. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(2) applies to subparagraph (g)(2)(B) and subparagraph (g)(2)(C) and no culpable mental state applies to the elements in these subparagraphs—that the actor's reasonable belief is based on the required statement and that the complainant is 14 years of age or older at the time of the sexual act or sexual contact.

Paragraph (g)(3) codifies an affirmative defense for a reasonable mistake of age for third degree sexual abuse of a minor (subsection (c)) and sixth degree sexual abuse of a minor (subsection (f)). There are several requirements for the affirmative defense. Per subparagraph (g)(3)(A), the actor must reasonably believe[15] that the complainant is 18 years of age or older at the time of the sexual act or sexual contact. Paragraph (g)(3) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(3) applies to subparagraph (g)(3)(A), and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (g)(3)(A). However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[16] Subparagraph (g)(3)(B) requires that the actor's reasonable belief be based on an oral or written statement that the complainant made to the actor about the complainant's age. Subparagraph (g)(3)(C) requires that the complainant is 16 years of age or older at the time of the sexual act or sexual contact. Per the rule of construction in RCC § 22E-207, the "in fact" specified in paragraph (g)(3) applies to subparagraph (g)(3)(B) and subparagraph (g)(3)(C) and no culpable mental state applies to the elements in these

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[14] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[15] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[16] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

subparagraphs—that the actor's reasonable belief is based on the required statement and that the complainant is 16 years of age or older at the time of the sexual act or sexual contact.

There is no affirmative defense for reasonable mistake of age for first degree sexual abuse of a minor (subsection (a)) or fourth degree sexual abuse of a minor (subsection (d)) when the complainant is under the age of 12 years.

Paragraph (h)(1) through paragraph (h)(6) specify relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (h)(7) codifies several penalty enhancements for first degree, second degree, fourth degree, and fifth degree of the revised sexual abuse of a minor statute. If any of the specified enhancements apply, the penalty classification for that gradation is increased by one class. Subparagraph (h)(7)(A) codifies a penalty enhancement for recklessly causing the sexual act or sexual contact by displaying or using an object that, in fact, is a "dangerous weapon" or "imitation dangerous weapon." "Displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch. Per the rules of interpretation in RCC § 22E-207, the culpable mental state of recklessly applies to both causing the sexual act or sexual contact and causing the sexual act or sexual contact by displaying or using an object. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using an object. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22E-701.

Subparagraph (h)(7)(B) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she acted with one or more accomplices that were physically present at the time of the sexual act or sexual contact. Subparagraph (h)(7)(C) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact. "Recklessly" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that he or she caused "serious bodily injury" to the complainant immediately before, during, or immediately after the sexual act or sexual contact "Serious bodily injury" is a defined term in RCC § 22E-701 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness. Subparagraph (h)(7)(D) codifies a penalty enhancement if the actor knows at the time of the sexual act or sexual contact that the actor is in a "position of trust with or authority over the complainant." "Knowingly," a defined term in RCC § 22E-206, here requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (h)(8) codifies several penalty enhancements for third degree and sixth degree of the revised sexual abuse of a minor statute. If any of the specified

enhancements apply, the penalty classification for that gradation is increased by one class. The penalty gradations in subparagraph (h)(8)(A), (h)(8)(B), and (h)(8)(C) are the same as the penalty gradations discussed above in subparagraph (h)(7)(A), (h)(7)(B), and (h)(7)(C).

Subsection (i) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised sexual abuse of a minor statute clearly changes current District law in eight main ways.*

First, the revised sexual abuse of a minor statute provides separate gradations for a complainant under the age of 12 years when the actor is at least four years older than the complainant. The current D.C. Code child sexual abuse statutes only require that the complainant be under the age of 16 years when the actor is at least four years older.[17] The current D.C. Code sex offense aggravators provide a penalty enhancement for when the complainant was "under the age of 12 years at the time of the offense."[18] In contrast, first degree and fourth degree of the revised sexual abuse of a minor statute provide gradations for a complainant under the age of 12 years when the actor is at least four years older. A more serious gradation for harming a complainant under the age of 12 years is consistent with the current penalty enhancement for complainants of such an age. The four year age gap matches the age gap in the current D.C. Code child sexual abuse statutes[19] and the other gradations of the revised sexual abuse of a minor statute. This change improves the consistency and proportionality of the revised sexual abuse of a minor statute.

Second, third degree and sixth degree of the revised sexual abuse of a minor statute require that the actor be at least four years older than the complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current D.C. Code sexual abuse of a minor statutes require that the complainant be under the age of 18 years and that the actor be 18 years of age or older and in a "significant relationship" with the complainant.[20] Unlike the current child sexual abuse statutes, which require at least a

[17] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[18] D.C. Code § 22-3020(a)(1) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense."). First degree child sexual abuse has a maximum term of imprisonment of 30 years. D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). A person convicted of first degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 45 years or life imprisonment without the possibility of release. Second degree child sexual abuse has a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). A person convicted of second degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 15 years.

[19] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[20] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

four year age gap between the actor and the complainant,[21] the current D.C. Code sexual abuse of a minor statutes do not have a required age gap. In contrast, third degree and sixth degree of the revised sexual abuse of a minor statute require at least a four year age gap between the actor and complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current definition of "significant relationship"[22] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[23] While the special relationship between the actor and the complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[24] Strict liability for the age gap matches the current D.C. Code sexual abuse of a child statutes,[25] the other gradations of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised sexually suggestive

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[21] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[22] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[23] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old with "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" may be guilty of second degree sexual abuse of a minor under current District law.

[24] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1302 provides that marriage is a defense to the revised sexual abuse of a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[25] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised sexual assault of a minor offense.

Third, the revised sexual abuse of a minor statute provides an affirmative defense for a reasonable mistake of age in certain circumstances when the complainant is under the age of 16 years or under the age of 18 years. Current D.C. Code § 22-3012 establishes strict liability for the age of the complainant in the current child sexual abuse statutes[26] (complainant under the age of 16 years) and current D.C. Code § 22-3011 establishes strict liability for the age of the complainant in the current sexual abuse of a minor statutes[27] (complainant under the age of 18 years). In contrast, the revised sexual abuse of a minor statute codifies an affirmative defense to the equivalent gradations in the revised statute—second degree, third degree, fifth degree, and sixth degree sexual abuse of a minor. The accused must reasonably believe that the complainant was 16 years of age or older or 18 years of age or older at the time of the sexual act or sexual contact. The belief must be based on an oral or written statement that the complainant made to the actor about the complainant's age,[28] and the complainant must be 14 or 16 years of age or older at the time of the sexual act or sexual contact. This change removes liability for an otherwise consensual sexual act or sexual contact between two people where the actor makes a reasonable mistake as to the complainant's age that is limited to one or two years and supported by the complainant's own representation as to their age. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[29] and legal experts[30] for any non-regulatory crimes,

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[26] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[27] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[28] The statement does not need to be a statement that the complainant is a specific, numerical age. The RCC reasonable mistake of age requires that the statement be "about" the complainant's age and statements such as "I'm old enough to drink," "I got into this bar, didn't I?" when carding is required for entry, or "I'm old enough to vote" would be sufficient for this requirement, although the other requirements of the defense must still be met. Showing a fake or altered written document of age, such as a fake driver's license, would also be a written statement "about" the complainant's age. Whether the complainant's statement is oral or written, however, the actor's belief as to age must still be proven reasonable.

[29] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[30] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from

although "statutory rape" laws are often an exception.[31] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[32] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[33] An affirmative defense requiring reasonableness is akin to requiring recklessness,[34] but places the initial burden of proof on the accused. The RCC general provision in RCC § 22E-201 establishes the burdens of production and proof for all affirmative defenses in the RCC. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the revised sexual abuse of a minor statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes,[35] D.C. Code § 22-3611 provides a separate penalty enhancement for committing child sexual abuse against complainants under the age of 18 years,[36] and D.C. Code § 22-4502 provides separate penalty enhancements for committing child sexual abuse against complainants when "armed with" or having "readily available" a deadly or dangerous

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behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[31] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")

[32] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[33] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[34] *See* RCC § 22E-208(b)(3) and accompanying commentary.

[35] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[36] D.C. Code §§ 22-3611(a), (c); 23-1331(4) (defining "crime of violence" to include child sexual abuse).

weapon.[37] Current District statutes are silent as to whether or how these different penalty enhancements can each be applied to an offense, although DCCA case law suggests that the age-based sex offense aggravators and separate penalty enhancement may not apply to certain sex offenses because they overlap with elements of the offense.[38] In contrast, the revised sexual abuse of a minor statute specifies a single set of enhancements that is capped at a penalty increase of one class.[39] The penalty enhancements are generally identical to the penalty enhancements in the RCC sexual assault statute, the main difference being the RCC sexual abuse of a minor statute excludes or limits the applicability of the penalty enhancements that overlap with the requirements of the RCC sexual abuse of a minor offense.[40] The RCC sexual abuse of a minor penalty enhancements result in several changes in law. First, the RCC sexual abuse of a minor statute is no longer subject to the current sex offense aggravators that overlap with the age requirements of the offense, or the current penalty enhancement in D.C. Code § 22-3611 for committing child sexual abuse against complainants under the age of 18 years.

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[37] D.C. Code § 22-4502.

[38] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, or enticing statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[39] Note, however, that subtitle I of the RCC specifies certain penalty enhancements (e.g., hate crime) that may apply *in addition to* the penalty enhancements specified in the revised sexual abuse of a minor offense.

[40] The RCC sexual abuse of a minor statute codifies the following penalty enhancements from the RCC sexual assault penalty enhancements: 1) causing the sexual act or sexual contact by displaying or using a dangerous weapon or imitation dangerous weapon; 2) acting with one or more accomplices that are physically present at the sexual act or sexual contact; and 3) causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. These penalty enhancements apply to any gradation of the RCC sexual abuse of a minor offense. In the alternative, for first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor offense, the RCC sexual abuse of a minor statute codifies as a penalty enhancement that the actor knows that he or she is in a "position of trust with or authority" over the complainant. The requirements for liability in first degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor statute encompass the additional requirements for this enhancement in the RCC sexual assault statute—that the complainant is under the age of 18 years and the actor is at least four years older. The enhancement in the RCC sexual abuse of a minor statute requires a knowledge culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant, as opposed to recklessness in the sexual assault penalty enhancement, because the RCC sexual abuse of a minor statute criminalizes otherwise consensual sexual conduct on the basis of the age of the parties. Third degree and sixth degree of the RCC sexual abuse of a minor statute also requires a knowledge culpable mental state for liability for this element.
The RCC sexual abuse of a minor statute also does not codify the RCC sexual assault penalty enhancements for a complainant that is an 65 years of age or older or for a complainant that is a "vulnerable adult," as that term is defined in RCC § 22-701, because these enhancements are inapplicable to the RCC sexual abuse of a minor statute.

Second, because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance sexual abuse of a minor with, for example, both a weapon enhancement and an enhancement based on the identity of the complainant, or to double-stack different weapon penalties[41] and offenses. Third, the scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[42] and excludes objects the complainant incorrectly perceives as being a dangerous weapon.[43] This change improves the proportionality of the revised offense.

Fifth, first degree and second degree of the RCC sexual abuse of a minor statute[44] are no longer subject to the heightened penalties and aggravating circumstances in current D.C. Code § 24-403.01(b-2). Current D.C. Code § 24-403.01(b-2) establishes heightened penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed if specified procedural requirements are met[45] and "one or more aggravating

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[41] In addition to the "while armed" enhancement in D.C. Code § 22-4502(a) applicable to child sexual abuse and first degree, second degree, and third degree sexual abuse, the current sex offense aggravators include an aggravator if "the defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon." D.C. D.C. Code § 22-3020(a)(6).

[42] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault abuse of a minor statute. However, possessing a dangerous weapon or a firearm during sexual abuse of a minor, without using or displaying it, may have liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[43] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g.*, *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 exclude these objects.

[44] As will be discussed, current D.C. Code § 24-403.01(b-2) authorizes enhanced penalties for first degree sexual abuse of a child and first degree sexual abuse of a child while armed, and the RCC replaces those enhanced penalties. In the RCC, however, there is no longer a first degree sexual abuse of a child "while armed" offense. First, in the RCC, the equivalent offenses to first degree sexual abuse of a child are first degree and second degree sexual abuse of a minor. Second, the RCC no longer has a "while armed" version of child sexual abuse. Depending on the facts of the case, the equivalent offense would be first degree or second degree sexual abuse of a minor with the weapons enhancement under subsection (h) of the revised sexual abuse of a minor statute or first degree or second degree sexual abuse of a minor with additional liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses. For clarity, the commentary for this entry refers only to first degree sexual abuse of a minor and second degree sexual abuse of a minor when discussing the relevant RCC statutes, even though the various forms of liability for committing these offenses with the use or presence of a weapon are also affected by the revision.

[45] D.C. Code § 24-403.01(b-2) ("(1) The court may impose a sentence in excess of 60 years for first degree murder or first degree murder while armed, 40 years for second degree murder or second degree murder while armed, or 30 years for armed carjacking, first degree sexual abuse, first degree sexual abuse while armed, first degree child sexual abuse or first degree child sexual abuse while armed, only if: (A) Thirty-days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon; and (B) One or more aggravating circumstances exist beyond a reasonable doubt.").

circumstances exist beyond a reasonable doubt."[46] In contrast, the revised sexual abuse of a minor statute is subject to a single set of aggravators for the revised statute, as well as the general enhancements in the RCC for repeat offenders (RCC § 22E-606), hate crimes (RCC § 22E-607), and pretrial release (RCC § 22E-608). As a result of this revision, the general aggravating circumstances in D.C. Code § 24-403.01(b-2) no longer apply to first degree sexual abuse of a minor and second degree sexual abuse of a minor, although several of them are covered by other provisions in the RCC.[47] The special procedures in D.C. Code § 24-403.01(b-2) to give notice to a defendant are unnecessary because aggravating circumstances must be charged in the criminal indictment per

[46] The aggravating circumstances that apply to first degree sexual abuse of a child are unclear. D.C. Code § 24-403.01(b-2)(2) establishes that the "[a]ggravating circumstances for first degree child sexual abuse . . . are set forth in § 22-3020," but the statute also codifies an additional set of aggravating circumstances that apply to "all offenses." It is unclear whether first degree sexual abuse of a child is included in "all offenses" and is subject to the additional set of aggravating circumstances, or if "all offenses" is limited to the offenses for which D.C. Code § 24-403.01(b-2) authorizes an enhanced penalty that do not have offense-specific aggravating circumstances. The aggravating circumstances that apply for first degree sexual abuse of a child while armed are similarly unclear. D.C. Code § 24-403.01(b-2)(2) does not specify whether first degree sexual abuse of a child while armed is included in the reference to first degree sexual abuse of a child and the aggravating circumstances in D.C. Code § 22-3020, or if it is subject only to the additional set of aggravating circumstances for "all offenses." Regardless, the revised sexual assault statute replaces the aggravating circumstances in D.C. Code § 24-403.01(b-2) insofar as they are applicable to first degree sexual abuse of a child and first degree sexual abuse of a child while armed. The revised sexual assault statute also replaces the aggravating circumstances in D.C. Code § 22-3020, which is discussed elsewhere in this commentary as a substantive change in law.

[47] The general aggravating circumstances in D.C. Code § 24-403.01(b-2)(2) are: "(A) The offense was committed because of the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression (as defined in § 2-1401.02(12A); (B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning; (G) The victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; [and] (H) Except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense." D.C. Code § 24-403.01(b-2)(2).

In the RCC, none of these aggravating circumstances apply to first degree or second degree of the revised sexual abuse of a minor offense. However, first degree or second degree of the revised sexual abuse of a minor offense is subject to two penalty enhancements that are substantially similar to two of the aggravating circumstances—the general penalty enhancement for hate crimes in RCC § 22E-607 and the sexual abuse of a minor penalty enhancement for recklessly causing serious bodily injury to the complainant (sub-subparagraph (h)(7)(A)(iii)). In addition, first degree and second degree sexual abuse of a minor already grade the offense based on the complainant being under 12 years of age.

The remaining aggravators in D.C. Code § 24-403.01(b-2)(2) appear better suited for the homicide offenses that are subject to enhanced penalties in the statute: "(B) The offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (C) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (D) The offense was especially heinous, atrocious, or cruel; (E) The offense involved a drive-by or random shooting; (F) The offense was committed after substantial planning." To the extent that these aggravators would apply to first degree and second degree sexual abuse of a minor, other offenses in the RCC may cover the conduct, such as [RCC §§ 22E-XXX obstruction of justice] or are more appropriate for consideration at sentencing.

Supreme Court case law decided after passage of the District statute.[48] This revision improves the consistency and proportionality of the revised sexual assault of a minor statute.

Sixth, the revised sexual assault statute replaces certain minimum statutory penalties for child sexual abuse in D.C. Code § 24-403.01(e).[49] These minimum statutory penalties require specified prior convictions, and it is unclear how the general recidivist statutes in the current D.C. Code[50] apply, if at all, to these provisions. There is no clear rationale for such special sentencing provisions in these offenses as compared to other offenses. In contrast, the revised sexual abuse of a minor statute is subject to a single recidivist penalty enhancement in RCC § 22E-606 that applies to all offenses in the RCC. This change improves the consistency and proportionality of the revised offense.

Seventh, the revised sexual abuse of a minor penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" an object that, in fact, is a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current D.C. Code sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[51] No culpable mental state is specified, and there is no DCCA case law interpreting the current weapons aggravator.[52] In addition to the sex offense weapons aggravator, current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[53] "while armed" or "having readily available" a dangerous weapon.[54] In contrast,

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[48] The D.C. Council approved D.C. Code § 24-403(b-2) well before *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000) was decided, and the statute became law shortly before *Apprendi* was decided. D.C. Code § 24-403(b-2) was approved on August 2, 2000, and became effective on June 8, 2001. The Sentencing Reform Amendment Act of 2000, 2000 District of Columbia Laws 13-302 (Act 13–406). *Apprendi* was decided on June 26, 2000. *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

[49] D.C. Code § 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of first or second degree sexual abuse or child sexual abuse in violation of § 22-3002, § 22-3003, or § 22-3008 through § 22-3010, shall not be less than 7 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence, as so defined.").

[50] D.C. Code §§ 22-1804; 22-1804a.

[51] D.C. Code § 22-3020(a)(6).

[52] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C. Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

[53] D.C. Code §§ 22-4501(1); 22-4502(a).

the revised sexual abuse of a minor penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" an object that, in fact, is a dangerous weapon or imitation weapon.[55] The revised enhancement is narrower than the current D.C. Code sex offense aggravator because it requires the use or display of the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fourth degree of the revised sexual assault statute for a "coercive threat." The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual abuse of a minor statute.

Eighth, the revised sexual abuse of a minor penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current D.C. Code sex offense aggravator for causing serious bodily injury[56] incorporates the current definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a . . . mental faculty."[57] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22E-701, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a

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[54] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

[55] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22E-701 specifically include firearms and imitation firearms.

[56] D.C. Code § 22-3020(a)(3).

[57] D.C. Code § 22-3001(7).

bodily member or organ, or a protracted loss of consciousness. This change improves the consistency and proportionality of the revised sex offenses.

Beyond these eight changes to current District law, eight other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised sexual abuse of a minor statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current D.C. Code sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[58] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[59] In addition to case law, District practice does not appear to follow the variations in statutory language.[60] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual

[58] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[59] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[60] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised sexual abuse of a minor statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. The current D.C. Code child sexual abuse statutes[61] and sexual abuse of a minor statutes[62] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[63] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[64] There is no DCCA case law regarding commission of a "sexual act" in the current child sexual abuse statutes or the sexual abuse of a minor statutes.[65] The revised sexual abuse of a minor statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for engaging in a sexual act or sexual contact with the complainant causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[66] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[67] This change improves the clarity and consistency of the revised statutes.

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[61] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[62] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[63] D.C. Code § 22-3001(9) (defining "sexual contact.").

[64] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[65] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.

[66] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[67] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address

Third, third degree and sixth degree of the revised sexual abuse of a minor statute require a "knowingly" culpable mental state for the element that actor was in a "position of trust with or authority over" the complainant. The current D.C. Code sexual abuse of a minor statutes require that the actor be "in a significant relationship with a minor,"[68] but they do not specify what, if any, culpable mental states apply, and there is no DCCA case law on point. Third degree and sixth degree of the revised sexual abuse of a minor statute resolve this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,[69] although recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[70] Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, as well as the expansive scope of the definition, a "knowingly" culpable mental state is proportionate. This change improves the clarity and consistency of the revised statutes.

Fourth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of third degree and sixth degree of the revised sexual abuse of a minor statute and the penalty enhancement for being in a "position of trust with or authority over" may differ as compared to the current D.C. Code sexual abuse of a minor statutes. The current D.C. Code sexual abuse of a minor statutes[71] require that the actor be in a "significant relationship" with the complainant and the fact that the actor was in a "significant relationship" with the complainant is included in the current sex offense aggravators.[72] "Significant relationship" is defined in D.C. Code § 22-3001[73] as

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whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[68] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with a minor or causes that minor to engage in a sexual act."); 22-3009.02 (second degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor[,] and engages in a sexual contact with that minor or causes that minor to engage in a sexual contact."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[69] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[70] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[71] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[72] D.C. Code § 22-3020(a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[73] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the

"includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[74] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

Fifth, the revised sexual abuse of a minor penalty enhancements require that accomplices be "physically present at the time of the sexual act or sexual contact." The current accomplice aggravator for the D.C. Code sexual abuse statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[75] There is no DCCA case law interpreting this aggravator.[76] It is unclear whether the aggravator would apply if an accomplice was not physically present. It is also unclear if the required aiding and abetting is limited to the sexual act or sexual contact, or encompasses the totality of the actor's conduct leading to the sexual act or sexual contact. Resolving this ambiguity, the revised sexual abuse of a minor penalty enhancement requires that the accomplices must be "physically present at the time of the sexual act or sexual contact." Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

Sixth, the revised sexual abuse of a minor penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The current accomplice aggravator for the D.C. Code sex offenses requires that the "defendant was aided or abetted by 1 or more accomplices."[77] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Resolving this ambiguity, the revised sexual abuse of a minor penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices

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person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[74] D.C. Code § 22-3001(10).

[75] D.C. Code § 22-3020(a)(4).

[76] However, current District law generally extends aider and abettor liability to accomplices who are not present at the time of the offense. *See, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) (upholding aider and abettor liability where "the jury could reasonably have found that appellant had participated in planning the robbery," and served as getaway driver, but was not physically present during the robbery) (collecting District case law).

[77] D.C. Code § 22-3020(a)(4).

that are physically present at the time of the sexual act or sexual contact."[78] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual abuse of a minor statute.

Seventh, the revised sexual abuse of a minor statute is subject to the RCC general provision enhancement for repeat offenders. The current D.C. Code sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[79] The plain language of the enhancement is unclear[80] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[81] It is unclear how the multiple recidivist enhancements apply to the sex offenses, and there is no case law. Resolving these ambiguities, the revised sexual abuse of a minor statute is subject to the RCC general recidivist penalty enhancement (RCC § 22E-606). By eliminating overlapping recidivist penalty enhancements, the RCC improves the consistency and proportionality of the revised sexual abuse of a minor statutes.

Eighth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state and requires that the defendant cause serious bodily injury "immediately before, during, or immediately after" the sexual act or sexual contact. The current D.C. Code sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[82] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states and the scope of "as a result of the offense" is unclear.[83] There is no DCCA case law for these issues. Resolving this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury immediately before, during, or immediately after the sexual act or sexual contact. The "recklessly" culpable mental state is consistent with several gradations of the revised assault statute (RCC § 22E-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual abuse of a minor, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

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[78] The revised penalty enhancement no longer uses the words "aided or abetted" that are in the current enhancement because they are surplusage. The revised penalty enhancement also no longer specifies that "[i]t is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply" as the current penalty enhancement specifies in D.C. Code § 22-3020(a)(6).

[79] D.C. Code § 22-3020(a)(5). In addition to the specific sexual abuse aggravator, current District law has general penalty enhancements for prior convictions. D.C. Code §§ 22-1805; 22-1805a. It is unclear how the multiple recidivist penalty enhancements apply to the sex offenses, and there is no DCCA case law.

[80] One possible interpretation is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[81] D.C. Code §§ 22-1805; 22-1805a.

[82] D.C. Code § 22-3020(a)(3).

[83] It is unclear whether "the offense" refers to the sexual act or sexual contact, or the totality of the defendant's actions leading to the sexual act or sexual contact. It is also unclear how to determine whether an injury is a "result" of the sexual act or sexual contact, particularly if a significant period of time passes between the incident and the development or discovery of the serious bodily injury.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised sexual abuse of a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[84] and sexual abuse of a minor, for complainants under the age of 18 years.[85] For clarification, the revised sexual abuse of a minor statute no longer distinguishes separate offenses for complainants who are a "child" or "minor" and instead organizes all offenses against minors as gradations of one "sexual abuse of a minor" statute. The text of the revised sexual abuse of a minor statute also specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[86] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexual abuse of a minor statute, by use of the phrase "in fact," clarifies that no culpable mental state is required as to the age of the complainant, the actor's own age, or the required age gap. Neither the current D.C. Code sexual abuse of a child statutes[87] nor the current D.C. Code sexual abuse of a minor statutes[88] specify culpable mental states as to the ages of the parties or the gap in their ages. However, current D.C. Code § 22-3012 states that for child sexual abuse, the government "need not prove that the defendant knew the child's age or the age difference between himself or herself and the child"[89] and current D.C. Code § 22-3011 establishes that "mistake of age" is not a defense to prosecution under the child sexual abuse and sexual abuse of a minor statutes.[90] DCCA case law further suggests that no culpable mental state

[84] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[85] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").
[86] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).
[87] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[88] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[89] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.
[90] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

whatsoever is required as to the age of the complainant or the age gap with the actor.[91] The revised sexual abuse of a minor statute, by use of the phrase "in fact," establishes strict liability as to the age of the complainant, the age of the actor, or the relevant age gap. Codifying the strict liability requirement improves the clarity and consistency of the revised statute.

Third, the revised sexual abuse of a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[92] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[93] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[94] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[95] In the revised sexual abuse of a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment

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[91] *See, e.g., Green v. United States*, 948 A.2d 554, 558 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instruction apparently required no culpable mental state as to the complainant's age).

[92] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[93] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[94] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[95] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse of a child and second degree sexual abuse of a child are "crimes of violence" and would have a maximum term of imprisonment of five years. First degree and second degree sexual abuse of a minor are not "crimes of violence," however, and would have a maximum term of imprisonment of 180 days.

sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute does not refer to other offenses. The current D.C. Code marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse of a minor "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[96] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[97] The marriage or domestic partnership defense in the revised sexual abuse of a minor statute applies only to prosecution for the revised sexual abuse of a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[98] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexual abuse of a minor offense.

Fifth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute makes two clarificatory changes to the current defense.[99] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Sixth, the revised sexual abuse of a minor statute does not codify a separate provision stating that consent is not a defense. The current D.C. Code sexual abuse statutes specify that "consent is not a defense" for the current sexual abuse of a child statutes and current sexual abuse of a minor statutes.[100] However, nothing in the RCC

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[96] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[97] D.C. Crim. Jur. Instr. § 9.700.

[98] See Commentary to RCC § 22E-1202 (revised assault statute).

[99] D.C. Code § 22-30011(b).

[100] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The

sexual abuse of a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

Seventh, by the use of the phrase "in fact," the revised weapon penalty enhancement for the sexual abuse of a minor statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The current D.C. Code sex offense aggravators include that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[101] The current D.C. Code sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[102] and the "while armed" enhancement in D.C. Code § 22-4502103 support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Eighth, the revised sexual abuse of a minor penalty enhancements consistently refer to the "sexual act or sexual contact" as opposed to "the offense." Several of the current sexual abuse aggravators refer to "at the time of the offense"[104] or "as a result of the offense."[105] The revised penalty enhancements consistently refer to the sexual act or sexual contact, improving the clarity of the revised statute.

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current child sexual abuse statutes and current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3008 – 22-3009.02 and fall within the specified range of statutes in D.C. Code § 22-3011(a).

[101] D.C. Code § 22-3020(a)(6) (authorizing a possible "penalty up to 1 ½ times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse if" the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[102] *See, e.g.*, *Perry v. United States*, 36 A.3d 799, 812 (D.C. 2011) ("[Whether the actor used the object in a dangerous manner] is an objective test, and has nothing to do with the actor's subjective intent to use the weapon dangerously."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (rejecting appellant's argument that "unless one is possessed with the specific intent to use an object offensively, it is not a dangerous weapon.").

[103] *See, e.g.*, *Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) (stating "[t]his court has traditionally looked to the use to which an object was put during an assault in determining whether that object was a dangerous weapon" and citing the objective tests used to determine if an object is a dangerous weapon in ADW).

[104] D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense."); (a)(2) ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

[105] D.C. Code § 22-3020(a)(3) ("The victim sustained serious bodily injury as a result of the offense.").

RCC § 22E-1303. Sexual Abuse by Exploitation.

Explanatory Note. *The RCC sexual abuse by exploitation offense prohibits specified acts of sexual penetration or sexual touching with several populations of vulnerable individuals. The penalty gradations are based on the nature of the sexual conduct. The revised sexual abuse by exploitation offense replaces six distinct offenses in the current D.C. Code: first degree sexual abuse of a secondary education student,[1] second degree sexual abuse of a secondary education student,[2] first degree sexual abuse of a ward,[3] second degree sexual abuse of a ward,[4] first degree sexual abuse of a patient or client,[5] and second degree sexual abuse of a patient or client.[6] The RCC sexual abuse by exploitation offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[7] the attempt statute,[8] the limitation on prosecutorial immunity,[9] and the aggravating sentencing factors.[10]*

Paragraph (a)(1) specifies the prohibited conduct for first degree sexual abuse by exploitation—engaging in a "sexual act" with the complainant or causing the complainant to engage in or submit to a "sexual act." Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22E-206 means here that the actor must be "practically certain" that he or she would engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Subparagraph (a)(2)(A) through subparagraph (a)(2)(E) specify the prohibited situations for an actor to engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to the "sexual act."

Subparagraph (a)(2)(A) specifies the first prohibited situation—the actor must be "a coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school" and "working as an employee, contractor, or volunteer." Per the rule of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to these elements in subparagraph (a)(2)(A). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she is "a coach, not including a

[1] D.C. Code § 22-3009.03.
[2] D.C. Code § 22-3009.04.
[3] D.C. Code § 22-3013.
[4] D.C. Code § 22-3014.
[5] D.C. Code § 22-3015.
[6] D.C. Code § 22-3016.
[7] D.C. Code § 22-3017.
[8] D.C. Code § 22-3018.
[9] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexual abuse by exploitation statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[10] D.C. Code § 22-3020.

coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contractor, or volunteer."

Sub-subparagraphs (a)(2)(A)(i) and its sub-subparagraphs specify several requirements for the complainant for this first type of prohibited situation. First, sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(i)(I), and (a)(2)(A)(i)(II) require that the complainant must either be "an enrolled student in the same secondary school" as the actor (sub-subparagraph (a)(2)(A)(i)(I)) or receive educational services or attend educational programming at the same secondary school as the actor (sub-subparagraph (a)(2)(A)(i)(II)).[11] Per the rule of interpretation in RCC § 22E-207, the "recklessly disregards" culpable mental state in subparagraph (a)(2)(A) applies to the requirements for the complainant in sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(i)(I), and (a)(2)(A)(i)(II). "Recklessly disregards" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the complainant is an enrolled student in the same secondary school or receives educational services or attends educational programming at the same secondary school. Sub-subparagraph (a)(2)(A)(ii) specifies a final requirement for the complainant—that he or she is under the age of 20 years. Per the rule of interpretation in RCC § 22E-207, the "recklessly disregards" culpable mental state in subparagraph (a)(2)(A) applies to this requirement and here means the actor is aware of a substantial risk that the complainant is under the age of 20 years.

Subparagraph (a)(2)(B) specifies the second prohibited situation—the actor must falsely represent that he or she is someone else with whom the complainant is in a romantic, dating, or sexual relationship. The "romantic, dating, or sexual relationship" language tracks the language in the District's current definition of "intimate partner violence"[12] and is intended to have the same meaning. Subparagraph (a)(2)(B) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here requires that the actor be "practically certain" that the actor falsely represents that the actor is someone else with whom the actor is in a romantic, dating, or sexual relationship.

Subparagraph (a)(2)(C) specifies the third prohibited situation—the actor is, or purports to be, a "healthcare provider," a "health professional," or a "religious leader described in D.C. Code § 14-309." The terms "healthcare provider" and "health professional" are defined terms in RCC § 22E-701, and include massage therapists, psychologists, and addiction counselors. A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,"[13] regardless of whether the religious leader hears confessions or receives other communications. Per the rule of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to the elements in subparagraph (a)(2)(C), and per the definition of

[11] Educational services and programming may include, for example, sports practices, music lessons, or a required class.

[12] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[13] D.C. Code § 14-309.

"knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she is, or purports to be, a "healthcare provider," "heath professional," or "a religious leader described in D.C. Code § 14-309."

Sub-subparagraphs (a)(2)(C)(i) through (a)(2)(C)(iii) specify additional requirements for an actor that is, or purports to be, a healthcare provider, heath professional, or a specified religious leader. Sub-subparagraph (a)(2)(C)(i) requires that the actor falsely represents that the sexual act is done for a bona fide medical, therapeutic, or professional purpose. Sub-subparagraph (a)(2)(C)(ii) requires that the actor commit the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to all the elements in sub-subparagraph (a)(2)(C)(i) and sub-subparagraph (a)(2)(C)(ii). Per the definition of "knowingly" in RCC § 22E-206, the actor must be "practically certain" that he or she falsely represents that the sexual act is done for a bona fide professional purpose or that he or she commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services.

Sub-subparagraph (a)(2)(C)(iii) requires that the actor commit the sexual act while the complainant is a patient or client of the actor. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in subparagraph (a)(2)(B) applies to these elements. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she commits the sexual act while the complainant is a patient or client of the actor. Sub-subparagraph (a)(2)(C)(iii) further requires that the actor "recklessly disregard" that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual act. "Recklessly disregards" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired from declining participation in the sexual act.

Subparagraph (a)(2)(D) specifies the fourth prohibited situation—the actor must "knowingly" work as "an employee, contractor, or volunteer at or for" a specified institution, such as a hospital or correctional facility. "Correctional facility" is a defined term in RCC § 22E-701. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she works as "an employee, contractor, or volunteer at or for" a specified institution, such as a hospital or treatment facility.

Sub-subparagraphs (a)(2)(D)(ii)(I) through (a)(2)(D)(ii)(III) specify requirements for the complainant. The complainant must be a ward, patient, client, or prisoner at a specified institution (sub-subparagraph (a)(2)(D)(ii)(I)), awaiting admission to a specified institution (sub-subparagraph (a)(2)(D)(ii)(I)(II)), or in transport to or from a specified institution (sub-subparagraph (a)(2)(D)(ii)(III)). Sub-subparagraph (a)(2)(D)(ii) specifies a culpable mental state of "recklessly disregards," which, per the rule of interpretation in in RCC § 22E-207, applies to all the requirements in sub-subparagraphs (a)(2)(D)(ii)(I) through (a)(2)(D)(ii)(III). "Recklessly disregard" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the complainant is: 1) a ward, patient, client, or prisoner at that institution; 2) awaiting admission to that institution; or 3) in transport to or from that institution.

Subparagraph (a)(2)(E) specifies the final prohibited situation—the actor works as a "law enforcement officer," as that term is defined in RCC § 22E-701. Subparagraph (a)(2)(E) specifies a culpable mental state of "knowingly" for this element. "Knowingly" is a defined term in RCC § 22E-206 that here means that the actor must be "practically certain" that he or she is a "law enforcement officer," as that term is defined in RCC § 22E-701. Subparagraph (a)(2)(E) further requires that the actor is "reckless" as to the fact that the complainant is in "official custody," a specified type of detention, or on probation or parole, as required in sub-subparagraphs (a)(2)(E)(i) through (a)(2)(E)(iii). "Official custody" is a defined term in RCC § 22E-701 that means "full submission after an arrest or substantial physical restraint after an arrest." "Reckless" is a defined term in RCC § 22E-206 that here means that the actor must be aware of a substantial risk that the complainant is in "official custody," a specified type of detention, or on probation or parole.

Subsection (b) specifies the required conduct for second degree sexual abuse by exploitation. The prohibited conduct is the same as first degree sexual abuse by exploitation except it requires a "sexual contact" instead of a "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person.

Subsection (c) codifies an affirmative defense for the RCC sexual abuse by exploitation statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. Subsection (c) establishes an affirmative defense that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact.

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (d)(3) states that a person shall not be subject to prosecution for violation of the RCC sexual abuse by exploitation offense and an abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised sexual abuse by exploitation statute clearly changes current District law in four main ways.*

First, the RCC sexual abuse by exploitation statute limits liability to an actor who is "a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309," or purports to be such. The current D.C. Code first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a professional relationship of

trust" with the complainant.[14] There is no DCCA case law more clearly specifying included professions. "Professional relationship of trust" is not defined in the D.C. Code and there is no DCCA case law interpreting the phrase. In contrast, the RCC sexual abuse by exploitation statute limits the offense to actors that are "a healthcare provider, a health professional, or a religious leader described in D.C. Code § 14-309," or actors that purport to be such. "Healthcare provider" and "health professional" are defined terms in RCC § 22E-701 and the D.C. Code,[15] referring to a wide array of medical and related professions, including massage therapists and addiction counselors. A "religious leader described in D.C. Code § 14-309" is a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,"[16] regardless of whether the religious leader hears confessions or receives other communications. This provision is intended to be interpreted broadly to include Christian and non-Christian religious officials. Complainants in a healthcare or spiritual setting are especially vulnerable to the conduct prohibited in the RCC sexual exploitation of an adult offense. Sexual activity in other professional settings[17] can be addressed by professional censure or civil liability. This change improves the clarity and proportionality of the RCC sexual abuse by exploitation statute.

Second, the RCC sexual abuse by exploitation statute no longer prohibits "the actor falsely represents that he or she is licensed as a particular kind of professional." The current D.C. Code first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[18] There is no DCCA case law interpreting this provision. Other provisions in the current sexual abuse of a patient or client statutes prohibit committing a sexual act or sexual contact during the "provision of professional services," when the actor "represents falsely that the sexual… [act or contact] is for a bona fide professional purpose," or when the actor "knows or has reason to know that the patient or client is impaired from declining participation."[19] In contrast, the RCC sexual abuse by exploitation statute does not specifically criminalize sexual conduct when the actor falsely represented that he or she is licensed as a particular kind of professional. The RCC sexual abuse by exploitation offense continues to penalize sexual conduct when falsely representing the conduct is for a medical, professional, or therapeutic purpose, during the provision of professional services, or when the actor disregards the possibility that the complainant is impaired. Apart from such circumstances, criminal punishment for lying about the status of one's professional licensing may be reprehensible but is not directly related to the sexual conduct. This change improves the proportionality of the RCC sexual abuse by exploitation statute.

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[14] D.C. Code §§ 22-3015 (first degree sexual abuse of a patient or client); 22-3016 (second degree sexual abuse of a patient or client).
[15] D.C. Code §§ 3–1205.01; 16–2801.
[16] D.C. Code § 14-309.
[17] For example, it is possible that "a professional relationship of trust" could be alleged to exist between a supervisor and employee, a contractor and contractee, and other common business relationships that involve a measure of trust.
[18] D.C. Code §§ 22-3015; 22-3016.
[19] D.C. Code §§ 22-3015 and 22-3016.

Third, only the general penalty enhancements in subtitle I of the RCC apply to the RCC sexual abuse by exploitation statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[20] In contrast, the revised sexual abuse by exploitation statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[21] are not necessary in the RCC sexual abuse by exploitation statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the RCC sexual exploitation of an adult offense improves the consistency and proportionality of the revised sex offenses.

Fourth, the RCC sexual abuse by exploitation statute completely specifies persons of authority in a secondary school that are subject to the revised statute and limits liability to situations where the student has a substantial link to the secondary school where the actor works. The current D.C. Code first and second degree sexual abuse of a secondary education student statutes prohibit "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school" from engaging in sexual conduct with a "student under the age of 20 years enrolled in that school or school system."[22] The statute does not define the term "person of authority" and there is no case law on point. In contrast, the RCC sexual abuse by exploitation statute limits the liable persons at a secondary school to "a coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school" and requires either that the complainant is enrolled at the same secondary school as the actor, or receives educational services or attends educational programming at the same secondary school as the actor. Categorical inclusion of all persons within a school system appears to be overbroad insofar as it would include persons who are not actually in a position to exert authority over the complainant, while limiting liability to persons within the school where the complainant is enrolled appears to be under-inclusive. The revised statute is tailored to inherently coercive roles at a secondary school where a student is enrolled or otherwise receives educational services or educational

[20] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[21] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexual abuse by exploitation, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[22] D.C. Code §§ 22-3009.03; 22-3009.04.

programming, including an "administrator," a "nurse," and a "security officer," which are not specified in the current statute. The revised statute requires that a "coach" is not also a secondary school student to ensure that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal. If the facts of a case fall outside the requirements of the revised statute, there may still be liability under second degree or fourth degree of the revised sexual assault statute (RCC § 22E-1301) for the use of a coercive threat or under third degree and sixth degree sexual abuse of a minor (RCC § 22E-1302) if the actor is in a "position of trust with or authority over" the complainant. This change improves the clarity, completeness, and proportionality of the RCC statute.

Beyond these four changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

First, the RCC sexual abuse by exploitation statute consistently requires that the actor engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[23] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[24] In addition to case law, District practice does not appear to follow the

[23] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[24] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

variations in statutory language.[25] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the sexual abuse by exploitation statute separately prohibits a sexual act or sexual contact when the actor "falsely represents that the actor is someone else with whom the actor is in a romantic, dating, or sexual relationship." The "romantic, dating, or sexual relationship" language tracks the language in the District's current definition of "intimate partner violence"[26] and is intended to have the same meaning. The current D.C. Code sexual abuse of a patient or client statutes do not contain a provision specifically addressing false identity used to engage in sexual conduct. However, the current D.C. Code misdemeanor sexual abuse (MSA) statute[27] prohibits engaging in a sexual act or sexual contact without the "permission" of the other person. "Permission" is not defined in the current D.C. Code and it is unclear whether or how "permission" differs from the defined term "consent."[28] In addition, the DCCA has used the terms "permission" and "consent" interchangeably in discussing the current MSA statute.[29] To the extent that the current MSA statute prohibits a sexual act or sexual contact without "consent," the current D.C. Code definition of "consent" appears to exclude consent that is obtained by deception because the current definition of "consent" requires that the

[25] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[26] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[27] D.C. Code § 22-3006.

[28] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[29] *See, e.g.*, *Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

words or actions be "freely given."[30] There is no DCCA case law on point. Resolving this ambiguity, the RCC sexual abuse by exploitation statute prohibits a specific type of deception, when the actor falsely represents that he or she is someone else with whom the complainant is in a romantic, dating, or sexual relationship.[31] This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense (RCC § 22E-1307) may prohibit. This change improves the clarity and proportionality of the RCC sexual abuse by exploitation statute.

Third, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. The current D.C. Code sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[32] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[33] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[34] There is no DCCA case law regarding commission of a "sexual act" in the current statutes that comprise the RCC sexual exploitation of an adult statute.[35] The RCC sexual abuse by exploitation statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[36] Requiring a

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[30] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[31] *See, e.g.*, *People v. Morales*, 150 Cal. Rptr. 3d 920 (2013) (Defendant entered the dark bedroom of complainant after seeing her boyfriend leave late at night, and has sex with the complainant by pretending to be the boyfriend).

[32] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[33] D.C. Code § 22-3001(9) (defining "sexual contact.").

[34] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[35] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1301, Sexual assault, above, for further discussion.

[36] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

"knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[37] This change improves the clarity and consistency of the RCC sexual abuse by exploitation statute.

Fourth, the RCC sexual abuse by exploitation statute specifies that a coach, teacher, counselor, principal, administrator, nurse, or security officer at a secondary school includes employees, contractors, and volunteers. The current D.C. Code sexual abuse of a secondary education student statutes list the prohibited actors in a secondary school and do not specify if the actors must be employees, or if contractors or volunteers are sufficient.[38] There is no DCCA case law on this issue. Resolving this ambiguity, the RCC statute specifies that the actor must be "working as an employee, contractor, or volunteer," which is consistent with the requirement in subparagraphs (a)(2)(D) and (b)(2)(D) of the statute for wards, patients, clients, and prisoners, and subsection (G) of the RCC definition of "position of trust with or authority over" (RCC § 22E-701). The specified secondary school actors have positions of authority that make otherwise consensual sexual activity criminal, regardless of whether the actors are employees, contractors, or volunteers. This revision improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.

Fifth, the RCC sexual abuse by exploitation statute requires that in the specified institutions, such as hospitals and treatment facilities, the actor and the complainant be at the same institution. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit specified actors, such as hospital staff and ambulance drivers from engaging in a sexual act or sexual contact with a "ward, patient, client, or prisoner."[39] It is unclear whether a complainant must be at the same institution as the

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[37] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[38] D.C. Code §§ 22-3009.03; 22-3009.04.

[39] D.C. Code §§ 22-3013; 22-3014. The text of first degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3013) is:

> Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution; anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions; or any official custodian of a ward, patient, client, or prisoner, who engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client, or prisoner to engage in or submit to a sexual act shall be imprisoned for not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.

actor in order to satisfy this requirement. There is no DCCA case law on this issue. Resolving this ambiguity, sub-subparagraphs (a)(2)(D)(i)(I), (a)(2)(D)(i)(II), (a)(2)(D)(i)(III), (b)(2)(D)(i)(I), (b)(2)(D)(i)(II), and (b)(2)(D)(i)(III) of the revised statute refer to "that institution"—the same institution as the actor. Limiting the statute to sexual conduct when the actor and the complainant are at the same institution tailors the statute to inherently coercive situations that make otherwise consensual sexual activity criminal. This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, the RCC sexual abuse by exploitation statute includes complainants that are "awaiting admission" to specified institutions. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit specified actors, such as hospital staff and ambulance drivers from engaging in a sexual act or sexual contact with a "ward, patient, client, or prisoner."[40] There is no DCCA case law interpreting this provision and it is unclear whether it extends to a complainant that is awaiting admission to one of the specified institutions. Resolving this ambiguity, the revised statute specifically includes complainants that are "awaiting admission" to specified institutions. A complainant that is awaiting admission at a specified institution has a similar vulnerability as a ward, patient, client, or prisoner that has been admitted to such an institution. This change improves the clarity, consistency, and proportionality of the revised statute.

Seventh, the RCC sexual abuse by exploitation statute includes an actor that is a "law enforcement officer" and recklessly disregards that the complainant is in "official custody," as that term is defined in RCC § 22E-701, a specified type of detention, or on probation or parole. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes prohibit "any official custodian of a ward, patient, client, or prisoner" from engaging in sexual activity with a "ward, patient, client, or prisoner."[41] The current D.C. Code does not define "official custodian," but does define "official custody."[42] The

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The text of second degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3014) is identical, differing only in requiring "sexual contact."

[40] D.C. Code §§ 22-3013; 22-3014. The text of first degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3013) is:

> Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution; anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions; or any official custodian of a ward, patient, client, or prisoner, who engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client, or prisoner to engage in or submit to a sexual act shall be imprisoned for not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.

The text of second degree sexual abuse of a ward, patient, client, or prisoner (D.C. Code 22-3014) is identical, differing only in requiring "sexual contact."

[41] D.C. Code §§ 22-3013; 22-3014.

[42] D.C. Code § 22-3001(6) (defining "official custody" as "(A) Detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion; (B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; or (C) Probation or parole.").

term "official custody" was deleted from the D.C. Code sexual abuse of a ward, patient, client or prisoner statutes in 2007.[43] The legislative history does not discuss why the definition of "official custody" was left in the D.C. Code. The legislative history does state that the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes were intended to "expand the list of individuals who are prohibited from engaging in sexual relations when the person provides care to a patient or other vulnerable population."[44] It is unclear whether the current D.C. Code definition of "official custody" is intended to apply to "official custodian" in the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes. To the extent that it does not, deleting the definition of "official custody" narrows, rather than expands, the scope of the current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes as they pertain to individuals in the custody of law enforcement officers or on probation or parole.

Resolving this ambiguity, the RCC sexual abuse by exploitation statute codifies as a discrete basis of liability an actor that is a "law enforcement officer" when the complainant is in "official custody," as that term is defined in RCC § 22E-701, a specified type of detention, or on probation or parole. The RCC definition of "official custody"—full submission after an arrest or substantial physical restraint after an arrest—is narrower than the current D.C. Code definition. However, the revised offense incorporates the substance of the current D.C. Code definition of "official custody" with the possible exceptions of: 1) "Surrender in lieu of an arrest"; and 2) "Custody for purposes incident to any detention described in subparagraph (A) of [the definition of "official custody"], including transportation, medical diagnosis or treatment, court

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[43] Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482) (2006 Omnibus Act). The original D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes required that the victim be in the "official custody" of certain institutions and under the "supervisory or disciplinary authority" of the defendant. The original D.C. Code first degree sexual abuse of a ward statute was:

> Whoever engages in a sexual act with another person or causes another person to engage in or submit to a sexual act when that other person:
> (1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and
> (2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed $100,000.

The original D.C. Code second degree sexual abuse of a ward, patient, client, or prisoner statute was the same, differing only in penalty and requiring a "sexual contact" instead of a "sexual act."

The legislative history for the 2006 Omnibus Act stated that the "supervisory or disciplinary authority" requirement created problems "successfully prosecuting persons who take advantage of inmates, group home residents, and persons with mental retardation." *See* Statement of Robert J. Spagnoletti, Attorney for the District of Columbia, at the May 31, 2005 Public Hearing on B16-247 the Omnibus Public Safety Act of 2005, B16-172 the Criminal Code Reform Commission Establishment Act of 2005, and B16-130 the Criminal Code Modernization Amendment Act of 2005 at 23. The 2006 Omnibus Public Safety Amendment Act deleted the requirements of "official custody" and "supervisory or disciplinary authority." It expanded the sexual abuse of a ward statutes to their current D.C. Code versions, including adding the language, "any *official custodian* of a ward, patient, client, or prisoner," but did not define the term "official custodian."

[44] Chairman of the Council of the District of Columbia Committee of the Judiciary, Phil Mendelson, "Report on Bill 16-247, the 'Omnibus Public Safety Act of 2006,'" (April 28, 2006) at 11.

appearance, work, and recreation." Subparagraphs (a)(2)(D), (b)(2)(D), (a)(2)(E), and (b)(2)(E) will provide liability for these situations when they also satisfy the requirements of the offense. Law enforcement officers have a position of authority over complainants that are in in "official custody," a specified type of detention, or on probation or parole such that otherwise consensual sexual activity is inherently coercive and criminalized. This change improves the clarity, consistency, and proportionality of the revised statute and removes a possible gap in liability.

Eighth, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for offense elements concerning the actor's own status and actions. The current D.C. Code sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[45] do not specify culpable mental states for the many facts regarding the actor's status or actions that must be proven for the offenses, apart from the "intent" required for "sexual contact."[46] There is no DCCA case law on point. Resolving this ambiguity, the RCC sexual abuse by exploitation statute requires a "knowingly" culpable mental state for the alternative facts that constitute the offense and involve the actor's own status or actions.[47] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[48] This change improves the clarity and consistency of the revised statutes.

Ninth, the RCC sexual abuse by exploitation statute requires a "recklessly" culpable mental state as to facts about the complainant's status. The current D.C. Code sexual abuse statutes that comprise the RCC sexual abuse by exploitation statute[49] do not specify culpable mental states for the many facts that must be proven for the offenses, apart from the "intent" required by the statutory definition of "sexual contact."[50] There is

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[45] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[46] D.C. Code § 22-3001(9).

[47] Specifically, the RCC sexual exploitation of an adult offense requires a "knowingly" culpable mental state as to the following alternative elements: the actor is a "a coach, not including a coach who is a secondary school student; a teacher, counselor, principal, administrator, nurse, or security officer at a secondary school, working as an employee, contractor, or volunteer"; the actor falsely represents to be someone else with whom the complainant is in a romantic, dating, or sexual relationship; the actor is a healthcare provider, a health professional, or a religious leader in D.C. Code § 14-309, or purports to be such; the actor falsely represents that sexual conduct is for a bona fide medical, therapeutic, or professional purpose; the actor commits the sexual act or sexual contact during a consultation, examination, treatment, therapy, or other provision of professional services; the actor commits the sexual act or sexual contact while the complainant is a patient or client of the actor; the actor "works as an employee, contractor, or volunteer at or for a hospital, treatment facility, detention or correctional facility, group home, or institution housing persons who are not free to leave at will"; and the actor "works as a law enforcement officer."

[48] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[49] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[50] D.C. Code § 22-3001(9).

no DCCA case law on point. Resolving this ambiguity, the RCC sexual abuse by exploitation statute requires a "recklessly" culpable mental state for the alternative facts that constitute the offense and involve the complainant's status.[51] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[52] However, a lower culpable mental state may be justified given the heightened power, responsibilities, and training of a person of authority in a secondary school, healthcare providers, clergy, persons who work at custodial institutions, and law enforcement officers. Recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[53] This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the RCC sexual abuse by exploitation offense combines in one offense the current D.C. Code sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses, with the same penalty. The current D.C. Code codifies as separate statutes sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client, but these statutes all have the same penalties—a maximum term of imprisonment of 10 years for first degree, requiring a "sexual act"[54] and a maximum term of imprisonment of 5 years for second degree, requiring "sexual contact."[55] Having separate statutes for these various offenses is unnecessarily confusing given that their penalties are equivalent and all pertain to sexual conduct with vulnerable adult populations. This change improves the clarity and organization of the revised statute.

Second, the RCC second degree sexual abuse by exploitation statute requires a "sexual contact" with a secondary education student. The current D.C. Code second degree sexual abuse of a secondary education student statute prohibits engaging in "sexual conduct" with specified secondary education students under the age of 20 years

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[51] Specifically, the RCC sexual exploitation of an adult offense requires a "recklessly" culpable mental state as to the following alternative elements: that the complainant is an enrolled student in the same secondary school as the actor or receives educational services or attends educational programming at the same secondary school as the actor; that the secondary education student complainant is under the age of 20 years; that the complainant is "impaired from declining participation" in sexual activity; that the complainant is a ward, patient, client, or prisoner at a specified institution; that the complainant is awaiting admission to a specified institution; that the complainant is in transport to or from a specified institution; that the complainant is in "official custody," as that term is defined in § RCC 22E-701, a specified type of detention, or on probation or parole.

[52] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[53] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[54] D.C. Code §§ 22-3009.03 (first degree sexual abuse of a secondary education student); 22-3013 (first degree sexual abuse of a ward; 22-3015 (first degree sexual abuse of a patient or client).

[55] D.C. Code §§ 22-3014 (second degree sexual abuse of a ward); 22-3016 (second degree sexual abuse of a patient or client). Second degree sexual abuse of a secondary education student prohibits "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system and is punishable by a maximum term of imprisonment of 5 years. D.C. Code § 22-3009.04. As is discussed elsewhere in this commentary, "sexual conduct" appears to be a typo for "sexual contact."

or causing specified secondary education students to engage in "sexual conduct."[56] "Sexual conduct" is not defined in the current sexual abuse statutes, nor does it appear in any other sexual abuse statute. In addition, the lower gradations of all the current sexual abuse statutes require "sexual contact."[57] There is no legislative history or DCCA case law for the current sexual abuse of a secondary education student statutes. For clarification, second degree of the RCC sexual abuse by exploitation statute codifies "sexual contact." This change improves the clarity and consistency of the revised statute.

Third, the RCC sexual abuse by exploitation statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[58] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[59] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[60] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[61] In the RCC sexual abuse by exploitation statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex

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[56] D.C. Code § 22-3009.04 (second degree sexual abuse of a secondary education student prohibiting "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system as any "teacher, counselor, principal, couch, or other person of authority in a secondary school and punishable by a maximum term of imprisonment of 5 years).

[57] D.C. Code §§ 22-3004 and 22-3005 (third degree and fourth degree sexual abuse requiring "sexual contact."); 22-3009 (second degree child sexual abuse requiring "sexual contact."); 22-3009.02 (second degree sexual abuse of a minor requiring "sexual contact."); 22-3014 (second degree sexual abuse of a ward requiring "sexual contact."); 22-3016(a) (second degree sexual abuse of a patient or client requiring "sexual contact.").

[58] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[59] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[60] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[61] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803.

offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised statute.

Fourth, the marriage and domestic partnership defense in the RCC sexual abuse by exploitation statute does not refer to other offenses. The current D.C. Code marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[62] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[63] The marriage or domestic partnership defense in the revised sexual abuse by exploitation statute applies only to prosecution for the revised sexual abuse by exploitation offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[64] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the RCC sexual abuse by exploitation offense.

Fifth, the marriage and domestic partnership defense in the RCC sexual abuse by exploitation statute makes two clarificatory changes to the current defense.[65] First, the

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[62] As is discussed in this commentary as a clarificatory change to law, the RCC sexual abuse by exploitation statute combines into one statute several current sexual abuse statutes: sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses. It is unclear whether a marriage and domestic partnership defense applies to the current sexual abuse of a secondary education student statutes. The current sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall into the range of specified statutes for the marriage and domestic partnership defense codified at D.C. Code 22 § 3011(b): "Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense . . . to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor." The defense refers to a "child" or "minor," which appears to exclude a secondary education student, and although the sexual abuse of a secondary education student statutes fall within the specified range of offenses, the defense was never specifically amended to reflect the codification of the sexual abuse of a secondary education student statutes. However, this appears to be a drafting error.
The marriage and domestic partnership defense for the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014) and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016) is codified at D.C. Code § 22-3017(b): "That the defendant and victim were married or in a domestic partnership at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018."

[63] D.C. Crim. Jur. Instr. § 9.700.

[64] See Commentary to RCC § 22E-1202 (revised assault statute).

[65] As is discussed in this commentary as a clarificatory change to law, the RCC sexual abuse by exploitation statute combines into one statute several current sexual abuse statutes: sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses. D.C. Code § 22-3017(b) establishes a marriage or domestic partnership defense for the current sexual abuse of a

revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Sixth, the revised sexual abuse by exploitation statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for certain sexual abuse statutes.[66] However, nothing in the RCC sexual abuse by exploitation statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

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ward statutes (D.C. Code §§ 22-3013 and 22-3014), as well as the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016). D.C. Code § 22-3017(b) ("That the defendant and victim were married or in a domestic partnership at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018.").

It is unclear whether there is a marriage or domestic partnership affirmative defense for the current sexual abuse of a secondary education student statutes, codified at D.C. Code §§ 22-3009.03 and 22-3009.04. D.C. Code § 22-3011 states that "Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor." The current sexual abuse of a secondary education student statutes fall into the range of specified statutes for the affirmative defense. However, the provision was never specifically amended to reflect the codification of the sexual abuse of a secondary education student statutes. Regardless, it would be inconsistent to exclude the sexual abuse of a secondary education student statutes from the marriage or domestic partnership affirmative defense that applies to the sexual abuse of a child and sexual abuse of a minor statutes.

[66] As is discussed in this commentary as a clarificatory change to law, the RCC sexual abuse by exploitation statute combines into one statute several current sexual abuse statutes: sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses.

It is unclear whether a provision barring consent as a defense applies to the current sexual abuse of a secondary education student statutes. The current sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall into the range of specified statutes for the consent prohibition codified at D.C. Code 22 § 3011(a): "Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403." Although the sexual abuse of a secondary education student statutes fall within the specified range of offenses, the provision was never specifically amended to reflect the codification of the sexual abuse of a secondary education student statutes. Regardless, it would be inconsistent to permit a consent defense for the sexual abuse of a secondary education student statutes when it is prohibited for most of the other current sexual abuse statutes.

The prohibition on consent for the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014) and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016) is codified at D.C. Code § 22-3017(a): "Consent is not a defense to a prosecution under §§ 22-3013 to 22-3016, prosecuted alone or in conjunction with charges under § 22-3018."

Seventh, the revised statute specifies that an actor at a specified institution, such as a hospital, must work as "an employee, contractor, or volunteer at or for" the specified institution. The current D.C. Code sexual abuse of a ward, patient, client, or prisoner statutes include "[a]ny staff member, employee, contract employee, consultant, or volunteer at a" specified institution.[67] There is no DCCA case law interpreting this language. The RCC statute retains "employee" and "volunteer" from the current D.C. Code statutes, and replaces "contract employee" with "contractor" for clarity. The RCC statute deletes "staff member" as duplicative with an "employee" or "contractor," and deletes "contractor." It is unclear how a "consultant" differs from an "employee" or "contractor." However, to the extent that a "consultant" is not an "employee, contractor, or volunteer at or for" a specified institution, the consultant may not be in a position of authority over a complainant such that otherwise consensual sexual activity is inherently coercive and criminalized. Sexual activity between such a consultant and a complainant at an institution may be prohibited under the RCC sexual assault statute (RCC § 22E-1301) if there is a coercive threat or the complainant is incapacitated. The commentary to the RCC sexual assault statute has been updated to reflect this is a clarificatory change in law.

[67] D.C. Code §§ 22-3013; 22-3014.

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

Explanatory Note. *The RCC sexually suggestive conduct with a minor offense prohibits comparatively less serious sexual conduct with certain complainants under the age of 18 years, such as touching a complainant with intent to cause the sexual arousal or sexual gratification of any person. The offense also prohibits a sexual act or sexual contact with certain complainants, making it a lesser included offense of the RCC sexual abuse of a minor statute.[1] The offense has a single penalty gradation. The revised sexually suggestive conduct with a minor offense replaces the current misdemeanor sexual abuse of a child or minor statute.[2] The revised sexually suggestive conduct with a minor statute also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[3] the attempt statute,[4] the limitation on prosecutorial immunity,[5] and the aggravating sentencing factors.[6]*

Paragraph (a)(1), subparagraph (a)(1)(A), subparagraph (a)(1)(B), and sub-subparagraphs (a)(1)(B)(i) and (a)(1)(B)(ii) establish the different age and relationship requirements for the actor and the complainant in the revised sexually suggestive conduct with a minor statute. Paragraph (a)(1) requires that the actor "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (a)(1) applies to every element that follows until a culpable mental state is specified. In paragraph (a)(1), this means that there is no culpable mental state required for the actor's age or the required four year age gap.

In addition to the requirements in paragraph (a)(1), subparagraph (a)(1)(A) and subparagraph (a)(1)(B) specify alternative age and relationship requirements for liability. Subparagraph (a)(1)(A) requires that the actor is "reckless" as to the fact that the complainant is under the age of 16 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 16 years. In the alternative, but also in addition to the requirements in paragraph (a)(1), subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(i) require that the actor is "reckless" as to the fact that the complainant is under 18 years of age and paragraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(ii) require that the actor "knows" that he or she is in a "position of trust with or authority over" the complainant. "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the complainant is under the age of 18 years. "Knowingly" is a

[1] RCC § 22E-1302.
[2] D.C. Code § 22-3010.01.
[3] D.C. Code § 22-3011.
[4] D.C. Code § 22-3018.
[5] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised sexually suggestive conduct with a minor statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[6] D.C. Code § 22-3020.

defined term in RCC § 22E-206 that here means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (a)(2), subparagraph (a)(2)(A), and sub-subparagraphs (a)(2)(A)(i) through (a)(2)(A)(iii) specify one type of prohibited conduct for the revised sexually suggestive conduct with a minor statute. The actor must "engage[] in" a "sexual act" that is visible to the complaint, a "sexual contact" that is visible to the complainant, or a "sexual or sexualized display" of the genitals, pubic area, or anus that is visible to the complainant. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Subparagraph (a)(2)(A) specifies a culpable mental state of "purposely" and per the rule of construction in RCC § 22E-207, applies to the prohibited conduct in sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii). "Purposely" is a defined term in RCC § 22E-206 that here means the actor must "consciously desire" that he or she engages in a sexual act that is visible to the complaint, a sexual contact that is visible to the complainant, or a sexual or sexualized display of the genitals, pubic area, or anus that is visible to the complainant. To the extent that conduct commonly understood as masturbation meets the RCC definitions of "sexual act" or "sexual contact," or is a sexual or sexualized display of the genitals, pubic area, or anus, that conduct falls under subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii), provided the other requirements of the offense are met.

Subparagraph (a)(2)(B) and its sub-subparagraphs specify another type of prohibited conduct for the revised sexually suggestive conduct statute. Sub-subparagraph (a)(2)(B)(i)(I) prohibits "touching or kissing any person, either directly or through the clothing"[7] and sub-sub-subparagraph (a)(2)(B)(ii)(II) prohibits "removing clothing from any person." Sub-subparagraph (a)(2)(B)(i) prohibits the actor engaging in either type of conduct with the complainant or causing the complainant to engage in or submit to either type of conduct. Subparagraph (a)(2)(B) specifies a culpable mental state of "knowingly" and, per the rules of interpretation in RCC § 22E-207, this "knowingly" culpable mental state applies to all elements in sub-subparagraphs (a)(2)(B)(i) and sub-subparagraphs (a)(2)(B)(i)(I) and (a)(2)(B)(i)(II). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she engages in with the complainant, or causes the complainant to engage in or submit to, touching or kissing any person, either directly or through the clothing, or removing clothing from any person. Sub-subparagraph (a)(2)(B)(ii) requires that the prohibited conduct under subparagraph (a)(2)(B) be done with "intent to cause the sexual arousal or sexual gratification of any person." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would cause the sexual arousal or sexual gratification of any person. Per RCC § 22E-205, the object of the phrase "with

[7] The revised sexually suggestive conduct with a minor statute does not change the DCCA's interpretation of the scope of "touching" in the current MSACM statute in *Augustin v. United States*, discussed elsewhere in this commentary.

intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such an arousal or gratification actually occurred, just that the defendant believed to a practical certainty that such arousal or gratification would result.

Subparagraph (a)(2)(C) specifies the final type of prohibited conduct for the revised sexually suggestive conduct with a minor statute—engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact. Subparagraph (a)(2)(C) specifies that the prohibited culpable mental state for this conduct is "knowingly." "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she will engage in a sexual act or sexual contact with the complainant or cause the complainant to engage in or submit to a sexual act or sexual contact. This language establishes that the revised sexually suggestive conduct with a minor statute is a lesser included offense of the RCC sexual abuse of a minor statute (RCC § 22E-1302) and is intended to have the same scope as in the RCC sexual abuse of a minor statute.

Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Subsection (c) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised sexually suggestive conduct with a minor statute clearly changes current District law in nine main ways.*

First, the revised sexually suggestive conduct with a minor statute replaces the prohibition on "touching one's own genitalia or that of a third person" with engaging in a "sexual act" that is visible to the complainant, a "sexual contact" that is visible to the complainant, or a specific sexualized display that is visible to the complainant. The current D.C. Code misdemeanor sexual abuse of a child or minor (MSACM) statute prohibits "engaging in" "touching one's own genitalia or that of a third person" with a child or minor.[8] The terms "touching" and "genitalia" are not statutorily defined and the only DCCA case law concerning this provision sustained an attempted MSACM conviction when the actor touched his penis "in front of" the complainant.[9] In contrast, the revised sexually suggestive conduct with a minor statute prohibits engaging in a "sexual act" that is visible to the complainant, a "sexual contact" that is visible to the

[8] D.C. Code § 22-3010.01(b), (b)(4).

[9] *Sutton v. United States*, 140 A.3d 1198, 1201, 1202 (D.C. 2016) (holding that the evidence was sufficient for attempted misdemeanor sexual abuse of a child under D.C. Code § 22-3010.01 when appellant touched his penis "in front of" the complainant).

complainant, or a sexualized display of the genitals, pubic area, or anus that is visible to the complainant. The scope of "touching one's own genitalia" in the current MSACM statute is unclear and if interpreted narrowly, there would be no liability under the current MSACM statute for showing genitalia, without touching it, or for touching sexual areas that are not "genitalia," such as the anus or pubic area more generally. The revised sexually suggestive conduct statute expands the offense to include a "sexual act" or "sexual contact," as those terms are defined in RCC § 22E-701, that is visible to the complainant, or a sexualized display of the genitals, pubic area, or anus that is visible to the complainant.[10] This change improves the clarity of the revised statute, its consistency with the requirement in the RCC sexual abuse of a minor statute of a sexual act or sexual contact, and removes gaps in liability.

Second, the revised sexually suggestive conduct with a minor statute requires a "purposely" culpable mental state for engaging in a sexual act that is visible to the complainant, a sexual contact that is visible to the complainant, or a specific sexualized display that is visible to the complainant. The current D.C. Code MSACM statute requires "engaging in . . . touching one's own genitalia or that of a third person"[11] in a way "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[12] The current D.C. Code "reasonably causes" language may mean that the offense is a general (rather than specific) intent offense,[13] or may indicate a culpable mental state similar to negligence as defined in the RCC. There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute requires a "purposely" culpable mental state for engaging in a sexual act that is visible to the complainant, a sexual contact that is visible to the complainant, or a specific sexualized display that is visible to the complainant. A knowledge culpable mental state would criminalize adult sexual conduct in front of a minor, particularly in a small or shared living space. The "purposely" culpable mental state requires that the defendant consciously desires that the sexual act, sexual contact, or sexualized display is visible to the complainant. This change improves the consistency and proportionality of the revised statute.

Third, the revised sexually suggestive conduct statute prohibits "touching or kissing any person, either directly or through the clothing" and "removing clothing from any person." The current D.C. Code MSACM statute prohibits: 1) "touching a child or minor inside his or her clothing"[14]; 2) "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks"[15]; and 3) "placing one's tongue in

[10] To the extent that conduct commonly understood as masturbation meets the RCC definitions of "sexual act" or "sexual contact," or is a sexual or sexualized display of the genitals, pubic area, or anus, that conduct falls under subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i), (a)(2)(A)(ii), and (a)(2)(A)(iii), provided the other requirements of the offense are met.
[11] D.C. Code § 22-3010.01(b), (b)(4).
[12] D.C. Code § 22-3010.01(b).
[13] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. *See* commentary to RCC 22E-1301, Sexual assault, above, for further discussion.
[14] D.C. Code § 22-3010.01(b)(1).
[15] D.C. Code § 22-3010.01(b)(2).

the mouth of the child or minor."[16] The various requirements for touching in the current statute may lead to counterintuitive liability[17] and it is unclear whether the current statute includes touching a naked child or minor, or undressing a child or minor. DCCA case law has interpreted "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks" as including incidental contact with these areas during a hug with the requisite intent.[18] In contrast, the revised sexually suggestive conduct statute prohibits "touching or kissing any person, either directly or through the clothing" and "removing clothing from any person." The revised statute simplifies the requirements for liability by removing the focus on where and how the complainant was touched or undressed and instead making the defendant's intent the deciding factor. Any touching, kissing, or removal of clothing, when done with the intent to cause the sexual arousal or sexual gratification of any person, is sufficient for liability, provided the other requirements of the offense are met.[19] This change improves the clarity, consistency, and proportionality of the revised statute and removes gaps in liability.

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[16] D.C. Code § 22-3010.01(b)(3).

[17] For example, under the current misdemeanor sexual abuse of a child or minor statute, a person would not have liability for touching a minor complainant on the complainant's bare foot or licking the complainant's face with the intent to sexually arouse or gratify himself or herself.

[18] In *Augustin v. United States,* appellant was convicted of MSACM on the basis of "intimate" hugs with the minor complainant when, while clothed, their "upper bodies, stomachs, hips, and lower areas were all in contact." *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889, at *1 (D.C. 2020). Appellant testified that, while the hugs were initially "brief and causal in nature," they became "slightly longer, up to four to five seconds in duration." *Id.* Appellant characterized three or four of these embraces as "intense" and "intimate" and like "the kind of hugs [one] would exchange with [one's] boyfriend." *Id.* The opinion discusses additional facts regarding the hugs and the relationship and communication between the actor and the appellant, which the court used in assessing the actor's intent with the hugs. *Id.* at 1-2, 6-7.

Appellant argued that the evidence was insufficient to prove that he "touch[ed]" the complainant's breast or other specified private parts in paragraph (b)(2) of the current MSACM statute (prohibiting "[t]ouching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks."). *Id.* at 3. Appellant argued that by using "touching," the legislature "must have meant to require more than merely incidental physical contact between any part of the defendant's body with the area of [a complainant's] 'genitalia, anus, breast, or buttocks.'" *Id.* at 4. Appellant argued that "touching" "requires an act of *feeling* one of those areas *with one's tactile senses*—i.e. generally speaking, with one's fingers, hands, genitals, or other sensory organs." *Id.* (emphasis in original). Appellant argued "mere hugs" do not involve such sensory touching and that the "incidental physical contact of parts of . . . bodies in [mere hugs] is not an act or sensory perception or exploration." *Id.*

The DCCA agreed with appellant that the current MSACM statute "does not sweepingly criminalize all hugging" but did not accept appellant's "somewhat restrictive construction" of the word "touching" in the MSACM statute. *Id.* at 4. Instead, the court stated that the intent requirement in the current MSACM statute ("intended to or reasonably causes the sexual arousal or sexual gratification of any person") is the "critical limiting language in the statute," as opposed to "touching." *Id.* at 5. The DCCA stated that the "statute does exclude ordinary hugging involving merely incidental contact with sensitive areas of the recipient's body from its purview" and that it does so "by prohibiting only such hugging as is 'intended to cause or reasonably causes' sexual arousal or sexual gratification." *Id.* The implication of the court's reasoning is that merely incidental contact during a hug that is intended to or reasonably causes sexual arousal or sexual gratification is sufficient for the current MSACM statute. The court found that there was sufficient evidence that the hugs were intended to derive sexual arousal or gratification, but remanded the case for the trial court to make new factual findings and render a new verdict. *Id.* at 7.

[19] The revised sexually suggestive conduct with a minor statute does not change the DCCA's interpretation of the scope of "touching" in the current MSACM statute in *Augustin v. United States*, discussed elsewhere in this commentary.

Fourth, the revised sexually suggestive conduct statute prohibits the actor from engaging in prohibited conduct with the complainant or causing the complainant to engage in or submit to prohibited conduct. The current D.C. Code MSACM statute prohibits: 1) "touching a child or minor inside his or her clothing"[20]; 2) "touching a child or minor inside or outside his or her clothing close to the genitalia, breast, or buttocks"[21]; and 3) "placing one's tongue in the mouth of the child or minor."[22] The current statute appears limited to the actor touching the complainant and would exclude, for example, the actor causing the complainant to touch the actor or a third person. This limited liability is inconsistent with other current sexual abuse statutes, as well as the RCC sex offenses that require a "sexual act" or "sexual contact."[23] There is no DCCA case law interpreting the scope of these provisions. In contrast, the revised sexually suggestive conduct statute prohibits the actor from engaging in touching, kissing, or undressing "any person" with the complainant or the actor causing the complainant to engage in or submit to touching, kissing, or undressing "any person." This change improves the consistency of the revised statute and removes gaps in liability.

Fifth, the revised sexually suggestive conduct with a minor statute requires "intent to cause the sexual arousal or sexual gratification of any person" for the prohibited touching, kissing, or undressing. The current MSACM statute requires engaging in specified conduct "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[24] There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute requires "with intent to cause the sexual arousal or sexual gratification of any person" for the prohibited touching, kissing, or undressing. The current "reasonably causes" alternative language may be interpreted to mean that the current MSACM offense is a general (rather than specific) intent offense,[25] or may indicate a culpable mental state similar to negligence. However, using negligence as the basis for criminal liability is disfavored for elements that distinguish otherwise non-criminal from criminal conduct.[26]

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[20] D.C. Code § 22-3010.01(b)(1).
[21] D.C. Code § 22-3010.01(b)(2).
[22] D.C. Code § 22-3010.01(b)(3).
[23] As is discussed in the commentaries to the RCC sex offenses, several of the current sexual abuse statutes specifically prohibit causing the complainant to "engage in" or "submit to" a sexual act or sexual contact, which includes liability for the actor penetrating or touching the complainant, as well as the actor causing the complaint to touch or penetrate the actor, the complainant, or a third party, or the actor causing the complainant to submit to being penetrated or touched by a third party. The RCC sex offenses that require a sexual act or sexual contact consistently prohibit the actor engaging in a sexual act or sexual contact with the complainant or the actor causing the complainant to engage in or submit to a sexual act or sexual contact.
[24] D.C. Code § 22-3010.01(b).
[25] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC § 22E-1301, Sexual assault, above, for further discussion.
[26] *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States,* 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand").) *See also Elonis v. United States,* 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (J. Alito, concurring) ("Whether negligence is morally

Conduct that is not intended to but "reasonably causes" sexual arousal or sexual gratification may be criminalized by the offensive physical contact offense in RCC § 22E-1205. This change improves the proportionality of the revised offense.

Sixth, the revised sexually suggestive conduct with a minor statute requires a "recklessly" culpable mental state as to the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[27] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[28] and legal experts[29] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[30] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[31] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[32] A "recklessly" culpable mental state in the revised sexually suggestive conduct with a minor statute is consistent with the culpable mental state required in other RCC sex offenses such as the revised enticing a minor into sexual conduct statute (RCC § 22E-1305) and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

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culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.").

[27] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[28] *Elonis v. United States*,135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[29] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[30] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")

[31] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[32] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

Seventh, the revised sexually suggestive conduct with a minor statute requires at least a four-year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current MSACM statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[33] but does not require any age gap when the complainant is under the age of 18 years and in a "significant relationship" with the actor.[34] In contrast, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[35] and the revised definition of "position of trust with or authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[36] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[37] Strict liability for the age gap matches the current sexual abuse of a child statutes[38] and the

[33] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[34] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[35] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[36] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old or touches the 17 year old inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person would be guilty under the current MSACM statute.

[37] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1304 provides that marriage is a defense to the revised sexually suggestive conduct with a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[38] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

revised sexual abuse of a minor statute (RCC § 22E-1302) and the revised enticing a minor into sexual conduct statute (RCC § 22E-1305). This change improves the consistency and proportionality of the revised statute.

Eighth, only the general penalty enhancements in subtitle I of the RCC apply to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[39] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[40] In contrast, the revised sexually suggestive conduct with a minor statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[41] are not necessary in the revised sexually suggestive conduct with a minor statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised sexually suggestive conduct with a minor statute improves the consistency and proportionality of the revised sex offenses.

Ninth, the revised sexually suggestive conduct statute is a lesser included offense of the RCC sexual abuse of a minor statute (RCC § 22E-1302). The current D.C. Code MSACM statute does not appear to be a lesser included offense of the current child

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[39] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[40] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging for sexual conduct with a real or fictitious child statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[41] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

sexual abuse statutes[42] or sexual abuse of a minor statutes[43] because it has different conduct requirements and requires that the defendant "intended to cause or reasonably causes the sexual arousal or sexual gratification of any person." There is no DCCA case law that addresses the relationship between the current MSACM statute and the current child sexual abuse statutes or sexual abuse of a minor statute. In contrast, the revised sexually suggestive conduct with a minor statute is a lesser included offense of the RCC sexual abuse of a minor statute under paragraph (a)(2)(C) if the other requirements of the offense are met. This change improves the consistency and proportionality of the revised statute.

Beyond these nine changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised sexually suggestive conduct with a minor statute requires a "knowingly" culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant. The current MSACM statute requires that an actor 18 years of age or older be in a "significant relationship" with a complainant under the age of 18 years,[44] but it does not specify a culpable mental state and there is no DCCA case law on point. The revised sexually suggestive conduct with a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[45] This change improves the clarity and consistency of the revised statute.

Second, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised sexually suggestive conduct with a minor statute may differ as compared to the current MSACM statute. The current MSACM statute requires that the actor be in a "significant relationship" with the complainant[46] and "significant relationship" is defined in D.C. Code § 22-3001.[47] The current definition of "significant relationship" is open-ended and defines "significant relationship" as

[42] D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").
[43] D.C. Code §§ 22-3009.01, 22-3009.02, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").
[44] D.C. Code §§ 22-3010.01(a) ("Whoever . . . being 18 years of age or older and being in a significant relationship with a minor."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[45] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[46] D.C. Code § 22-3010.01(a).
[47] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

"includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[48] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised sexually suggestive conduct with a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[49] and sexual abuse of a minor, for complainants under the age of 18 years.[50] The current MSACM statute has the same distinction in one statute, applying to complainants under the age of 16 years[51] and complainants under the age of 18 years.[52] For clarification, the revised sexually suggestive conduct with a minor statute no longer distinguishes specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[53] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexually suggestive conduct with a minor statute, by use of the phrase "in fact," requires no culpable mental state as to the actor's own age or the required age gap. The current MSACM statute does not specify any culpable mental states for the age of the actor or the required age gap.[54] However, current D.C. Code §

[48] D.C. Code § 22-3001(10).
[49] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[50] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").
[51] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").
[52] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[53] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).
[54] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3), (5A) (defining "child" as a "person who has not yet attained the age of 16 years" and "minor" as a "person who has not yet attained the age of 18 years.").

22-3011 states that a mistake of age is not a defense to the current MSACM statute.[55] For clarification, the revised sexually suggestive conduct with a minor statute uses the phrase "in fact," establishing strict liability as to the ages of the actor and the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[56] Strict liability for these elements also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the clarity and consistency of the revised offense.

Third, for a complainant under the age of 16 years, the revised sexually suggestive conduct with a minor statute requires an age gap between the complainant and the actor of "at least four years." The current MSACM statute requires that an actor 18 years of age or older be "more than 4 years older" than a complainant under the age of 16 years.[57] The current child sexual abuse statutes, in contrast, are worded to require that the complainant be "at least four years older" than the complainant.[58] Consequently, there is a difference of a day in liability between the two offenses due to the different required age gaps.[59] For clarification, the revised sexually suggestive conduct with a minor statute uses the language "at least four years older," the same as in the revised sexual abuse of a minor statute (RCC § 22E-1302) for complainants that are under the age of 16 years. The change improves the consistency of the revised offense.

Fourth, the revised sexually suggestive conduct with a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[60] Under the statute, if the maximum term of imprisonment for

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[55] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[56] *See Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[57] D.C. Code §§ 22-3010.01(a) ("Whoever, being 18 years of age or older and more than 4 years older than a child."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[58] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[59] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be liable under the current MSACM statute because, while the actor is over the age of 18, the actor is not "more than four years older" than the complainant.

[60] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a

the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[61] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[62] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[63] In the revised sexually suggestive conduct with a minor statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for sexually suggestive conduct, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexually suggestive conduct with a minor offense.

Fifth, the marriage and domestic partnership defense in the revised sexually suggestive conduct with a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to MSACM "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[64] There is

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ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor).

[61] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[62] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[63] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSACM statute would have a maximum term of imprisonment of 180 days, which is the same penalty as the completed offense.

[64] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[65] The marriage or domestic partnership defense in the revised sexually suggestive conduct with a minor statute applies only to prosecution for the revised sexually suggestive conduct with a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[66] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexually suggestive conduct with a minor offense.

Sixth, the marriage and domestic partnership defense in the revised sexually suggestive conduct with a minor statute makes two clarificatory changes to the current defense.[67] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Seventh, the revised sexually suggestive conduct statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a defense" for the current MSACM statute.[68] However, nothing in the RCC sexually suggestive conduct statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

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[65] D.C. Crim. Jur. Instr. § 9.700.

[66] See Commentary to RCC § 22E-1202 (revised assault statute).

[67] D.C. Code § 22-30011(b).

[68] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The current child sexual abuse statutes and current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3008 – 22-3009.02 and fall within the specified range of statutes in D.C. Code § 22-3011(a).

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

Explanatory Note. *The RCC enticing a minor offense prohibits commanding, requesting, or trying to persuade certain complainants under the age of 18 years to engage in sexual conduct. The revised enticing a minor offense replaces the current enticing a child statute[1] and the current indecent sexual proposal to a minor offense.[2] The revised enticing a minor statute also replaces in relevant part five[3] [4] [5] [6] [7]*

Paragraph (a)(1) specifies the prohibited conduct—commanding, requesting, or trying to persuade the complainant to engage in or submit to a sexual act or sexual contact. "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (a)(1) specifies a culpable mental state of "knowingly" for the prohibited conduct. "Knowingly" is a defined term in RCC § 22E-206 that means the actor must be practically certain that he or she will command, request, or try to persuade the complainant to engage in or submit to a sexual act or sexual contact.

The RCC enticing statute generally has two bases for liability. Paragraph (a)(2), subparagraph (a)(2)(A), subparagraph (a)(2)(B), and sub-subparagraphs (a)(2)(B)(i) and (a)(2)(B)(ii) establish the requirements for the actor and the complainant when the complainant is a "real," i.e. not fictitious, person. Paragraph (a)(3), subparagraph (a)(3)(A), and subparagraph (a)(3)(B) establish the requirements for the actor and the complainant when the complainant is a fictitious person—specifically, a law enforcement officer purporting to be a person under the age of 16 years.

For a "real," i.e. not fictitious complainant, paragraph (a)(2) requires that the actor "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to each element that follows the phrase until a culpable mental state is specified. In paragraph (a)(2), there is no culpable mental state requirement for the age of the actor or the required four year age gap with the complainant.

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[1] D.C. Code § 22-3010.

[2] D.C. Code § 22-1312 ("It is unlawful for a person to make an obscene or indecent sexual proposal to a minor.").

[3] D.C. Code § 22-3011.

[4] D.C. Code § 22-3012.

[5] D.C. Code § 22-3018.

[6] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised enticing a minor into sexual conduct statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.

[7] D.C. Code § 22-3020.

When an actor satisfies the requirements of paragraph (a)(2) (at least 18 years of age and at least four years older than the complainant), there are two alternative bases for liability. First, under subparagraph (a)(2)(A), there is liability if the actor is "reckless" as to the fact that the complainant is under 16 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 16 years of age. Second, and in the alternative, there is liability if the actor is "reckless" as to the fact that the complainant is under 18 years of age (sub-subparagraph (a)(2)(B)(i)) and the actor "knows" that he or she is in a "position of trust with or authority over" the complainant (sub-subparagraph (a)(2)(B)(ii)). "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 18 years of age. Knowledge is a defined term in RCC § 22E-206 that means the accused must be practically certain that he or she is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches.

Paragraph (a)(3) requires that the actor "in fact" is at least 18 years of age and at least four years older than the "purported age" of the complainant. "In fact" is a defined term in RCC § 22E-207 that means no culpable mental state is required for a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to each element that follows the phrase until another culpable mental state is specified. In paragraph (a)(3), there is no culpable mental state requirement for the age of the actor or the required age gap. Per subparagraph (a)(3)(A), the complainant must be a "law enforcement officer," as that term is defined in RCC § 22E-701, who purports to be a person under the age of 16 years. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" in paragraph (a)(3) applies to subparagraph (a)(3)(A) and there is no culpable mental state requirement for the fact that the complainant is a "law enforcement officer," as that term is defined in RCC § 22E-701, who purports to be a person under 16 years of age. Per subparagraph (a)(3)(B), the actor must be "reckless" as to the fact that the purported age of the complainant is under 16 years. "Reckless" is a defined term in RCC § 22E-206 that means the actor was aware of a substantial risk that purported age of the complainant was under 16 years of age. The references to the "purported age" of the complainant in paragraph (a)(3) and subparagraph (a)(3)(B), and the reference to the law enforcement officer "purport[ing]" to be a person under 16 years of age in subparagraph (a)(3)(A) do not require the law enforcement officer to state a specific age.

Subsection (b) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the sexual act or sexual contact. "Domestic partnership" is defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor and the complainant are, "in fact," in a marriage or domestic partnership at the time of the sexual act or sexual contact. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC.

Subsection (c) specifies the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised enticing a minor statute clearly changes current District law in eight main ways.*

First, the revised enticing statute no longer prohibits taking or attempting to take the complainant to a location for the purpose of committing a specified sex offense. The current D.C. Code enticing statute prohibits in D.C. Code § 22-3010(a)(1) "tak[ing] that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02,"; and in D.C. Code § 22-3010(b)(2) "attempt[ing] . . . to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact." The enticing provision in paragraph (a)(1) that prohibits taking a complainant overlaps with the current D.C. Code kidnapping statute, which has a significantly higher maximum penalty (30 years)[8] than the current enticing statute (5 years).[9] The scope of the provision in paragraph (b)(2) for attempting to entice, etc. a person that represents himself or herself to be a child to go to any place also is unclear.[10] In contrast, the RCC relies upon the RCC kidnapping offense (RCC § 22E-1401) to criminalize when the actor successfully takes the complainant to a location with the intent to commit a sex offense. When the actor attempts to entice, etc., a complainant to go to any place for the ultimate purpose of engaging in a sexual act or sexual contact provision, but is unsuccessful, that conduct is now criminalized as attempted kidnapping under the general RCC attempt statute (RCC § 22E-301). Any enticing conduct that fails to satisfy either the RCC kidnapping or RCC attempted kidnapping offenses may still result in liability for the RCC enticing offense if the defendant "command[ed], request[ed], or trie[d] to persuade the complainant" to engage in or submit to a sexual act or sexual contact. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised enticing statute requires a "reckless" culpable mental state for the age or purported age of the complainant. The current D.C. Code enticing a child statute[11] does not specify any culpable mental states and there is no DCCA case law on this issue. However, current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the age of the complainant, real or fictitious, in the current enticing statute.[12] In contrast, the revised enticing statute applies a "reckless" culpable mental

[8] D.C. Code § 22-2001.

[9] D.C. Code § 22-3010(a), (b).

[10] D.C. Code § 22-3010(b)(2) states: "Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts . . . (2) to entice, allure, convince, or persuade any person who represents himself or herself to be a child to go to any place for the purpose of engaging in a sexual act or contact . . . ."). It is unclear if the "attempt" provision is intended to include situations where the actor engages in persuading or enticing and is ultimately unsuccessful, or where the actor is prevented from engaging in enticing the complainant at all, or if the "attempt" language is limited to providing liability in situations when the complainant is an individual falsely representing to be under the age of 16 years.

[11] D.C. Code § 22-3010.

[12] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing

state to the age or purported age of the complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[13] and legal experts[14] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[15] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[16] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[17] A "reckless" culpable mental state in the revised enticing statute is consistent with the culpable mental state required in parts of the sexually suggestive conduct with a minor statute (RCC § 22E-1304), sexual abuse by exploitation statute (RCC § 22E-1303), and the nonconsensual sexual conduct statute (RCC § 22E-1307). This change improves the consistency and proportionality of the revised offense.

Third, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element. The

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statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error.

D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute is included.

[13] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[14] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[15] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")

[16] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[17] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

current D.C. Code enticing statute[18] does not specify any requirements for the age of the actor. DCCA case law does not address the point. In contrast, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict liability for this element. Requiring the actor to be 18 years of age or older ensures that the enticing offense is reserved for adults to who engage in predatory behavior of complainants under the age of 18 years.[19] While an actor presumably will know his or her own age, it is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[20] Requiring that the actor be 18 years of age or older and applying strict liability to this element also is consistent with this element in the revised sexually suggestive contact with a minor statute (RCC § 22E-1304), and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302). This change improves the consistency and proportionality of the revised offense.

Fourth, the revised enticing statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current enticing statute requires a four year age gap between the actor and a complainant under the age of 16 years,[21] but does not have an age gap requirement when the complainant is under the age of 18 years.[22] In contrast, the revised enticing statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[23] and the revised definition of "position of trust with or

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[18] D.C. Code §§ 22-3010(a), (b) ("Whoever, being at least four years older than a child, or being in a significant relationship with a minor" and "Whoever, being at least four years older than the purported age of a person who represents himself or herself to be a child."); 22-3001(3), (5A) (defining "child" as "a person who has not yet attained the age of 16 years" and "minor" as "a person who has not yet attained the age of 18 years.").

[19] For example, under the revised enticing statute, a 17 year old actor would not be guilty of enticing a 12 year old complainant to engage in sexual intercourse. However, depending on the facts of the case, the 17 year old could be guilty of attempted second degree sexual abuse of a minor (RCC § 22E-1302) and if sexual intercourse actually occurs, the 17 year old actor could be guilty of second degree sexual abuse of a minor unless there was a reasonable mistake of age defense.

[20] *See Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

[21] D.C. Code §§ 22-3010(a), (b); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[22] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining a "minor" as "a person who has not yet attained the age of 18 years."). The current arranging statute is limited to complainants under the age of 16 years and requires at least a four year age gap. D.C. Code §§ 22-3010.02(a); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[23] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other

authority over" (RCC § 22E-701) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[24] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[25] Strict liability for the age gap matches the current sexual abuse of a child statutes[26] and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22E-1302), and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised statute.

Fifth, the revised enticing statute limits the offense to fictitious complainants that are law enforcement officers. The current D.C. Code enticing statute applies to any fictitious complainant,[27] while the closely-related statute for arranging sexual conduct with a real or fictitious child is limited to fictitious complainants that are law enforcement officers.[28] The legislative history for the current D.C. Code arranging for sexual conduct with a minor statute states that the statute was limited to law enforcement officers because otherwise the statute could "enable mischief, such as blackmail, between adults where they are acting out fantasies with no real child involved or intended to involved (the thrill such as it is, being in the salacious banter)."[29] In contrast, the revised enticing

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religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[24] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, texts his 17 year old girlfriend that he wants to touch her buttocks may be guilty of enticing a minor under current District law.

[25] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22E-1305 provides that marriage is a defense to the revised enticing a minor into sexual conduct statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[26] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[27] D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child.").

[28] D.C. Code § 22-3010.02(a) ("For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.").

[29] Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary, Bill 18-963, the "Criminal Code Amendment Act" at 7 (internal quotation marks omitted) (quoting written testimony of Richard Gilbert, District of Columbia Association of Criminal Defense Lawyers). The current arranging contact statute was enacted in 2011 as part of the "Criminal Code Amendment Act of 2010, 2010 District of Columbia Laws 18-377 (Act 18-722)."

statute is limited to fictitious complainants who actually are law enforcement officers. The same legislative rationales that underlie the current arranging statute's limitation to fictitious persons who are really police officers also apply to enticement-type conduct. This change improves the consistency and proportionality of the revised offense.

Sixth, only the general penalty enhancements in subtitle I of the RCC apply to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[30] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[31] In contrast, the revised enticing statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[32] are not necessary in the revised enticing statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses.

Seventh, the revised enticing statute relies on the RCC general attempt statute to define what conduct constitutes an attempt and set the punishment for an attempt. The current D.C. Code enticing statute explicitly includes an attempt in the offense definition.[33] As is discussed elsewhere in this commentary, the scope of "attempt" in the current D.C. Code enticing statute is unclear, but the current statute treats an "attempt" to

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[30] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[31] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[32] However, an actor that merely possesses a dangerous weapon or a firearm while committing enticing, without using or displaying it, may face may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[33] D.C. Code § 22-3010.

commit enticing the same as the completed offense. The current D.C. Code enticing offense does not describe the elements necessary to prove an attempt, however, and there is no case law on point.[34] In contrast, in the RCC, an attempt to commit enticing is no longer punished the same as the completed offense. The RCC relies on the General Part's attempt provision (RCC § 22E-301) to describe the requirements to prove an attempt and set the penalty at ½ the maximum imprisonment sentence, consistent with other RCC sex offenses. This change improves the consistency and completeness of the revised sexual abuse of a minor offense.

Eighth, the revised enticing statute replaces the indecent sexual proposal to a minor offense in current D.C. Code § 22-1312 ("It is unlawful for a person to make an obscene or indecent sexual proposal to a minor."). The offense has a maximum term of imprisonment of 90 days.[35] The current D.C. Code indecent sexual proposal to a minor offense appears to overlap[36] with the prohibition in the current D.C. Code enticing a minor statute for enticing certain complainants under the age of 18 years to engage in a sexual act or sexual contact. The current D.C. Code enticing offense has a maximum term of imprisonment of five years.[37] In contrast, the revised enticing statute replaces the indecent sexual proposal to a minor offense in current D.C. Code § 22-1312. It is disproportionate to penalize the same conduct under a separate 90 day offense. To the extent that the current D.C. Code indecent sexual proposal to a minor offense does not overlap with the current D.C. Code enticing a minor offense, it may criminalize non-obscene speech to a minor in a content-based manner that raises both vagueness and First

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[34] In addition to the "attempt" language in the current enticing statute, the current enticing statute is subject to current D.C. Code § 22-3018, which provides an attempt penalty applicable to all current sex offenses, including enticing. D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense." It is unclear how the attempt statute in D.C. Code § 22-3018 applies to the current enticing statute, which includes an "attempt" in the definition of the offense.

[35] D.C. Code § 22-1312.

[36] The DCCA has not interpreted the current D.C. Code indecent sexual proposal to a minor offense. However, the DCCA did interpret an earlier, substantively similar, version of the offense that prohibited making "any lewd, obscene, or indecent sexual proposal." The DCCA stated that in this earlier version, a "sexual proposal . . . connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.... [G]iven the nature of the common law offense of solicitation, it is appropriate to construe the sexual proposal clause . . . as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime." *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *District of Columbia v. Garcia*, 335 A.2d 217, 219 (D.C. 1975)).

It seems likely that the DCCA would similarly interpret the prohibition in current D.C. Code § 22-1312 on making "an obscene or indecent sexual proposal" to a minor as limited to solicitations to commit lewd, obscene or indecent sexual acts which if accomplished would be punishable as a crime. The earlier version of the offense differed from the current D.C. Code version of the offense only in that it: 1) included "any lewd, obscene, or indecent sexual proposal," as opposed to any "obscene or indecent sexual proposal" in the current D.C. Code offense; and 2) did not require that the proposal be "to a minor" like the current D.C. Code offense Under this interpretation, there is substantial overlap with the current D.C. Code enticing a minor statute, which prohibits soliciting certain minors to engage in a "sexual act" or "sexual contact."

[37] D.C. Code § 22-1310(a).

Amendment issues. This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these eight changes to current District law, five other aspects of the revised statute may constitute substantive changes to current District law.

First, the RCC enticing statute prohibits the conduct: "commands, requests, or tries to persuade the complainant" instead of relying on references to attempts. The current D.C. Code enticing statute prohibits, in D.C. Code § 22-3010(a)(2) "attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact," and in D.C. Code § 22-3010(b)(1) "attempts . . . to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact." There is no DCCA case law interpreting this language and the scope of "attempts" to "seduce, entice, allure, convince, or persuade" is unclear.[38] Resolving this ambiguity, the revised enticing statute requires "commands, requests, or tries to persuade the complainant." With this change, the revised enticing statute uses language identical to the RCC solicitation statute (RCC § 22E-302), and the RCC enticing statute differs from solicitation liability primarily in the required culpable mental state—enticing requires "knowingly" and solicitation requires "purposely." This change rephrases "attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact" in the current enticing statute as "tries to persuade" in the revised offense. To the extent the language in the current D.C. Code enticing statute prohibits an actor knowingly enticing a complainant when the actor is ultimately unsuccessful in persuading the complainant, this remains criminalized as a completed offense under the "tries to persuade" language of the revised statute. However, to the extent that the current D.C. Code enticing statute's "attempts" provision includes in the completed enticing offense conduct that is not covered by the "tries to persuade" language of the revised offense, there would remain liability for attempted enticing under the RCC attempt offense. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised enticing statute requires a "knowingly" culpable mental state for commanding, requesting, or trying to persuade. The current enticing statute does not specify any culpable mental states, and there is no DCCA case law on this issue. The revised enticing statute resolves these ambiguities by requiring a "knowingly" culpable mental state for commanding, requesting, or trying to persuade. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make

[38] Paragraph (a)(2) of the current enticing statute is for a "real," i.e. not fictitious minor, and has "attempt" language. D.C. Code § 22-3010(a)(2) ("(a) Whoever, being at least 4 years older than a child or being in a significant relationship with a minor . . . (2) seduces, entices, allures, convinces, or persuades or attempts to seduce, entice, allure, convince, or persuade a child or minor to engage in a sexual act or contact."). Paragraph (b)(1) of the current enticing statute is for a "fake" minor, i.e. an individual that "represents himself or herself to be a child," and also has "attempt" language. It is unclear if the "attempt" provisions are intended to include situations where the actor engages in persuading or enticing, but is prevented from engaging in enticing the complainant at all, or if the "attempt" language is limited to providing liability in situations when the complainant is an individual falsely representing to be under the age of 16 years.

otherwise legal conduct illegal is a generally accepted legal principle.[39] This change improves the clarity and consistency of the revised statutes.

Third, the revised enticing statute consistently requires that the actor commands, requests, or tries to persuade the complainant "to engage in or submit to a sexual act or sexual contact." While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[40] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[41] In addition to case law, District practice does not appear to follow the variations in statutory language.[42] Instead of these variations in language, the revised sex offenses consistently require that the actor "engages" in a sexual act or sexual contact with the complainant or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Given the unique requirements of the revised enticing statute, it requires that the actor commands, requests, or tries to persuade the complainant "to engage in or submit to" the sexual act or sexual

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[39] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[40] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[41] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[42] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

contact. The language clearly establishes that the actor is liable for commanding, requesting, or trying to persuade the complainant to engage in or submit to a sexual act or sexual contact with the actor, with a third party, or with the complainant. Differentiating liability based on whether an actor entices the complainant to engage in the sexual conduct with the actor, or whether the actor entices the complainant to engage in or submit to the sexual conduct with the complainant or a third party, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Fourth, the revised enticing statute requires a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. The current enticing statute requires that the actor be "in a significant relationship with a minor,"[43] but it does not specify a culpable mental state and there is no DCCA case law for this issue. The revised enticing statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[44] This change improves the clarity and consistency of the revised statute.

Fifth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the revised enticing statute may differ as compared to the current enticing statute. The current enticing statute requires that the actor be in a "significant relationship" with the complainant[45] and "significant relationship" is defined in D.C. Code § 22-3001.[46] The current definition of "significant relationship" is open-ended and defines "significant relationship" as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[47] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority over" is discussed in detail in the

[43] D.C. Code §§ 22-3010; 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").
[44] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[45] D.C. Code § 22-3010.01(a).
[46] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").
[47] D.C. Code § 22-3001(10).

commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised enticing statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[48] and sexual abuse of a minor, for complainants under the age of 18 years.[49] The current enticing statute[50] makes the same distinctions. For clarification, the revised enticing statute specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[51] These changes improve the clarity and consistency of the revised statute.

Second, the revised enticing statute, by use of the phrase "in fact," requires strict liability for the age gap between the actor and complainants under the age of 16 years, or the purported age gap between the actor and a complainant that is a law enforcement officer. Current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the required age gap between the actor and a complainant, real or fictitious, under the age of 16 years in the current enticing statute.[52] For clarification, the revised enticing statute uses the phrase "in fact," establishing strict liability as to the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[53] Strict liability for the required age

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[48] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[49] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

[50] D.C. Code § 22-3010.

[51] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

[52] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error. However, D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute was meant to be included in D.C. Code § 22-3011.

[53] *See Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea

gap also is consistent with the revised sexual abuse of a minor statute (RCC § 22E-1302) and the revised sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the clarity and consistency of the revised offense.

Third, the marriage and domestic partnership defense in the revised enticing statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to enticing "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[54] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[55] The marriage or domestic partnership defense in the revised enticing statute applies only to prosecution for the revised enticing offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses. Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22E-301 to the completed offenses.[56] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised enticing offense.

Fourth, the marriage and domestic partnership defense in the revised enticing statute makes two clarificatory changes to the current defense.[57] First, the revised marriage and domestic partnership defense replaces "at the time of the offense" with "at the time of the sexual act or sexual contact." Referring to marriage or domestic partnership at the time of the sexual act or sexual contact improves the clarity and consistency of the revised statute. Second, the revised marriage and domestic partnership statute, by use of the phrase "in fact," applies strict liability to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. The current marriage or domestic partnership statute does not specify a culpable mental state for this requirement, and doing so improves the clarity and consistency of the revised statute.

Fifth, the revised enticing statute does not codify a separate provision stating that consent is not a defense. The current sexual abuse statutes specify that "consent is not a

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which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

[54] D.C. Code § 22-3011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[55] D.C. Crim. Jur. Instr. § 9.700.

[56] *See* Commentary to RCC § 22E-1202 (revised assault statute).

[57] D.C. Code § 22-3011(b).

defense" for the current enticing statute.[58] However, nothing in the RCC enticing statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. Deleting the current prohibition on consent as a defense is not intended to change current District law.

[58] D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."). The current enticing statute is codified at D.C. Code §§ 22-3010 and falls within the specified range of statutes in D.C. Code § 22-3011(a).

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

Explanatory Note. *The RCC arranging for sexual conduct with a minor or person incapable of consenting offense ("revised arranging for sexual conduct" offense) prohibits an actor with a responsibility under civil law for the health, welfare, or supervision of the complainant from knowingly giving effective consent to a third party to engage in sexual activity with the complainant in specific situations. Because of the unique duty of care such actors have, the offense extends liability beyond other RCC offenses that provide more severe penalties for criminally soliciting, attempting, or being an accomplice to a sex offense involving the complainant. The offense applies to specified complainants that are under the age of 18 years or to complainants of any age that satisfy the offense requirements for incapacitation or intoxication. The offense has a single penalty gradation. The revised arranging for sexual conduct offense replaces the current arranging for a sexual contact with a real or fictitious child statute.[1] The revised arranging for sexual conduct offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the attempt statute,[2] the limitation on prosecutorial immunity,[3] and the aggravating sentencing factors.[4]*

Subsection (a) specifies the prohibited conduct for the revised arranging for sexual conduct offense. Subparagraph (a)(1)(A) specifies the first requirement for the revised offense—the actor must have a "responsibility under civil law for the health, welfare, or supervision of the complainant."[5] Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state applies to the elements in subparagraph (a)(1)(A). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant."

Subparagraph (a)(1)(B) and sub-subparagraphs (a)(1)(B)(i) and (a)(1)(B)(ii) specify the two alternate types of prohibited conduct for the revised offense. First, per subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(i), the actor must give effective consent to a third party to engage in or submit to a sexual act or sexual contact with or for[6] the complainant. "Effective consent, "sexual act," and "sexual contact" are defined terms in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the

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[1] D.C. Code § 22-3010.02.

[2] D.C. Code § 22-3018.

[3] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised arranging for sexual conduct with a minor person incapable of consenting statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.

[4] D.C. Code § 22-3020.

[5] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

[6] The words "or for" clarify that the offense includes the third party engaging in masturbatory conduct for the complainant.

"knowingly" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(i). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that the actor gives effective consent to a third party to engage in or submit to a sexual act or sexual contact with or for the complainant.

Subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(ii) specify the alternate type of prohibited conduct in the revised arranging for sexual conduct statute—the actor must give effective consent to a third party to cause the complainant to engage in or submit to a sexual act or sexual contact with or for[7] the third party or any other person. "Effective consent, "sexual act," and "sexual contact" are defined terms in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(B) and sub-subparagraph (a)(1)(B)(ii). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must give effective consent to a third party to cause the complainant to engage in or submit to a sexual act or sexual contact with or for the third party or any other person.

Paragraph (a)(2) and its subparagraphs and sub-subparagraphs specify the various alternate requirements for the complainant in the revised arranging for sexual conduct statute. The requirements under subparagraph (a)(2)(A) and subparagraph (a)(2)(B) ensure that the complainant and the third party or the complainant and another person satisfy the age, age gap, and relationship requirements in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Subparagraph (a)(2)(A) and sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii) specify the requirements when the complainant is under 16 years of age. Per the rule of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in subparagraph (a)(2)(A) applies to all the elements in sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii). Under subparagraph (a)(2)(A) and sub-subparagraph (a)(2)(A)(i), the actor must be reckless as to the fact that the complainant is under 16 years of age. Under subparagraph (a)(2)(A) and sub-subparagraph (a)(2)(A)(ii), the actor must also be reckless as to the fact that the third party or any other person is at last four years older than the complainant. "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is under 16 years of age and that the third party or other person is at least four years older than the complainant.

Subparagraph (a)(2)(B) and its sub-subparagraphs specify requirements when the complainant is under the age of 18 years. Subparagraph (a)(2)(B), sub-subparagraph (a)(2)(B)(i), sub-subparagraph (a)(2)(B)(i)(a), and sub-subparagraph (a)(2)(B)(b) require that the complainant is under 18 years of age and that the third party or other person is at least 18 years of age and at least four years older than the complainant. Per the rule of interpretation in RCC § 22E-207, the "reckless" culpable mental state in sub-subparagraph (a)(2)(B)(i) applies to the elements in sub-subparagraph (a)(2)(B)(i)(a) and sub-subparagraph (a)(2)(B)(i)(b). "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is under 18 years of age and that the third party or other person is at least 18 years of age and at least

[7] The words "or for" clarify that the offense includes the complainant engaging in masturbatory conduct for the a third party or any other person.

four years older than the complainant. Sub-subparagraph (a)(2)(B)(ii) further requires that the actor knows that the third party or other person is in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22E-701 that includes individuals such as parents, siblings, school employees, and coaches. "Knows" is a defined term in RCC § 22E-206 that here means the actor is practically certain that the third party or other person is in a position of trust with or authority over the complainant.

Subparagraph (a)(2)(C) and its sub-subparagraphs specify the requirements when the complainant is incapacitated. Subparagraph (a)(2)(C) and sub-subparagraph (a)(2)(C)(i) require that the actor is reckless as to the fact that the complainant is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Per the rules of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (a)(2)(C) applies to the elements in sub-subparagraph (a)(2)(C)(i). "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is the complainant is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.

Subparagraph (a)(2)(C) and sub-subparagraph (a)(2)(C)(ii) require that the actor is reckless as to the fact that the complainant is incapable of communicating[8] willingness or unwillingness to engage in the sexual act or sexual contact. Sub-subparagraph (a)(2)(C)(ii) includes paralyzed individuals who are able to appraise the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent under sub-subparagraph (a)(2)(C)(i), but are unable to communicate. Per the rules of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (a)(2)(C) applies to the elements in sub-subparagraph (a)(2)(C)(ii). "Reckless" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the complainant is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact.

Subsection (b) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised arranging for sexual conduct with a minor or person incapable of consenting statute clearly changes current District law in seven main ways.*

First, the revised arranging for sexual conduct statute is limited to actors who are responsible under civil law for the health, welfare, or supervision of the complainant.

[8] If the complainant is unable to communicate verbally or orally, but is able to make gestures, facial expressions, or engage in other conduct, the person may be capable of communicating and this element may not be satisfied.

The current D.C. Code arranging for a sexual contact statute prohibits any person from either directly "engag[ing] in a sexual act or sexual contact with an individual…represented to be a child…" or indirectly "arrang[ing] for another person to engage in a sexual act or sexual contact" with such an individual.[9] In contrast, the revised arranging for sexual conduct statute applies only when the actor is a parent or other person with a responsibility under civil law for the health, welfare, or supervision of the complainant and misuses their authority by giving effective consent to a third party to engage in specified sexual activity. A person who seeks to directly engage in sexual activity with a minor complainant would face more serious and proportionate liability for an attempted RCC sex offense under the RCC criminal attempt provision (RCC § 22E-301) or the RCC criminal solicitation statute (RCC § 22E-302) and, if the sexual activity takes place, liability for the completed offense. This change reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised statutes.

Second, the revised arranging for sexual conduct statute prohibits giving effective consent to sexual activity rather than "arrang[ing]" sexual activity with the complainant. The current D.C. Code arranging for a sexual contact statute prohibits, in relevant part, the actor "arrangi[ng] to engage in a sexual act or sexual contact with the complainant."[10] The term "arrange" is not statutorily defined and there is no DCCA case law interpreting it. In contrast, the revised arranging for sexual conduct statute requires that the actor "give[] effective consent to a third party" to engage in or cause sexual activity with the complainant. The agreement by the actor may be indicated in many ways,[11] and does not require any particular logistical arrangements or details. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised arranging for sexual conduct statute replaces the various age requirements for a minor complainant and any third party in the current D.C. Code arranging statute with the requirements that: 1) the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant"; and 2) that the consented-to sexual activity would violate, or does violate, the RCC sexual abuse of a minor statute. The current D.C. Code arranging statute requires, in relevant part, that the complainant be under the age of 16 years,[12] but it is unclear whether a four year age gap is required between the actor and the complainant, as well as between the complainant and any third party with whom the sexual conduct is arranged.[13] There is no DCCA case law on this issue. There is also no liability in the current D.C. Code arranging statute

[9] D.C. Code § 22-3010.02(a).
[10] D.C. Code § 22-3010.02(a).
[11] *See* RCC § 22E-701 (defining "consent" in relevant part as "a word or act that indicates explicitly or implicitly, agreement to particular conduct or a particular result").
[12] Current D.C. Code § 22-3001 defines "child" for the current D.C. Code sexual abuse statutes, including the arranging statute, as "a person who has not yet attained the age of 16 years." D.C. Code § 22-3001(3).
[13] The ambiguity arises from the multiple references to a "person" in the current arranging statute. D.C. Code § 22-3010.02(a) ("It is unlawful *for a person* to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger *than the person*.") (emphasis added).

when the complainant is 16 years of age or older, but under the age of 18 years, which is inconsistent with other current D.C. Code sex offenses.[14] In contrast, the revised arranging for sexual conduct statute requires that the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and that the consented-to sexual activity would violate the RCC sexual abuse of a minor statute. Such an actor has a heightened duty of care, which justifies the comparatively low culpable mental state of "knowingly" and the less stringent requirements for liability in the RCC arranging for sexual conduct statute as compared to the RCC general provisions for inchoate liability, such as the RCC soliciting provision (RCC § 22E-302) or accomplice liability (RCC § 22E-210). The phrase a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is used consistently throughout the RCC. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised arranging for sexual conduct statute applies a culpable mental state of "reckless" as to the age of the complainant. The current D.C. Code arranging statute does not specify any culpable mental states[15] and there is no DCCA case law on this issue. In contrast, the revised arranging for sexual conduct statute applies a "reckless" culpable mental state to the age of the complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[16] and legal experts[17] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[18] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[19] However, recklessness has been upheld in some

[14] For example, the current D.C. Code, closely-related enticing a child statute includes "real" complainants under the age of 18 years when the actor is in a "significant relationship" with the complainant. D.C. Code §§ 22-3010(a); 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").
[15] D.C. Code § 22-3010.02.
[16] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").
[17] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).
[18] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e. consensual intercourse by a male with an underage female.")
[19] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

cases as a minimal basis for punishing morally culpable crime.[20] A "reckless" culpable mental state for the age of the complainant in the revised arranging for sexual conduct statute is consistent with the culpable mental state for the age of certain complainants in the sexual abuse by exploitation statute (RCC § 22E-1303), the sexually suggestive conduct with a minor statute (RCC § 22E-1304), and the enticing a minor into sexual conduct statute (RCC § 22E-1305). This change improves the consistency and proportionality of the revised offense.

Fifth, the revised arranging for sexual conduct statute no longer specifically applies when the "arrangement is done with or by a law enforcement officer." The current D.C. Code arranging statute states that it is unlawful for a "person" to arrange to engage in a sexual act or sexual contact "with an individual (whether real or fictitious) . . . who is represented to be a child at least 4 years younger than the person" or "to arrange for another person" to engage in a sexual act or sexual contact "with an individual (whether real or fictitious) . . . who is represented to be a child at least 4 years younger than the person."[21] This statutory language seems to limit the role of a fictitious person to the complainant, but the current statute further provides that "arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer."[22] There is no DCCA case law interpreting the provisions in the current D.C. Code arranging statute for fictitious complainants. In contrast, the revised arranging for sexual conduct statute is limited to real complainants described in paragraph (a)(2) and real actors that are responsible under civil law for them, although in instances where the circumstances are not as the actor perceives them to be there may be attempt liability.[23] The revised arranging for sexual conduct statute is limited to such an actor "knowingly" giving effective consent to a third party, who may or may not be an undercover law enforcement officer or other person. The RCC enticing a minor into sexual conduct statute (RCC § 22E-1305) specifically includes law enforcement officers that purport to be a complainant under the age of 16 years, which is proportionate given that the offense requires that the actor must entice the minor. This change improves the clarity and consistency of the revised statute.

Sixth, the revised arranging for sexual conduct statute prohibits giving effective consent to a third party to engage in sexual activity with an incapacitated complainant or to cause an incapacitated complainant to engage in sexual activity. The current D.C. Code arranging statute is limited to certain complainants under the age of 16 years[24] and

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[20] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[21] D.C. Code § 22-3010.02(a).

[22] D.C. Code § 22-3010.02(a).

[23] RCC § 22E-301.

[24] D.C. Code §§ 22-3010.02(a) (" It is unlawful for a person to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person. For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer."); 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

there is no current D.C. Code offense that specifically prohibits arranging for sexual activity with incapacitated complainants. In contrast, the RCC arranging for sexual conduct statute prohibits giving effective consent to a third party to engage in sexual activity with an incapacitated complainant or to cause an incapacitated complainant to engage in sexual activity. The language in sub-subparagraphs (2)(C)(i) and (2)(C)(ii) of the revised statute is identical to requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301). Without such a provision in the RCC, an actor that is civilly responsible for such an incapacitated complainant that "knowingly" gives effective consent to a third party to engage in or cause sexual activity with that incapacitated complainant would not have liability unless there were a harm or risk of harm that satisfies the RCC criminal abuse of a minor (RCC § 22E-1501), RCC criminal neglect of a minor (RCC § 22E-1502), RCC criminal abuse of a vulnerable adult or elderly person (RCC § 22E-1503), or RCC criminal neglect of a vulnerable adult or elderly person statute (RCC § 22E-1504). An actor that "purposely" engages in this conduct may have liability under an RCC inchoate offense such as solicitation (RCC § 22E-302), but providing liability in the RCC arranging statute when there is a lower culpable mental state of "knowingly" is proportionate given that the actor must have a responsibility under civil law for the complainant's health, welfare, or supervision. This change improves the clarity, consistency, and proportionality of the revised statute, and removes a possible gap in liability.

Seventh, only the general penalty enhancements in subtitle I of the RCC apply to the revised arranging for sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current D.C. Code sex offense statutes.[25] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[26] In contrast, the revised

[25] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[26] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C.

arranging for sexual conduct statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[27] are not necessary in the arranging statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. This change improves the consistency and proportionality of the revised sex offenses.

Beyond these seven changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised arranging for sexual conduct statute requires a "knowingly" culpable mental state for the actor being a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and for giving effective consent to a third party to engage in sexual activity with the complainant or to cause the complainant to engage in sexual activity. The current D.C. Code arranging statute[28] does not specify any culpable mental state and there is no DCCA case law on this issue. The revised arranging for sexual conduct statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the actor being a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and for giving the required effective consent. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[29] This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised arranging for sexual conduct statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[30] Under the statute, if the maximum term of imprisonment for the underlying

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2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[27] However, an actor that merely possesses a dangerous weapon or a firearm while committing the revised arranging for sexual conduct offense, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[28] D.C. Code § 22-3010.02.

[29] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[30] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

offense is life, an attempt has a maximum term of imprisonment of 15 years.[31] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[32] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[33] In the revised arranging for sexual conduct statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties for the arranging offense, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised arranging for sexual conduct offense.

Second, the revised arranging for sexual conduct statute codifies as a discrete basis of liability giving effective consent to a third party to "cause the complainant to engage in or submit to a sexual act or sexual contact with or for a third party." The current D.C. Code arranging for a sexual contact statute prohibits, in relevant part, the actor "arrangi[ng] for another person to engage in a sexual act or sexual contact" with the complainant.[34] The term "arrange" is not statutorily defined and there is no DCCA case law interpreting it. The revised language is consistent with the other RCC sex offenses that prohibit causing the complainant to engage in or submit to conduct. This change improve the clarity of the revised statutes.

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[31] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[32] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[33] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current arranging statute would have a maximum term of imprisonment of 180 days.

[34] D.C. Code § 22-3010.02(a) ("It is unlawful for a person . . . to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger than the person.").

RCC § 22E-1307. Nonconsensual Sexual Conduct.

Explanatory Note. *The RCC nonconsensual sexual conduct offense prohibits engaging in a sexual act or sexual contact with the complainant or causing a complainant to engage in or submit to a sexual act or sexual contact without the complainant's effective consent. The penalty gradations are based on the nature of the sexual conduct. The revised nonconsensual sexual conduct offense replaces the current misdemeanor sexual abuse statute.[1] The revised nonconsensual sexual conduct offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the consent defense,[2] the attempt statute,[3] the limitation on prosecutorial immunity,[4] and the aggravating sentencing factors.[5]*

Subsection (a) specifies the prohibited conduct for first degree nonconsensual sexual conduct. Paragraph (a)(1) requires that the actor engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that his or her conduct will engage in a "sexual act" with the complainant or cause the complainant to engage in or submit to a "sexual act." Paragraph (a)(2) requires that the actor be "reckless" as to the fact that the actor lacks the complainant's "effective consent." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor lacks the complainant's effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Subsection (b) specifies the prohibited conduct for second degree nonconsensual sexual conduct. Paragraph (b)(1) requires that the actor engage in a "sexual contact" with the complainant or cause the complainant to engage in or submit to a "sexual contact." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person. Paragraph (b)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be practically certain that he or she engages in a "sexual contact" with the complainant or cause the complainant to engage in or submit to a "sexual contact." Paragraph (b)(2) requires that the actor be "reckless" as to the fact that the actor lacks the complainant's "effective consent." "Recklessly" is a defined term

[1] D.C. Code § 22-3006.
[2] D.C. Code § 22-3007.
[3] D.C. Code § 22-3018.
[4] D.C. Code § 22-3019 ("No actor is immune from prosecution under any section of this subchapter because of marriage, domestic partnership, or cohabitation with the victim; provided, that marriage or the domestic partnership of the parties may be asserted as an affirmative defense in prosecution under this subchapter where it is expressly so provided."). The revised nonconsensual sexual conduct statute and other RCC Chapter 13 statutes each account for liability changes based on marriage or domestic partnership in the plain language of the statutes and D.C. Code 22-3019 is deleted as unnecessary.
[5] D.C. Code § 22-3020.

in RCC § 22E-206 that here means the actor must be aware of a substantial risk that the actor lacks the complainant's effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Subsection (c) excludes from liability an actor's use of deception unless it is deception as to the nature[6] of the sexual act or sexual contact. Under the exclusion, there is no liability for deception that induces[7] the complainant to consent, notwithstanding the fact that such deception may negate the complainant's effective consent as is required for liability. "Deception" is a defined term in RCC § 22E-701. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here that the actor used to deception, unless it was deception as to the nature of the sexual act or sexual contact.

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised nonconsensual sexual conduct statute clearly changes current District law in six main ways.*

First, the revised nonconsensual sexual conduct statute is comprised of two gradations, based on whether a "sexual act" or "sexual contact" was committed. The current D.C. Code misdemeanor sexual abuse (MSA) statute prohibits committing either a "sexual act" or "sexual contact" without distinction in penalty, with both types of conduct subject to the same maximum imprisonment of 180 days.[8] In contrast, first degree of the nonconsensual sexual conduct statute prohibits a "sexual act" without effective consent and second degree prohibits "sexual contact" without effective consent. Differentiating the penalties for a "sexual act" and "sexual contact" is consistent with the

[6] Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to the object or body part that is used to penetrate the other person and deceptions as to a person's health status (e.g., having a sexually transmitted disease). In addition, deception as to the nature of the sexual act or sexual contact includes a practice known as "stealthing," generally understood as removing a condom without the consent of the sexual partner. *See, e.g.*, https://www.newsweek.com/what-stealthing-lawmakers-california-and-wisconsin-want-answer-be-rape-61098. In the RCC, "stealthing" is sufficient for nonconsensual sexual conduct if the other requirements of the offense are met. Similar acts may be committed despite the gender of the actor. It should be noted that in addition to liability for nonconsensual sexual conduct, deception as to the nature of the sexual act or sexual contact that results in a sexually transmitted disease may by sufficient for assault liability (RCC § 22E-1202).
In addition to the RCC nonconsensual sexual conduct offense, the RCC sexual abuse by exploitation statute (RCC § 22E-1303) specifically prohibits a sexual act or sexual contact when the actor falsely represents that he or she is someone else with whom the complainant is in a romantic, dating, or sexual relationship. This particular form of deception is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense may prohibit.

[7] Examples of deception to induce a sexual act or sexual contact include: a false statement about one's feelings for the complainant; a false assertion that one is a celebrity; and a false promise to perform a future action in return for the sexual conduct.

[8] D.C. Code § 22-3006.

grading in other current D.C. Code and RCC sex offenses.[9] This change improves the consistency and proportionality of the revised offense.

Second, the second degree of the revised nonconsensual sexual conduct statute partially replaces non-violent sexual touching forms of assault. The District's current assault offense, D.C. Code § 22-404, does not specifically refer to nonconsensual sexual touching. However the DCCA has held that a simple assault per D.C. Code § 22-404(a)(1) includes non-violent sexual touching,[10] and that such an assault is a lesser included offense of the current MSA statute.[11] DCCA case law also suggests that a simple assault in D.C. Code § 22-404(a)(1) also likely requires a culpable mental state of recklessness.[12] In contrast, in the RCC, second degree nonconsensual sexual conduct

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[9] The other current sexual abuse statutes grade offenses involving a "sexual act" more severely than offense involving a "sexual contact." *Compare* D.C. Code §§ 22-3002, 22-3003, 22-3008, 22-3009.01, 22-3013, 22-3015 (first degree sexual abuse offenses prohibiting a "sexual act") *with* §§ 22-3004, 22-3006, 22-3009, 22-3009.02, 22-3014, 22-3016 (second degree sexual abuse offenses prohibiting "sexual contact.").

[10] The District's current assault statute does not state the elements of the offense. D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both."). DCCA case law, however, recognizes that assault includes non-violent touching. "Where the assault involves a nonviolent sexual touching the court has held that there is an assault . . . because 'the sexual nature [of the conduct] suppl[ies] the element of violence or threat of violence.'" *Matter of A.B.*, 556 A.2d 645, 646 (D.C. 1989) (quoting *Goudy v. United States*, 495 A.2d 744, 746 (D.C.1985), *modified*, 505 A.2d 461 (D.C.), *cert. denied*, 479 U.S. 832, 107 S.Ct. 120, 93 L.Ed.2d 66 (1986)). The DCCA has stated that the elements of non-violent sexual touching assault are: 1) That the defendant committed a sexual touching on another person; 2) That when the defendant committed the touching, s/he acted voluntarily, on purpose and not by mistake or accident; and 3) That the other person did not consent to being touched by the defendant in that matter. *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (quoting Criminal Jury Instructions for the District of Columbia, No. 4.06(C) (4th ed.1993)); *see also Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020). "Touching another's body in a place that would cause fear, shame, humiliation or mental anguish in a person of reasonable sensibility, if done without consent, constitutes sexual touching." *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) (citations omitted). "The government need not prove that the victim actually suffered anger, fear, or humiliation." *Mungo*, 772 A.2d at 246 (citations omitted).

[11] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act."). However, the sexual conduct at issue in *Mungo* was a "sexual contact." *Mungo*, 772 A.2d at 242. Consequently, the *Mungo* decision that non-consensual sexual touching forms of assault are a lesser included of MSA may only be *dicta* with respect to sexual acts, even though the DCCA's holding in *Mungo* did not differentiate between an MSA conviction based on a "sexual act" and an MSA conviction based on "sexual contact." *Id.* at 246 ("[W]e conclude that non-violent sexual touching assault is a lesser included offense" of MSA). Instead, the court was focused on the parts of the current definitions of "sexual act" and "sexual contact" that require an extra intent to gratify or arouse that simple assault does not. *Id.* ("When prosecuting MSA based on an alleged sexual contact or an alleged sexual act [based on subsection (C) of the current definition], the government must therefore prove an element of intent, i.e. the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[12] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667,

generally replaces the non-violent sexual touching form of assault, although, depending on the facts, a non-consensual sexual touching may satisfy the elements of more serious RCC sex offenses[13] or the comparatively less serious sexually suggestive conduct with a minor offense (RCC § 22E-1304).[14] The RCC offensive physical contact offense (RCC § 22E-1205) provides even more general liability for offensive touching (regardless whether there is a sexual intent).[15] The RCC abolishes common law non-violent sexual touching assault that is currently recognized in DCCA case law.[16] This change reduces unnecessary overlap between offenses and improves the proportionality and consistency of the revised offense.

Third, the revised nonconsensual sexual conduct offense requires a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The current MSA statute requires that an actor "should have knowledge or reason to know that the act was committed without that other person's permission."[17] There is no case law describing the meaning of these mental state terms.[18] However,

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668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient, *see Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013), and, in the context of intent-to-frighten assault, has suggested that a higher culpable mental state than recklessness is required. *See Powell v. United States*, 238 A.3d 954, 959 (D.C. 2020) ("Our additional concern is whether the evidence proved that appellant had the *mens rea* required for intent-to-frighten assault: a 'purposeful design ... to engender fear' or 'create apprehension.') (quoting *Parks v. United States*, 627 A.2d 1, 5 (D.C. 1993); *id.* at 959 ("For similar reasons, we conclude that the evidence was insufficient for conviction even if we assume *arguendo* that the *mens rea* for intent-to-frighten assault can be satisfied by evidence of recklessness.").

[13] For example, a non-consensual sexual touching of a person who is unconscious may constitute fourth degree sexual assault in the RCC.

[14] The RCC sexually suggestive conduct with a minor statute prohibits various types of sexual touching that do not satisfy the RCC definitions of "sexual act" or "sexual contact" and is limited to certain complainants under the age of 18 years.

[15] However, the general merger provision in RCC § 22E-214 would likely prohibit an actor from receiving a conviction for both offensive physical contact and nonconsensual sexual conduct based on the same course of conduct, which would be consistent with current case law on assault and MSA. *See, e.g.*, *Mattete v. United States*, 902 A.2d 113, 117-18 (D.C. 2006) (agreeing with appellant and the government that appellant's assault conviction merges into the conviction for MSA and remanding the case to the trial court for the purpose of vacating the assault conviction).

[16] *See, e.g.*, *Augustin v. United States*, No. 17-CF-906, 2020 WL 6325889 (D.C. Oct. 29, 2020).

[17] D.C. Code § 22-3006.

[18] The current "should have knowledge or reason to know" language may suggest a culpable mental state akin to negligence. However, negligence is disfavored as a basis for criminal liability. *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States,* 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"). In addition, with respect to the similar phrase "knowing or having reason to believe" in the District's current receiving stolen property offense, D.C. Code § 22-3232, the DCCA held that the culpable mental state still required a subjective awareness by the defendant as to the offense element. *See Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury

District case law[19] and District practice[20] have consistently construed the culpable mental state regarding the lack of permission in the current MSA statute as "know or should have known," without discussion of the discrepancy with the statutory language. In contrast, the RCC nonconsensual sexual conduct offense requires a "recklessly" culpable mental state as to the lack of effective consent. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[21] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[22] It would be disproportionate to allow a conviction, particularly a felony conviction that requires sex offender registry, on the basis of negligence. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the revised nonconsensual sexual conduct offense requires proof that the actor lacked "effective consent" and does not provide for a separate consent defense. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission."[23] "Permission," unlike "consent,"[24] is undefined in the

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instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge"). However, in *Coleman v. United States*, the DCCA recently held that in the District's stalking statute, a culpable mental state of "should have known" is an "objective standard" that allows for a stalking conviction "based on what an objectively reasonable person would have known." *Coleman v. United States*, 202 A.3d 1127, 1143, 1144 (D.C. 2019). In *Coleman*, the DCCA distinguished the *Owens* opinion as "merely reflect[ing] courts' longstanding reluctance to read a negligence standard into a criminal statute in the absence of a 'clear statement from the legislature.'" *Coleman*, 202 A.2d at 1143 (internal citations omitted). The DCCA stated that the "should have known" language in the current stalking statute represents "the type of clear legislative statement not present in *Owens*." *Id.* at 1143-1144.

It should be noted, however, that the current mental state language in the MSA statute does not fit neatly into either category of mental state discussed in *Owens* ("reason to believe") or *Coleman* ("should have known."). The current MSA statute requires "*should* have knowledge or reason to know that the act was committed without that other person's permission.

[19] *See, e.g.*, *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001) (stating that the "essential elements" of MSA are "(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact.") (citing the Criminal Jury Instructions for the District of Columbia, No. 460A (4th ed. 1993 & Supp. 1996)); *Harkins v. United States*, 810 A.2d 895, 900 (D.C. 2002) (stating that MSA "occurs when an individual 'engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission," citing the MSA statute, but also stating that "there are two essential elements to [MSA]: "'(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact." (quoting *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)).

[20] D.C. Crim. Jur. Instr.§ 4.400 at 4-116 (jury instruction stating the culpable mental state in the MSA statute as "knew or should have known.")

[21] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[22] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[23] D.C. Code § 22-3006.

[24] D.C. Code § 22-3001(4) ("'Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

current sexual abuse statutes. DCCA case law has not specifically addressed the definition of "permission," although it has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.[25] The current MSA statute, however, is subject to the same consent defense applicable to other sexual abuse statutes.[26] In contrast, the nonconsensual sexual conduct offense requires proof of lack of "effective consent" and eliminates the consent defense for the MSA statute. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" appears to be consistent with the current definition of "consent" for sex abuse offenses.[27] Elimination of a separate consent defense to the RCC nonconsensual sexual conduct offense does not change the scope of the statute because if a complainant gives effective consent, that negates an element of the offense, and the actor is not guilty. The elimination of a consent defense, moreover, avoids unconstitutionally shifting the burden of proof for an element of the offense to the actor.[28] These changes improve the clarity, consistency and legality of the revised offense.

Fifth, only the general penalty enhancements in subtitle I of the RCC apply to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[29] In contrast, the revised

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[25] *See, e.g.*, *Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[26] D.C. Code § 22-3007.

[27] D.C. Code § 22-3001(4), defining consent, requires that there be "words or overt actions indicating a *freely* given agreement" (emphasis added). There is no DCCA case law interpreting the "freely given" requirement in the current definition of "consent." However, the RCC definition of "effective consent" in RCC § 22E-701 appears to cover this requirement insofar as it requires consent that is obtained by means other than physical force, a coercive threat, or deception.

[28] *In re Winship*, 397 U.S. 358, 364 (1970) ("[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). To the extent that "permission" in the current MSA statute is the same as "consent," (see commentary above) the current consent defense may unconstitutionally shift the burden of proof to the defendant.

[29] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-

nonconsensual sexual conduct statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[30] are not necessary in the revised nonconsensual sexual conduct statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised nonconsensual sexual conduct statute improves the consistency and proportionality of the revised sex offenses.

Sixth, to the extent that the protection of District public officials statute,[31] various offense-specific penalty enhancements,[32] and certain statutory minimum penalties[33] apply to the current assault statute and related assault offenses, the RCC second degree nonconsensual sexual conduct offense partially replaces them. These statutes are silent as to whether the provisions are intended to apply to low-level assaultive conduct and there is no DCCA case law on the issue. In contrast, in the RCC, non-violent sexual touching that is criminalized in the RCC nonconsensual sexual conduct statute no longer is subject to these provisions. This change improves the proportionality of the revised offense. For further discussion of how these enhancements and provisions apply to the District's current assault statutes, see the commentary to the revised assault statute (RCC § 22E-1202).

Beyond these six changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised nonconsensual sexual conduct statute consistently requires that the actor "engages in" a sexual act or sexual contact with the complainant or "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the

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3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[30] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22E-4104) or other RCC weapons offenses.

[31] D.C. Code § 22-851.

[32] The enhancement for committing an offense while armed (D.C. Code § 22-4502); the enhancement for senior citizens (D.C. Code § 22-3601); the enhancement for citizen patrols (D.C. Code § 22-3602); the enhancement for minors (D.C. Code § 22-3611); the enhancement for taxicab drivers (D.C. Code §§ 22-3751; 22-3752); and the enhancement for transit operators and Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

[33] D.C. Code §§ 24-403.01(e) ("The sentence imposed under this section on a person who was over 18 years of age at the time of the offense and was convicted of assault with intent to commit first or second degree sexual abuse or child sexual abuse in violation of § 22-401…shall be not less than 2 years if the violation occurs after the person has been convicted in the District of Columbia or elsewhere of a crime of violence as defined in § 22-4501, providing for the control of dangerous weapons in the District of Columbia."); D.C. Code § 24-403.01(f) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of: (1) Assault with a dangerous weapon on a police officer in violation of § 22-405, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").

sexual conduct or "causes" the complainant to "submit to" the sexual conduct.[34] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[35] In addition to case law, District practice does not appear to follow the variations in statutory language.[36] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "engages in" or "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised nonconsensual sexual conduct offense requires a culpable mental state of "knowingly" as to engaging in the sexual act or contact. The current MSA statute does not specify any culpable mental state for engaging in a sexual act or sexual contact, although the current statutory definition of "sexual contact" requires an

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[34] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[35] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[36] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

"intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[37] The DCCA has characterized the current first degree and third degree sexual abuse statutes, which concern a "sexual act," as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness.[38] In addition, the current assault statute,[39] which has been interpreted by the DCCA to include liability for nonconsensual sexual touching,[40] likely requires a culpable mental state of recklessness.[41] Resolving this ambiguity, the revised nonconsensual sexual conduct statute requires a "knowingly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a

[37] D.C. Code § 22-3001(9) (defining "sexual contact."). Despite this additional intent element the definition of "sexual contact" requires, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted "with intent to abuse, humiliate, harass, degrade, or arouse or gratify." *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[38] See commentary to RCC § 22E-1301, Sexual assault, for further discussion.

[39] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[40] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act.").

[41] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient, *see Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013), and, in the context of intent-to-frighten assault, has suggested that a higher mental state than recklessness is required. *See Powell v. United States*, 238 A.3d 954, 959 (D.C. 2020) ("Our additional concern is whether the evidence proved that appellant had the *mens rea* required for intent-to-frighten assault: a 'purposeful design ... to engender fear' or 'create apprehension.') (quoting *Parks v. United States*, 627 A.2d 1, 5 (D.C. 1993); *id.* at 959 ("For similar reasons, we conclude that the evidence was insufficient for conviction even if we assume *arguendo* that the *mens rea* for intent-to-frighten assault can be satisfied by evidence of recklessness.").

generally accepted legal principle.[42] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[43] This change improves the clarity and consistency of the revised statutes.

Third, notwithstanding the requirement for liability that the defendant lack "effective consent," subsection (c) of the RCC nonconsensual sexual conduct statute excludes from liability the use of deception to induce the sexual conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." As is discussed earlier in this commentary, the RCC definition of "effective consent" appears to be consistent with the current definition of "consent" for sex offenses,[44] which requires that the agreement be "freely given." However, there is no DCCA case law interpreting the current definition of "consent" for the sex offense statutes and it is not clear whether deception, or what kind of deception, prevents consent from being "freely given." Resolving this ambiguity, the RCC excludes from liability deception as to the inducement of the sexual act or sexual contact. The use of deception to induce the sexual act or sexual contact is not of the same gravity as deception as to the nature of the sexual conduct. Criminalizing sexual conduct by deception is largely disfavored in current American criminal law,[45] with the exceptions of falsely represented medical procedures and impersonation of a woman's husband.[46] This exclusion from liability is discussed further in the explanatory note to this offense. This change improves the consistency and proportionality of the revised statute.

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[42] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[43] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[44] The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission." "Permission," unlike "consent," is undefined in the current sexual abuse statutes, but, as is discussed elsewhere in this commentary, DCCA case law has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.

[45] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1372, (2013) (stating that "[r]ape-by-deception" is almost universally rejected in American criminal law.").

[46] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that "sex falsely represented as a medical procedure, and impersonation of a woman's husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.") (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998).

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised nonconsensual sexual conduct statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[47] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[48] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[49] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[50] In the revised nonconsensual sexual conduct statute, the RCC General Part's attempt provisions (RCC § 22E-301) establish the requirements to prove an attempt and applicable penalties, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general attempt provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised nonconsensual sexual conduct offense.

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[47] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[48] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[49] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[50] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSA statute would have a maximum term of imprisonment of 180 days, which is the same as the current penalty for the completed offense. D.C. Code § 22-3010.01.

RCC § 22E-1308. Incest.

Explanatory Note. *This section establishes the incest offense and penalty for the Revised Criminal Code (RCC). The offense prohibits knowingly engaging in a sexual act or a sexual contact with a specified family member when the consent of that family member is obtained by undue influence. The offense has two gradations that are based on the nature of the sexual conduct. The incest offense replaces the incest offense[1] in the current D.C. Code.*

Subsection (a) establishes the requirements for first degree incest, the most serious gradation of the offense. First, per paragraph (a)(1), the actor must, "in fact," be at least 16 years of age. "In fact," a defined term in RCC § 22E-207, is used here to indicate that there is no culpable mental state requirement as to the age of the actor.

Paragraph (a)(2) specifies the prohibited conduct for first degree incest — engaging in a "sexual act" with another person. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts. Paragraph (a)(2) specifies that the required culpable mental state for this conduct is "knowingly." "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that he or she engages in a "sexual act" with another person. "Sexual act" is a defined term in RCC § 22E-701 that specifies types of sexual penetration or contact between the mouth and certain body parts.

Subparagraph (a)(2)(A), sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii), and subparagraph (a)(2)(B) specify the family members that are included in the scope of the revised incest statute. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(2) applies to subparagraph (a)(2)(A), sub-subparagraphs (a)(2)(A)(i) and (a)(2)(A)(ii), and subparagraph (a)(2)(B). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that the other person is a family member in one of the specified relationships—for example, a parent related by blood or adoption.

Paragraph (a)(3) specifies the final requirement for first degree of the revised incest statute. The actor must obtain the consent of the other person by undue influence. "Consent" is a defined term in RCC § 22E-701 that requires some indication (by word or action) of agreement given by a person generally competent to do so. "Undue influence" is defined in RCC § 22E-701 as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes that person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." Whether the coercion causes a person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being is a fact-specific determination. Per the rules of interpretation in RCC § 22E-207, the culpable mental state "knowingly" in paragraph (a)(2) applies to the requirements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain that the consent of the other person is obtained by "undue influence," as that term is defined in RCC § 22E-701.

Subsection (b) specifies the prohibited conduct for second degree of the revised incest statute. The requirements for second degree incest are the same as the

[1] D.C. Code § 22-1901.

requirements under subsection (a), the only difference being that second degree incest requires a "sexual contact" as opposed to a "sexual act." "Sexual contact" is a defined term in RCC § 22E-701 that means touching the specified body parts, such as genitalia, of any person with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person.

Subsection (c) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised incest statute clearly changes current District law in eleven main ways.*

First, the revised incest statute no longer prohibits marriage or cohabitation. The current D.C. Code incest statute states that no person "shall marry or cohabit with" specified family members.[2] The statute does not define "marry" or "cohabit" and there is no DCCA case law on the issue. In contrast, the revised incest statute is limited to engaging in a "sexual act" or a "sexual contact" as those terms are defined in RCC § 22E-701, and does not prohibit marriage or cohabitation. Marriage between several of the specified individuals may be precluded under District or other jurisdictions' civil law. Cohabitation with a relative, absent engaging in a sexual act or sexual contact with consent obtained by undue influence, is decriminalized. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised incest statute includes adoptive parents, grandparents, and great-grandparents, and adopted children, grandchildren, and great-grandchildren. The current D.C. Code incest statute[3] includes these relationships by blood, but not by adoption. In contrast, the revised incest statute includes adoptive parents, grandparents, and great-grandparents, and adopted children, grandchildren, and great-grandchildren, when consent is obtained by undue influence. Including these adoptive relationships in incest is consistent with the scope of several current D.C. Code[4] sex offenses and the

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[2] D.C. Code § 22-1901.

[3] The current incest statute prohibits relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[4] Current District law includes adoptive parents and adoptive grandparents in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

RCC definition of "position of trust with or authority over,"[5] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Third, the revised incest statute includes specified relationships by marriage or domestic partnership, both during the marriage or domestic partnership and after the marriage or domestic partnership ends. The current D.C. Code incest statute[6] includes several of these relationships by blood, but not by marriage or domestic partnership. In contrast, the revised incest statute includes these relationships by marriage or domestic partnership, both during the marriage or domestic partnership and after the marriage or domestic partnership ends, when consent is obtained by undue influence. Including these relationships by marriage or domestic partnership in incest is consistent with the scope of several current D.C. Code[7] sex offenses and the RCC definition of "position of trust with or authority over,"[8] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Fourth, the revised incest statute includes siblings by adoption. The current D.C. Code incest statute[9] includes siblings related by blood, but not by adoption. In contrast, the revised incest statute prohibits sexual activity between adopted siblings, when consent is obtained by undue influence. Including siblings by adoption in incest is consistent with the scope of several current D.C. Code[10] sex offenses and the RCC definition of

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[5] RCC § 22E-701.

[6] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[7] Current District law defines "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by . . . marriage [or] domestic partnership. . .". D.C. Code § 22-3001(10). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

[8] RCC § 22E-701.

[9] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[10] Current District law includes adoptive siblings in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age

"position of trust with or authority over,"[11] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Fifth, the revised incest statute includes a "parent's sibling," whether related by blood, adoption, marriage, or domestic partnership. The current D.C. Code incest statute[12] includes a parent's sibling related by blood, but not by adoption, marriage, or domestic partnership. In contrast, the revised incest statute includes a parent's sibling, whether related by blood, adoption, marriage, or domestic partnership, when consent is obtained by undue influence. Including these relationships in incest is consistent with the scope of several current D.C. Code[13] sex offenses and the RCC definition of "position of trust with or authority over,"[14] and recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Sixth, the revised incest statute includes a "sibling's child," whether related by blood, adoption, marriage, or domestic partnership. The current D.C. Code incest statute[15] includes a sibling's child related by blood, but not by adoption, marriage, or domestic partnership. In contrast, the revised incest statute includes a sibling's child, whether related by blood, adoption, marriage, or domestic partnership, when consent is obtained by undue influence. Including these relationships in incest recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

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requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

[11] RCC § 22E-701.

[12] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[13] Current District law includes a parent's sibling (aunt or uncle) whether related by blood, adoption, marriage, or domestic partnership in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). Whether a defendant is in a "significant relationship" with a minor complainant determines liability for several of the current D.C. Code sex offenses, such as sexual abuse of a minor. D.C. Code §§ 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). However, if the adoptive parent or grandparent satisfies the age requirements of the current sexual abuse of a child statutes, then the fact that there is a "significant relationship" is irrelevant to liability. D.C. Code §§ 22-3008 and 22-3009 (first degree and second degree sexual abuse of a child), 22-3001(3) (defining a "child" as a "person who has not yet attained the age of 16 years.").

[14] RCC § 22E-701.

[15] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

Seventh, the revised incest statute includes first cousins (child of a parent's sibling), whether related by blood, adoption, marriage, or domestic partnership. The current D.C. Code incest statute does not include first cousins because first cousins are within the fourth degree of consanguinity.[16] In contrast, the revised incest statute includes a first cousin, whether related by blood, adoption, marriage, or domestic partnership, when consent is obtained by undue influence. Including these relationships recognizes their importance to the family unit. This change improves the consistency and proportionality of the revised statute, and removes a possible gap in current law.

Eighth, the revised incest statute requires that the actor obtains the consent of the specified relative "by undue influence," as defined in RCC § 22E-701,[17] and applies a "knowingly" culpable mental state to this element. The current D.C. Code incest statute does not have any such element[18] and criminalizes consensual sexual activity between specified relatives due to the familial relationship. In contrast, the revised incest statute requires that the actor obtains the consent of the specified relative "by undue influence," as defined in RCC § 22E-701, and applies a "knowingly" culpable mental state to this element. These requirements, in conjunction with the requirement that the defendant in an incest case be at least 16 years old, ensure that the revised incest statute does not criminalize consensual sexual activity between adults or minors that are close in age. When a minor complainant is under the age of 16 years and the actor is at least 4 years older, the RCC sexual abuse of a minor statute (RCC § 22E-1302) criminalizes a sexual act or sexual contact, regardless of apparent consent, based on the ages of the parties. For minor complaints that are under the age of 18 years, third degree and sixth degree of the RCC sexual abuse of a minor statute criminalize otherwise consensual sexual conduct with many of the familial relationships in the RCC incest statute if the actor is at least 18 years of age and at least four years older, without regard to apparent consent. This change improves the clarity, consistency, and proportionality of the revised statutes. The commentary to this offense has been updated to reflect that this is a change in law.

Ninth, the revised incest statute codifies two degrees of incest, based on whether there is a "sexual act" or "sexual contact." The current D.C. Code incest statute is limited to one degree.[19] In contrast, the revised incest statute has two degrees—first degree requires a "sexual act" and second degree incest requires a "sexual contact." This is consistent with RCC sex offenses that differentiate gradations based on whether there is a "sexual act" or "sexual contact." This change improves the clarity, consistency, and proportionality of the revised statutes.

Tenth, the revised incest statute requires that the actor be at least 16 years of age and, by use of the phrase "in fact," requires strict liability for this element. The current

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[16] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

[17] RCC § 22E-701 defines "undue influence" as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes that person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being."

[18] D.C. Code § 22-1901.

[19] D.C. Code § 22-1901.

D.C. Code incest statute, D.C. Code § 22-1901, does not address whether an actor must be a certain age and there is no DCCA case law on this issue. However, absent an age requirement for the actor, the current D.C. Code incest statute includes a person under the age of 16 years who engages in sexual activity with an older family member, as well as a person under 16 years of age who engages in consensual sexual activity with a younger family member that is close in age. This differs from current D.C. Code sexual abuse statutes and the RCC which criminalize otherwise consensual sexual acts between persons under the age of 16 only when the actor is at least four years older than the complainant.[20] In contrast, the revised incest statute requires that the actor be at least 16 years of age and applies strict liability to this element.[21] This change clearly and categorically removes criminal liability for incest for persons under 16 years of age, although there may still be liability under the RCC sexual assault statute (RCC § 22E-1301) or the RCC sexual abuse of a minor statute (RCC § 22E-1302). This change improves the clarity, consistency, and proportionality of the revised statute.

Eleventh, the revised incest statute is subject to the RCC duty to report a sex crime and the related civil infraction and civil provisions (RCC § 22E-1309), and the RCC evidentiary provisions for RCC sex offenses (RCC § 22E-1310). The current D.C. Code incest statute is codified in D.C. Code § 22-1901. As a result, it is not subject to the current D.C. Code equivalents of these provisions.[22] In contrast, the revised incest statute is subject to the RCC duty to report a sex crime and the related civil infraction and civil provisions (RCC § 22E-1309), and the RCC admission of evidence in sexual assault and related cases statute (RCC § 22E-1310). Given the overlap between the current D.C. Code sexual abuse statutes and the RCC sexual abuse statutes discussed elsewhere in this commentary, it is inconsistent for the duty to report and related civil provisions and sex offense evidentiary provisions to not apply to incest. This change improves the clarity and consistency of the revised statute.

Beyond these eleven substantive changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

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[20] The current D.C. Code child sexual abuse statute requires that the complainant be under the age of 16 years and that the defendant be at least four years older. D.C. Code §§ 22-3008 and 22-3009; 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). First degree, second degree, fourth degree, and fifth degree of the RCC sexual abuse of a minor statute have the same requirements. RCC § 22E-1302.

[21] It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct. *See Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)."). Strict liability for the age of the actor also is consistent with several of the RCC sex offenses.

[22] Incest is not included in the current D.C. Code duty to report a sex crime statute and failing to report incest is not included in the related civil infraction. D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" for the purposes of the duty to report a sex crime and related statutes as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102."). Similarly, incest is not included in the current D.C. Code evidence provisions for the current D.C. Code sexual abuse offenses in Chapter 30 of Title 22. *See* D.C. Code §§ 22-3021 through 22-3024.

First, the revised incest statute requires a "knowingly" culpable mental state for engaging in the sexual act or sexual contact. The current D.C. Code incest statute requires that the defendant know that he or she is related to the other person within one of the specified degrees of consanguinity,[23] but does not specify any culpable mental state for marrying, cohabiting, or engaging in sexual intercourse. There is no DCCA case law regarding the required mental state, if any, for this conduct. Resolving these ambiguities, the revised incest statute requires a "knowingly" culpable mental state for engaging in a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[24] Requiring a "knowingly" culpable mental state is also consistent with the RCC sex offenses, which require that the defendant "knowingly" engage in the prohibited conduct. This change improves the clarity and consistency of the revised statutes.

Second, the revised incest statute prohibits engaging in a "sexual act" or "sexual contact," as those terms are defined in RCC § 22E-701. The current incest statute, D.C. Code § 22-1901, prohibits "sexual intercourse," but does not define the term. However, DCCA case law states that incest "involves the same bodily invasion, *i.e.* sexual intercourse, as that of rape,"[25] and some District case law appears to limit "sexual intercourse" in that context to penile penetration of the vagina.[26] In 1995, the District's sexual assault laws were significantly amended to specifically prohibit means of sexual penetration besides penile penetration of the vagina,[27] but the incest statute was not revised. Resolving this ambiguity, through the definitions of "sexual act" and "sexual contact" in RCC § 22E-701, the revised incest statute prohibits additional forms of sexual penetration other than penile penetration of the vagina and sexual touching. Prohibiting a "sexual act" or "sexual contact" is also consistent with the scope of other RCC sex offenses. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised incest statute specifies that half-siblings by blood are included. The current incest statute, D.C. Code § 22-1901, prohibits marriage, cohabitation, or sexual intercourse with a person related "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." The statute does not specify whether a half-sibling is included, and there is no DCCA case law on this issue. Resolving this ambiguity, the revised incest statute specifies that half-siblings are included. Including half-siblings in incest is consistent with the RCC definition of "position of trust with or authority over,"[28] and recognizes their importance to the family unit. This change improves the clarity and consistency of the revised statutes, and removes a possible gap in current law.

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[23] D.C. Code § 22-1901 ("knowing him or her to be within said degree of relationship.").
[24] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[25] *Robinson v. United States*, 452 A.2d 354, 359 (D.C. 1982); *Pounds v. United States*, 529 A.2d 791, 797 (D.C. 1987) (citing *Robinson v. United States*, 452 A.2d 354, 359 (D.C. 1982)).
[26] *United States v. Bryant*, 420 F.2d 1327, 1334 (D.C. Cir. 1969) ("In a rape case the prosecution must establish the fact of sexual intercourse (that is, penetration of the female sexual organ by the sexual organ of the male) . . . .").
[27] Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385) (1995).
[28] RCC § 22E-701.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised incest statute replaces the language "related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law" in the current statute with the specific relatives related by blood.[29] This change improves the clarity of the revised statute without changing current District law.

Second, the revised incest statute no longer specifies that the actor must be "in the District." The language is surplusage, particularly since the revised statute is limited to sexual intercourse, and no longer prohibits marriage. Deleting it does not change the scope of the offense.

[29] The current incest statute specifies relationships "within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law." D.C. Code § 22-1901. Parents and children are within the first degree of consanguinity, grandparents, grandchildren, and siblings are within the second degree of consanguinity, and great-grandparents, great-grandchildren, uncles, aunts, nieces, and nephews are within the third degree of consanguinity. MPC § 230.2 cmt. at 398 n. 7.

RCC § 22E-1309. Civil Provisions on the Duty to Report a Sex Crime.

Explanatory Note. *The RCC Civil Provisions on the Duty to Report a Sex Crime statute establishes a duty for persons 18 years of age or older to report known or suspected specified sex crimes involving persons under 16 years of age. The revised statute establishes several exclusions from the duty to report, as well as immunity from liability and employment discrimination for good-faith reports made pursuant to this statute. The revised statute establishes a civil violation for failing to report a sex crime as required. The civil violation has a single penalty gradation. The revised statute replaces five distinct provisions in the current D.C. Code: the child sexual abuse reporting requirements and privileges statute,[1] the defense to non-reporting statute,[2] the penalties for failing to report statute,[3] immunity from liability for good-faith reporting statute,[4] and definitions for these provisions.[5]*

Subsection (a) of the revised statute establishes the duty to report specified sex crimes. To be subject to the duty to report, a person must "in fact" be at least 18 years of age. "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element, here the required age for a person to be subject to the duty to report. Subsection (a) further requires that, in order to be subject to the duty to report the person "in fact . . . is aware of a substantial risk that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime." Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to these requirements and no culpable mental state, as defined in RCC § 22E-205 applies to them. However, to be subject to the duty to report, a person must be aware of a substantial risk both that the other person is under 16 years of age and that this person is being subjected to, or has been subjected to, a predicate crime. Subparagraph (i)(2)(B) defines the term "predicate crime" for the revised statute.

If a person is, in fact, at least 18 years of age and is aware of a substantial risk that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime, subsection (a) requires that person shall "shall immediately report such information or belief in a call to 911, a report to the Child and Family Services Agency, or a report to the Metropolitan Police Department." Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in subsection (a) applies to the required ways of reporting information or belief of a suspected predicate crime, and no culpable mental state applies.

Subsection (b) establishes several exclusions to the duty to report a predicate crime established in subsection (a). Paragraph (b)(1) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (b)(1) applies to the requirements of all the exclusions from the

[1] D.C. Code § 22-3020.52.
[2] D.C. Code § 22-3020.53.
[3] D.C. Code § 22-3020.54.
[4] D.C. Code § 22-3020.55.
[5] D.C. Code § 22-3020.51.

duty to report specified in the subparagraphs and sub-subparagraphs under paragraph (b)(1).

The first exclusion from the duty to report is in subparagraph (b)(1)(A)—a person that is subjected to a predicate crime by the same person alleged to have committed a predicate crime against the person under 16 years of age. The second exclusion from the duty to report is in subparagraph (b)(1)(B)—a lawyer or a person employed by a lawyer if certain requirements are met. The third exclusion to the duty to report is in subparagraph (b)(1)(C)—a "religious leader described in D.C. Code § 14-309, when the information or basis for the belief is the result of a confession or penitential communication made by a penitent directly to the minister" and satisfies the requirements in sub-subparagraphs (b)(1)(C)(i) through (b)(1)(C)(iv). A "religious leader described in D.C. Code § 14-309" is a priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science, regardless of whether the religious leader hears confessions or receives other communications. The final exclusion to the duty to report is in subparagraph (b)(1)(D)—"a sexual assault counselor, when the information or basis for the belief is disclosed in a confidential communication" unless the sexual assault counselor is "aware of a substantial risk" of specified situations in sub-subparagraphs (b)(1)(D)(i) through (b)(1)(D)(iii),[6] such as the sexual assault victim is under 13 years of age. "Sexual assault counselor" and "confidential communication" are defined terms in subsection (i).

Paragraph (b)(2) states that no legal privilege, other than those established in subsection (b), applies to the duty to report established in subsection (a).

Subsection (c) establishes that RCC § 22E-1309 does not alter the mandatory reporting requirements for certain individuals, such as teachers, that are required in D.C. Code § 4-1321.02(b).

Subsection (d) establishes the requirements for the civil violation. First, per paragraph (d)(1), the person must, "in fact," be at least 18 years of age. "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element, here the required age of the person committing the civil violation. Paragraph (a)(2) requires that the person "knows" that he or she has a duty to report the predicate crime involving a person under 16 years of age as required by subsection (a). "Knows" is a defined term in RCC § 22E-206 that here means the person must be practically certain that he or she has a duty to report a predicate crime as required by subsection (a). Paragraph (a)(3) requires that the person fails to carry out the duty required in subsection (a). Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state specified in paragraph (d)(2) applies to the elements in paragraph (d)(3) and the person must be practically certain that he or she fails to carry out the duty specified in subsection (a).

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[6] Per the rules of interpretation in in RCC § 22E-207, the "in fact" specified in paragraph (b)(1) applies to all the requirements of the exclusion in subparagraph (b)(1)(D) and sub-subparagraphs (b)(1)(D)(i) through (b)(1)(D)(i)(iii), and no culpable mental state, as defined in RCC § 22E-205, applies to them. However, a sexual assault counselor must be "aware of a substantial risk" that the specified situations in sub-subparagraphs (b)(1)(D)(i) through (b)(1)(D)(i)(iii) exist, such as the sexual assault victim is under 13 years of age.

Subsection (e) establishes a defense to the civil violation. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. The defense applies if the person, "in fact," reasonably believes[7] that they are a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). Subsection (e) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Although no culpable mental state, as defined in RCC § 22E-205, applies to the defense, the actor must subjectively believe, and that belief must be reasonable, that they are a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[8] There is no defense when the person makes an unreasonable mistake that they are a survivor of either intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9).

Subsection (f) establishes the penalty for the civil violation. Paragraph (f)(1) establishes that the penalty for the civil violation is a civil fine of $300. Paragraph (f)(2) establishes that a civil violation under subsection (d) "shall not" constitute a criminal offense or a delinquent act as defined in D.C. Official Code § 16-2301(7).

Subsection (g) establishes that the Office of Administrative Hearings has jurisdiction to adjudicate civil infractions under this statute, pursuant to D.C. Code § 2-1831.03(b-6).

Subsection (h) establishes immunity for persons who make good-faith reports pursuant to this statute. In particular, paragraph (h)(1) is specific to immunity from civil or criminal liability with respect to making the report or any participation in any judicial proceeding involving the report. In all relevant civil or criminal proceedings, paragraph (h)(1) establishes that good faith shall be presumed unless rebutted. Paragraph (h)(2) states that in the event of employment discrimination due to a good-faith report made pursuant to this statute, a person may commence a civil action for appropriate relief and the Superior Court for the District of Columbia may grant appropriate relief. Paragraph (h)(2) also states that the District may intervene in any action commenced under paragraph (h)(2).

Subsection (i) cross-references applicable definitions located elsewhere in the RCC and D.C. Code.

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[7] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[8] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

Relation to Current District Law. *The revised civil provisions on the duty to report a sex crime statute clearly changes current District law in five main ways.*

First, the revised duty to report statute includes incest as a predicate crime. The current D.C. Code duty to report statute applies to a violation of the sexual abuse offenses in Chapter 30 of Title 22 of the D.C. Code.[9] The current D.C. Code incest statute is codified at D.C. Code § 22-1901 and is not included in the current D.C. Code duty to report statute. In contrast, the revised duty to report statute includes any RCC sex offense in RCC Chapter 13 as a predicate crime, which includes incest (RCC § 22E-1308). This change improves clarity and consistency of the revised duty to report statute and removes a possible gap in liability.

Second, the revised duty to report statute includes several human trafficking statutes as predicate crimes. The current D.C. Code duty to report statute applies to a violation of D.C. Code § 22-1834 (sex trafficking of children),[10] but does not include any other human trafficking offenses. In contrast, the revised duty to report statute includes the RCC statute that is equivalent to D.C. Code § 22-1834 (§ 22E-1605; sex trafficking of a minor or adult incapable of consenting), as well as three additional RCC trafficking statutes: 1) forced commercial sex (RCC § 22E-1602); 2) trafficking in forced commercial sex (RCC § 22E-1604); and 3) commercial sex with a trafficked person (RCC § 22E-1608). These human trafficking crimes generally do not require the complainant to be a minor, but could apply when the complainant is a minor, and should be included as predicate crimes in the duty to report a known or suspected sex crime. This change improves clarity and consistency of the revised duty to report statute and removes a possible gap in liability.

Third, the revised statute includes the RCC trafficking in commercial sex statute (RCC § 22E-4403) as a predicate crime, which broadly prohibits causing an individual to engage in consensual commercial sex acts. The current D.C. Code duty to report statute only includes one prostitution-related offense as a predicate crime—D.C. Code § 22-2704, abducting or enticing a child from his or her home for the purposes of prostitution. However, prostitution may fall under one of the other predicate crimes included in the current D.C. Code duty to report statute: 1) D.C. Code § 22-1834, sex trafficking of children; or 2) a sexual abuse offense in Chapter 30 of Title 22.[11] In contrast, the revised duty to report statute specifically includes the RCC trafficking in commercial sex statute (RCC § 22E-4403). This offense broadly prohibits causing an individual to engage in consensual commercial sex acts and should be included in the list of predicate offenses for a duty to report when the complainant is under the age of 16 years. This change improves clarity and consistency of the revised duty to report statute and removes a possible gap in liability.

Fourth, the revised statute no longer includes abduction for the purposes of prostitution as a predicate offense. The current D.C. Code duty to report statute applies

[9] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").
[10] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").
[11] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

to a violation of D.C. Code § 22-2704, abducting or enticing a child from his or her home for the purposes of prostitution.[12] In contrast, the revised duty to report statute no longer includes abduction for the purposes of prostitution as a predicate offense. To the extent that abducting or enticing a minor for purposes of prostitution satisfies the other offenses included in the definition of "predicate crime" under subparagraph (i)(2)(B), such as the RCC trafficking in commercial sex statute (RCC § 22E-4403), the RCC duty to report statute still applies. However, for conduct that falls outside these offenses, the RCC duty to report statute does not apply. This change improves the consistency of the revised statute.

Fifth, the predicate crimes that give rise to the duty to report in the revised statute differ as compared to current law. The current D.C. Code duty to report statute applies to a violation of: 1) D.C. Code § 22-1834 (sex trafficking of children); 2) D.C. Code § 22-2704 (abducting or enticing a child from his or her home for the purposes of prostitution; harboring such child); 3) Chapter 30 of Title 22 of the D.C. Code (sexual abuse offenses); and 4) D.C. Code § 22-3102 (sexual performance using minors).[13] These offenses have been revised and the scope of the RCC offenses may differ as compared to current law. For example, the RCC obscenity offenses included as predicate crimes in the revised duty to report statute (Creating or Trafficking an Obscene Image of a Minor under RCC § 22E-1807, Possession of an Obscene Image of a Minor under RCC § 22E-1808, Arranging a Live Sexual Performance of a Minor under RCC § 22E-1809, or Attending or Viewing a Live Sexual Performance of a Minor under RCC § 22E-1810) include a wider scope of prohibited images as compared to the current D.C. Code sexual performance using a minors statute (D.C. Code § 22-3102). The RCC commentaries to the revised offenses discuss the difference with the current D.C. Code statutes in detail.

Beyond these five changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised duty to report statute requires that a person 18 years of age or older is "aware of a substantial risk" that a person under 16 years of age is being, or has been subjected to, specified sex crimes. The current D.C. Code reporting statute requires such a person "knows" or "has reasonable cause to believe."[14] There is no DCCA case law interpreting these terms in the current statute. Resolving these ambiguities, the revised duty to report statute requires the person is "aware of a substantial risk." This language requires that the person have subjective awareness of a substantial risk, as opposed to negligence—that the person merely should have known that there was a substantial risk of abuse. An objective (negligence) standard that applies even when a person had no subjective awareness of misconduct would be inconsistent with the Council's stated intent to encourage persons to report behavior.[15] This change improves the clarity and completeness of the revised statute.

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[12] D.C. Code § 22-3020.51(4) (defining "sexual abuse" to include "any act that is a violation of . . . (B) Section 22-2704.").

[13] D.C. Code § 22-3020.51(4) (defining "sexual abuse" as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

[14] D.C. Code § 22-3020.52(a).

[15] *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 6 ("Requiring everyone to report simplifies the reporting requirement,

Second, the revised duty to report statute applies to situations where a person is aware of a substantial risk that a person under 16 years of age "is being," currently, or "has been subjected to," in the past, specified sexual crimes. The current D.C. Code reporting statute applies to a child that "is a victim" of specified sexual crimes. "Victim" is defined for the current D.C. Code reporting statute and all of Chapter 30 of Title 22 of the D.C. Code as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[16] However, as applied in the reporting statute, this definition of "victim" conflicts with the definition of "sexual abuse," which includes sex crimes that are not in Chapter 30 of Title 22 of the D.C. Code.[17] Moreover, it is unclear whether the current D.C. Code reporting statute includes both current and past instances of known or suspected sexual abuse, or if it is limited to current instances. There is no DCCA case law interpreting the scope of the current statute and the legislative history is ambiguous.[18] Resolving this ambiguity, the revised duty to report statute applies to a child under 16 years of age that is being, or has been subjected to, a predicate crime. This requirement is consistent with the scope of the mandatory reporters statute in current D.C. Code § 4-1321.02.[19] This change improves the clarity, completeness, and consistency of the revised statute.

Third, the revised duty to report statute replaces the reference to a "priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia"[20] in the current D.C. Code duty to report statute with "a religious leader described in D.C. Code § 14-309." The language in the current D.C.

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eliminates the need to analyze whether one is a mandatory reporter, and may overcome the reluctance of many . . . to get involved.").

[16] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code § 22-3001(11). The current reporting statute is codified in D.C. Code § 22-3020.52 and is included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to the current reporting statute.

[17] *See* D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" to include D.C. Code § 22-1834, § 22-2704, and § 22-3102, as well as all offenses in Chapter 30 of Title 22); 22-3020.52(a) ("Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report…").

[18] The Committee Report for the current reporting statute frequently refers to a child that "is a victim of sexual abuse," which raises the same ambiguity that is in the statute. *See, e.g.*, Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 1, 6. There are at least two references to "is being sexually abused," which may indicate a legislative intent to limit the reporting statute to current sexual abuse. Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4, 13. However, there is no discussion in the legislative history regarding the required time frame or the meaning of the term "victim."

[19] D.C. Code § 4-1321.02(a) ("Notwithstanding § 14-307, any person specified in subsection (b) of this section who knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity *has been or is in immediate danger of* being a mentally or physically abused or neglected child, as defined in § 16-2301(9), shall immediately report or have a report made of such knowledge or suspicion to either the Metropolitan Police Department of the District of Columbia or the Child and Family Services Agency.") (emphasis added).

[20] D.C. Code § 22-3020.52(c)(2)(A).

Code duty to report statute and the religious leaders described in D.C. Code § 14-309[21] differ primarily in that D.C. Code § 14-309 refers to specified religious leaders that are "authorized to perform a marriage ceremony" in the District, and the current D.C. Code duty to report statute refers to a duly appointed, licensed, ordained, or consecrated minister "of a given religion" in the District. It is unclear whether this is a substantive difference and there is no DCCA case law. Resolving this ambiguity, the RCC duty to report statute refers to a "religious leader in D.C. Code § 14-309," which is consistent with the inclusion of this language in the RCC sexual abuse by exploitation statute (RCC § 22E-1303). A "religious leader described in D.C. Code § 14-309" is a 'priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science,' regardless of whether the religious leader hears confessions or receives other communications." This change improves the clarity and consistency of the revised statute.

Fourth, the revised defense in subsection (e) requires that the person "reasonably believes"[22] that he or is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9)." The defense in current D.C. Code § 22-3020.53[23] does not specify any such subjective awareness, and it is unclear whether such subjective awareness, or strict liability, applies. There is no DCCA case law on this issue. Resolving this ambiguity, the revised defense requires that the person "reasonably believes" that he or she is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). This is consistent with the "reasonably believes" requirement in other defenses in the RCC. This change improves the clarity, consistency, and proportionality of the revised statutes.

Fifth, the revised defense in subsection (e) requires that the person fail to report known or suspected sexual abuse as required by subsection (a) "because" he or she is a survivor of intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9). The current D.C. Code defense states that "[a]ny survivor of [intimate partner violence, as defined in D.C. Code § 16-1001(7), or intrafamily violence, as defined in D.C. Code § 16-1001(9)] may use such . . . violence as a defense to his or her failure to report."[24] The current defense does not appear to require any causal link between the violence and the failure to report, meaning that the specified types of violence are a defense even if they are unrelated to the known or suspected child sexual abuse or the failure to report is part of a purposeful criminal scheme. However, the legislative history for the current D.C. Code reporting

[21] D.C. Code § 14-309 refers to a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science."

[22] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[23] D.C. Code § 22-3020.53(a) ("Any survivor of domestic violence may use such domestic violence as a defense to his or her failure to report under this subchapter.").

[24] D.C. Code § 22-3020.53(a).

statute and related provisions suggests that a causal link was intended.[25] Resolving this ambiguity, the revised in subsection (e) requires that the failure to report be "because" the person is a survivor of intimate partner violence or intrafamily violence. This change improves the clarity and completeness of the revised statute.

Sixth, the revised civil violation for failing to report a sex crime (subsection (d)) requires that a person "knows" that he or she has a duty to report a known or suspected specified sexual crime pursuant to subsection (a). The current D.C. Code civil infraction statute prohibits "willfully fail[ing]" to make the required report.[26] "Willfully" is not defined in the current D.C. Code civil infraction statute and there is no DCCA case law for this statute. It is unclear whether "willfully" requires that a person know that he or she has a duty to report as required by D.C. Code § 22-3020.52. Resolving this ambiguity, the revised civil violation in subsection (d) requires that a person "knows" that he or she has a duty to report pursuant to RCC § 22E-1309(a). Supreme Court case law commonly interprets "willfully" in a criminal statute as requiring that the defendant act with a purpose to disobey or disregard the law,[27] and in the case of highly complex laws such as federal tax laws, may require that the defendant know of the specific law that his or her conduct is violating.[28] In addition, Supreme Court case law recognizes due process limits on criminal convictions for the mere failure to act if there is no reason for the person to believe he or she had a legal duty to act or that his or her failure to act was

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[25] Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 4-5 (stating that the legislation "[p]rovides a defense to any survivor of domestic violence who, due to the domestic violence, failed to report as required by this bill."). In addition, the legislative history indicates that the defense should be narrowly interpreted:

> Although victims will now have an opportunity to reach safety before reporting, the defense should not be used as a reason to never notify authorities about the known or suspected sexual abuse. Once a victim and his or her family are safely away from their abuser, the Committee intends that authorities be notified in order to report the abuse and to ensure that the abuser is not able to prey upon other children.

Committee on the Judiciary, *Report on Bill 19-647, "Child Sexual Abuse Reporting Amendment Act of 2012,"* (October 9, 2012) at 11.

[26] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

[27] *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) ("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. As we explained in *United States v. Murdock,* 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), a variety of phrases have been used to describe that concept. As a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (internal citations and footnotes omitted); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (holding that "[t]o establish that a defendant willfully violated the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.").

[28] *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 194 (1991) ("In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, *e.g., Cheek v. United States,* 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991).").

blameworthy.[29] This case law supports requiring at least a "knowing" culpable mental state for the duty to report as required in subsection (a). This change improves the clarity and completeness of the revised statute.

Seventh, the revised civil violation for failure to report a sex crime (subsection d)) requires that the person knowingly fail to carry out his or her duty to report specified sex crimes to the authorities per subsection (a). The current D.C. Code civil infraction statute prohibits "willfully fail[ing]" to make the required report.[30] It is unclear what is required for a person to "willfully" fail to make the required report and there is no DCCA case law on this issue. Resolving this ambiguity, the civil violation for failure to report a sex crime (subsection d)) requires a "knowingly" culpable mental state for failing "to carry out his or her duty to report" as required by subsection (a). The current and revised duty to report statutes have specific reporting requirements and requiring a "knowing" culpable mental state for the failure to report is proportional to the specificity of these requirements. This change improves the clarity and completeness of the revised infraction.

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[29] Former D.C. Code § 22-2511 stated in relevant part, "It is unlawful for a person to be voluntarily in a motor vehicle if that person knows that a firearm is in the vehicle, unless the firearm is being lawfully carried or lawfully transported." D.C. Code § 22-2511(a) (Repl. 2015). The statute was repealed in 2015. Prior to its repeal, however, the DCCA in *Conley v. United States* held that the statute was unconstitutional for two reasons. Pertinent to the present discussion, the second reason was that:

> [I]t is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy. The fundamental constitutional vice of § 22–2511 is that it criminalizes entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle, which the average citizen would not suppose to be wrongful (let alone felonious)—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise."

Conley v. United States, 79 A.3d 270, 273 (D.C. 2013) (citing *Lambert v. California*, 355 U.S. 225 (1957)).

The DCCA acknowledged that *Lambert* "applies only when an unusual statute is 'triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations.'" *Conley*, 79 A.3d at 283 (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 547 (1982) (Brennan, J., dissenting)). The DCCA stated that courts have typically rejected *Lambert* challenges for "public welfare offenses" that involve dangerous articles like drugs and dangerous weapons and for statutes "imposing legal obligations on persons with other particular reasons to be on notice of them, as in prosecutions for violating [statutes that prohibit the possession of firearms by persons who have been convicted of misdemeanor domestic violence offenses or who are subject to a judicial anti-harassment or anti-stalking order] and for failing to register as required by the Sex Offender Registration and Notification Act." *Conley*, 79 A.3d at 283-84.

However, despite these limitations, the DCCA found that D.C. Code § 22-2511 was similar to the statute held unconstitutional in *Lambert* because it criminalized mere presence and did not require proof of any conduct "that would traditionally and foreseeably subject a person to criminal sanction, such as handling or concealing the firearm, constructively possessing it, or aiding and abetting someone else's possession or use of it." *Id*. at 285. In addition, the statute targeted individuals "who are not engaged in [firearm ownership, possession, transportation, or dealing] and who therefore have no reason to be familiar with the firearms laws or to investigate whether those laws impose any duties on *them*." *Id.* at 286 (emphasis in original).

[30] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

Eighth, the exclusion to the duty to report for sexual assault counselors requires that the sexual assault counselor is "aware of a substantial risk" that the situations specified in sub-subparagraphs (b)(1)(D)(i), (b)(1)(D)(ii), and (b)(1)(D)(iii) exist, such as the sexual assault victim is under 13 years of age. The exclusion in the current D.C. Code reporting statute requires that the sexual assault counselor have "actual knowledge" of these situations.[31] The meaning of "actual knowledge" is unclear and is inconsistent with the "knows, or has reasonable cause to believe" requirement for the duty to report in the current D.C. Code duty to report statute.[32] There is no DCCA case law interpreting these terms in the current statute. Resolving these ambiguities, the revised duty to report statute requires that a sexual assault counselor is "aware of a substantial risk" that the situations specified in sub-subparagraphs (b)(1)(D)(i), (b)(1)(D)(ii), and (b)(1)(D)(iii) exist. This language requires that the person have subjective awareness of a substantial risk, as opposed to negligence—that the person merely should have known that there was a substantial risk—and is consistent with the duty to report in subsection (a) of the revised statute. This change improves the clarity and consistency of the revised statute.

Ninth, due to the RCC definition of "position of trust with or authority over" in RCC § 22E-701, the scope of the exclusion to the duty to report for sexual assault counselors (subparagraph (b)(1)(D)) may differ as compared to the current D.C. Code reporting statute. The current D.C. Code duty to report statute establishes an exclusion to the duty to report for a sexual assault counselor that is limited when a perpetrator or alleged perpetrator of the predicate crime has a "significant relationship" with the sexual assault victim."[33] "Significant relationship" is defined in D.C. Code § 22-3001[34] as "includ[ing]" the specified individuals as well as "any other person in a position of trust with or authority over" the complainant."[35] There is no DCCA case law interpreting the current definition of "significant relationship." The RCC definition of "position of trust with or authority over" is close-ended, but defines "position of trust with or authority over as "mean[ing]" specified individuals or "a person responsible under civil law for the health, welfare, or supervision of the complainant." The revised definition provides a broad, flexible, objective standard for determining who is in a position of trust with or authority over another person. The RCC definition of "position of trust with or authority

[31] D.C. Code § 22-3020.52(c)(3).
[32] D.C. Code § 22-3020.52(a) ("Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police.").
[33] D.C. Code § 22-3020.52(c)(3)(B).
[34] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").
[35] D.C. Code § 22-3001(10).

over" is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, paragraph (b)(2) states that "No legal privilege, except the privileges set forth in subsection (b) of this section, shall apply to the duty to report in subsection (a) of this section." Paragraph (b)(2) accounts for the language in the current D.C. Code duty to report statute that "[n]o other legally recognized privilege, except the following [applies to the duty to report a sex crime]"[36] and is not intended to change current District law.

Second, the revised reporting statute revises and deletes the separate definitions for "child," "person," and "police" that apply to the current D.C. Code reporting statute and related provisions.[37] Instead of having separate defined terms, the revised definitions are incorporated directly into the revised statute. The revised definitions are intended to be clarificatory and not change current District law.[38]

Third, subsection (b) of revised duty to report statute deletes the provision in the current D.C. Code duty to report statute that states "A confession or communication made under any other circumstances does not fall under this exemption."[39] Nothing in the revised duty to report statute suggests that confessions or communications that do not satisfy the requirements under paragraph (b)(1) would be privileged, and paragraph (b)(2) of the revised statute clearly establishes that no other privileges than those described in subsection (b) apply. Codifying a provision that explicitly states other confessions or communications are *not* privileged is potentially confusing for other provisions that do not similarly list what is "not" included. Deleting this provision from the current statute is a clarificatory change in law.

Fourth, the revised duty to report statute refers to a violation of the prohibited conduct "as a civil violation." The current D.C. Code duty to report statute refers to an offense as an "infraction"[40] subject to a "civil fine."[41] Referring to a violation of the

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[36] D.C. Code § 22-3020.52(c).

[37] D.C. Code § 22-3020.51(1), (2), (3) ("For the purposes of this subchapter, the term: (1) "Child" means an individual who has not yet attained the age of 16 years. (2) "Person" means an individual 18 years of age or older. (3) "Police" means the Metropolitan Police Department.").

[38] D.C. Code § 22-3020.51 currently defines "child" as "an individual who has not yet attained the age of 16 years." D.C. Code § 22-3020.51(1). Consistent with other RCC offenses and provisions, the revied statute instead codifies "a person under 16 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 currently defines "person" as "an individual 18 years of age or older." D.C. Code § 22-3020.51(2). Consistent with other RCC offenses and provisions, the revised statute refers to "a person at least 18 years of age" as necessary instead of referring to a separate definition. D.C. Code § 22-3020.51 defines "police" as "the Metropolitan Police Department." RCC § 22-1310 refers to "the Metropolitan Police Department" as necessary.

[39] D.C. Code § 22-3020.52(c)(2)(B).

[40] D.C. Code § 22-3020.54(b) ("Adjudication of any infraction of this subchapter shall be handled by the Office of Administrative Hearings pursuant to § 2-1831.03(b-6).").

[41] D.C. Code § 22-3020.54(a) ("Any person required to make a report under this subchapter who willfully fails to make such a report shall be subject to a civil fine of $300.").

prohibited conduct as a "civil violation" is consistent with marijuana decriminalization in current D.C. Code § 48-1201[42] and is not intended to change current District law.

Fifth, subparagraph (e)(2) of the revised duty to report statute states that "A violation of subsection (c) of this section shall not constitute a criminal offense or a delinquent act as defined in § 16-2301(7)."[43] The marijuana decriminalization in current D.C. Code § 48-1201[44] has an identical provision and including it in the revised statute is not intended to change current District law.

Sixth, the revised duty to report statute, by use of the phrase "in fact" in subsection (a) specifies that strict liability applies to the requirements of the duty to report a sex crime: 1) the age of the person with the duty to report (at least 18 years); 2) the fact that the person with a duty to report is aware of a substantial risk[45] that a person under 16 years of age is being subjected to, or has been subjected to, a predicate crime; and 3) the required method of reporting known or suspected abuse. The current D.C. Code duty to report statute[46] does not specify any culpable mental states for these requirements. This change improves the clarity of the revised statute.

Seventh, the revised duty to report statute, by use of the phrase "in fact" in paragraph (b)(1) specifies that strict liability applies to the requirements of the exclusions from the duty to report under paragraph (b)(1).[47] The current D.C. Code duty to report statute does not specify any culpable mental states for the exclusions to the duty to report.[48] This change improves the clarity of the revised statute.

Eighth, the revised duty to report statute defines "confidential communication" as having "the meaning specified in D.C. Code § 14-312(a)(1), and is subject to the protections in D.C. Code § 14-312(b)(3)." Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to the current D.C. Code duty to report a sex crime statute[49] (subparagraph

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[42] D.C. Code § 48-1201(a) ("Notwithstanding any other District law, the possession or transfer without remuneration of marijuana weighing one ounce or less shall constitute a civil violation.").

[43] D.C. Code § 48-1201(b).

[44] D.C. Code § 48-1201(b) ("A violation of subsection (a) of this section shall not constitute a criminal offense or a delinquent act as defined in § 16-2301(7).").

[45] "Aware of a substantial risk" in subsection (a) is not a culpable mental state as defined in RCC § 22E-205.

[46] D.C. Code §§ 22-3020.52(a) ("(a) Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police."); § 22-3020.51(a)((defining "person" as "an individual 18 years of age or older.").

[47] "Aware of a substantial risk" in subparagraph (b)(1)(D) is not a culpable mental state as defined in RCC § 22E-205.

[48] D.C. Code §§ 22-3020.52(a) ("(a) Any person who knows, or has reasonable cause to believe, that a child is a victim of sexual abuse shall immediately report such knowledge or belief to the police. For the purposes of this subchapter, a call to 911, or a report to the Child and Family Services Agency, shall be deemed a report to the police."); § 22-3020.51(a)((defining "person" as "an individual 18 years of age or older.").

[49] D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 "Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A

(b)(1)(D)) in the revised statute). Section 6 of the Act did not codify a definition for the term "confidential communication." However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312[50] for mandatory reporting and codified a definition of "confidential communication"[51] applicable to that exclusion. The revised duty to report statute incorporates this definition of "confidential communication," as well as the protections for a "confidential communication" that Section 5 of the Act added to current D.C. Code § 14-312.[52] This change improves the clarity of the revised statutes.

Ninth, the revised duty to report statute defines "sexual assault counselor" as having "the meaning specified in D.C. Code § 23-1907(10). Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added an exclusion for sexual assault counselors to the current D.C. Code duty to report a sex crime statute[53]

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victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.").

[50] Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

> (5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:
>
> (A) A victim under the age of 13;
>
> (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or
>
> (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

[51] D.C. Code § 14-312(a), (a)(1):

> (a) For the purposes of this section, the term:
>
> (1) "Confidential communication" means:
>
> (A) Information exchanged between a sexual assault victim 13 years of age or older and a sexual assault counselor during the course of the sexual assault counselor providing counseling, support, and assistance to the victim; and
>
> (B) Records kept by a community-based organization in the course of providing victim advocacy services pursuant to § 23-1909 for sexual assault victim 13 years of age or older.

[52] D.C. Code § 14-312(b)(3):

> (3) The confidentiality of a confidential communication shall not be waived by the presence of, or disclosure to a:
>
> (A) Sign language or foreign language interpreter; provided, that a sign language or foreign language interpreter shall be subject to the limitations and exceptions set forth in paragraph (1) of this subsection and the same privileges set forth in subsection (c) of this section;
>
> (B) Third party participating in group counseling with the sexual assault victim; or
>
> (C) Third party with the consent of the victim where reasonably necessary to accomplish the purpose for which the sexual assault counselor is consulted.

[53] D.C. Code § 22-3020.52(c), (c)(3) ((c) No legally recognized privilege, except for the following, shall apply to this subchapter: (3 "Sexual assault counselors shall be exempt from reporting pursuant to subsection (a) of this section any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves: (A) A victim under the age of 13; (B) A perpetrator or alleged perpetrator with whom the sexual assault victim

(subparagraph (b)(1)(D)) in the revised statute). Section 6 of the Act did not codify a definition for the term "sexual assault counselor." However, Section 5 of the Act added an identical exclusion to current D.C. Code § 14-312[54] for mandatory reporting and codified a definition of "sexual assault counselor"[55] applicable to that exclusion. The revised duty to report statute incorporates this definition of "sexual assault counselor." This change improves the clarity of the revised statutes.

Tenth, the exclusion for sexual assault counselors in the revised statute consistently uses the term "sexual assault victim" and adopts the definition of that term in D.C. Code § 23-1907(11). The sexual assault counselor exclusion in the current D.C. Code duty to report statute is limited when the predicate crime involves "(A) A *victim* under the age of 13; (B) A perpetrator or alleged perpetrator with whom the *sexual assault victim* has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than *the sexual assault victim*."[56] It is unclear why subparagraph (A) uses the term "victim" instead of "sexual assault victim" as in subparagraphs (B) and (C).

Section 6 of the Sexual Assault Victims' Rights Amendment Act of 2019 (the Act) added this exclusion to current D.C. Code § 22-3020.52 and does not define the term "victim"[57] or "sexual assault victim." However, Section 5 of the Act added an identical exclusion to D.C. Code § 14-312 for mandatory reporting. D.C. Code § 14-312 does not define the term "victim," but does define "sexual assault victim" as "any individual against whom a sexual assault has been committed or is alleged to have been committed, including: (A) Deceased individuals; and (B) Representatives appointed by the court to exercise the rights and receive services on behalf of sexual assault victims who are under 18 years of age, incompetent, incapacitated, or deceased."[58] The exclusion for sexual assault counselors in the RCC duty to report statute consistently uses the term "sexual assault victim" because this definition is consistent with the use of that term in sub-subparagraphs (b)(1)(D)(i) and (b)(1)(D)(ii). The definition of "sexual assault victim" in

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has a significant relationship, as that term is defined in § 22-3001(10); or (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.").

[54] Section 5 of the Act added a new paragraph (b)(5) to current D.C. Code § 14-312:

> (5) Notwithstanding § 4-1321.02, sexual assault counselors shall be exempt from mandatory reporting of any crime disclosed in a confidential communication unless the sexual assault counselor has actual knowledge that the crime disclosed to the sexual assault counselor involves:
>
> (A) A victim under the age of 13;
>
> (B) A perpetrator or alleged perpetrator with whom the sexual assault victim has a significant relationship, as that term is defined in § 22-3001(10); or
>
> (C) A perpetrator or alleged perpetrator who is more than 4 years older than the sexual assault victim.

D.C. Code § 14-312(b)(5).

[55] D.C. Code § 14-312(a)(5A): "(a) For the purposes of this section, the term: (5) 'Sexual assault counselor' shall have the same meaning as provided in § 23-1907(10).").

[56] D.C. Code § 22-3020.52(c)(3) (emphasis added).

[57] It seems unlikely that the Act intended to adopt the definition of "victim" in D.C. Code § 22-3001 that would otherwise apply in D.C. Code § 22-3001(11) ("victim" is "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter."). Section 5 of the Act added an identical exclusion for sexual assault counselors to D.C. Code § 14-312 for mandatory reporting and also uses the undefined term "victim," as opposed to "sexual assault victim."

[58] D.C. Code § 14-312(a)(6).

D.C. Code § 14-312 is identical to the definition of that term in D.C. Code § 23-1907(11)E and the revised statute refers to that definition for consistency with the definition of "sexual assault counselor," also in Title 23 of the current D.C. Code. This change improves the clarity of the revised statute.

RCC § 22E-1310. Admission of Evidence in Sexual Assault and Related Cases.

Explanatory Note. *The RCC admission of evidence in sexual assault and related cases statute (revised admission of evidence statute) establishes limitations on the use of evidence pertaining to a complainant's past sexual behavior in criminal cases for sex offenses under RCC Chapter 13. The revised admission of evidence statute replaces four distinct provisions in the current D.C. Code: the statute prohibiting the use of reputation or opinion evidence of a complainant's past sexual behavior,[1] the statute governing admissibility of other evidence of a complainant's past sexual behavior,[2] the prompt reporting statute,[3] and the statute prohibiting privilege between spouses or domestic partners.[4]*

Subsection (a) states that notwithstanding any other provision of law, in a criminal case under RCC Chapter 13, reputation or opinion evidence of the past sexual behavior of the complainant is not admissible. Paragraph (e)(2) defines "past sexual behavior" for this statute.

Subsection (b) governs the admissibility of evidence of a complainant's past sexual behavior, other than reputation or opinion evidence, in criminal cases under RCC Chapter 13. Paragraph (1) states the standards for when such evidence is admissible. Paragraph (2) establishes the procedural requirements an actor must follow if the actor plans to offer such evidence. Paragraph (3) and paragraph (4) establish court procedures for determining the admissibility, as well as the use of such evidence.

Subsection (c) states that evidence of delay in reporting an offense under RCC Chapter 13 to a public authority shall not raise any presumption concerning the credibility or veracity of a charge under RCC Chapter 13.

Subsection (d) states that laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under RCC Chapter 13 in specified situations.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC and also provides a definition of "past sexual behavior" applicable to this statute.

Relation to Current District Law. *The changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.*

First, the revised admission of evidence statute refers to a "complainant" instead of "victim" or "alleged victim." "Victim" is defined for the current admissibility of evidence statutes and related provisions as "a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter [Chapter 30].[5] RCC § 22E-701

[1] D.C. Code § 22-3021.
[2] D.C. Code § 22-3022.
[3] D.C. Code § 22-3023.
[4] D.C. Code § 22-3024.
[5] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter." D.C. Code § 22-3001(11). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "victim" in D.C. Code § 22-3001(11) applies to these statutes.

defines "complainant" as "person who is alleged to have been subjected to a criminal offense." Consistently using the defined term "complainant" instead of "victim" or "alleged victim" improves the clarity and consistency of the revised admission of evidence statute.

Second, the revised admission of evidence statute refers to the "actor" instead of the "person accused of an offense under subchapter II of this chapter,"[6] the "accused"[7] or the "defendant."[8] RCC § 22E-701 defines "actor" as "person accused of a criminal offense." Consistently using the defined term "actor" improves the clarity and consistency of the revised admission of evidence statute.

Third, sub-subparagraph (b)(1)(B)(ii) refers to the "consent" and "effective consent" of the complainant. The current admission of evidence statute refers to the "consent" of the complainant.[9] "Consent" is currently defined, in part, as "words or overt actions indicating a freely given agreement to the sexual act or contact in question."[10] The RCC breaks the current sex offense definition of "consent" into two terms, "consent" and "effective consent." The RCC definition of "consent" in RCC § 22E-701 refers to the bare fact of an agreement between parties obtained by any means when the parties are generally competent, while the RCC definition of "effective consent" in RCC § 22E-701 refers to "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The revised statute refers to both "consent" and "effective consent" because either may be relevant, depending on the RCC sex offense statute at issue. The use of these terms in the revised admission of evidence statute is not intended to change the scope of D.C. Code § 22-3022 or the scope of the RCC sex offenses. This change improves the clarity and consistency of the revised statute.

Fourth, the revised admission of evidence statute incorporates the RCC definitions of "domestic partner" and "bodily injury" in RCC § 22E-701. The RCC definition of "domestic partner" is the same as it is for the current admission of evidence statute.[11] As is discussed to the commentary for the revised definition of "bodily injury" in RCC § 22E-701, the RCC definition of "bodily injury" is changed from the definition that applies to the current admission of evidence statute.[12] Although the revised

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[6] *See, e.g.*, D.C. Code §§ 22-3021(a); 22-3022(a).

[7] *See, e.g.*, D. C. Code § 22-3022(a)(2)(A), (b)(1).

[8] D.C. Code § 22-3024.

[9] D.C. Code § 22-3022(a)(2)(B) ("Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.").

[10] D.C. Code § 22-3001(4).

[11] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'domestic partner' shall have the same meaning as provided in § 32-701(3)." D.C. Code § 22-3001(4A). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021 through 22-3024 and are included in Chapter 30. The definition of "domestic partner" in D.C. Code § 22-3001(4A) applies to these statutes and is unchanged in RCC § 22E-701.

[12] D.C. Code § 22-3001 defines terms for Chapter 30, Sexual Abuse, of Title 22 of the current D.C. Code. D.C. Code § 22-3001 states that "[f]or the purposes of this chapter . . . 'bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain." D.C. Code § 22-3001(2). The current admissibility of evidence statutes and related provisions are codified in D.C. Code §§ 22-3021

definition may substantively change parts of current District law for the sex offenses to which they apply, the use of these terms in the revised admission of evidence statute is not intended to affect the procedures established in current D.C. Code § 22-3022. This change improves the clarity and consistency of the revised statute.

through 22-3024 and are included in Chapter 30. The definition of "bodily injury" in D.C. Code § 22-3001(2) applies to these statutes.

RCC § 22E-1401. Kidnapping.

Explanatory Note. *This subsection establishes the kidnapping offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly confining or moving another person with intent: to hold that person for ransom; to hold that person as a hostage or shield; to facilitate commission of any felony or flight thereafter; to inflict bodily injury or commit a sexual assault; to cause any person to believe that the complainant will not be released without suffering death, serious bodily injury, or a sex offense; or to permanently leave a parent who is responsible for the general care and supervision of the complainant, or a court appointed guardian, without custody of the complainant. The kidnapping offense is divided into two penalty grades, based on the actor's intent in moving or confining the complainant. The statute also includes penalty enhancements, which require that the accused commits kidnapping with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by knowingly displaying or using a dangerous weapon or imitation dangerous weapon. Along with the criminal restraint statute,[1] the revised kidnapping statute replaces the kidnapping[2] statute in the current D.C. Code, and parts of several prostitution related statutes that involve restraining or moving another person.[3] Insofar as they are applicable to current kidnapping offense, the revised kidnapping offense also replaces the protection of District public officials statute[4] and seven penalty enhancements: the enhancement for committing an offense while armed;[5] the enhancement for senior citizens;[6] the enhancement for citizen patrols;[7] the enhancement for minors;[8] the enhancement for taxicab drivers;[9] and the enhancement for transit operators and Metrorail station managers.[10]*

Subsection (a) specifies the elements of first degree kidnapping. Paragraph (a)(1) specifies that first degree kidnapping requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she confines or moves another person. Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of persuasion, threat, or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the

[1] RCC § 22E-1404.
[2] D.C. Code § 22-2001.
[3] D.C. Code § 22-2704; 22-2705; 22-2706; 22-2708; 22-2709.
[4] D.C. Code § 22-851.
[5] D.C. Code § 22-4502.
[6] D.C. Code § 22-3601.
[7] D.C. Code § 22-3602.
[8] D.C. Code § 22-3611.
[9] D.C. Code §§ 22-3751; 22-3752.
[10] D.C. Code §§ 22-3751.01; 22-3752.

actor's intervention. Confining another person can include either physically trapping a person in a location against his or her will, such as by locking a person in a room, or by causing the person to remain in a location by means of persuasion, threat, or deception.[11]

Paragraph (a)(2) specifies prohibited means of confining or moving a person. Subparagraph (a)(2)(A) requires that the actor confines or moves the complainant by causing bodily injury to the complainant, or by using physical force. The term "bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of a physical condition." Subparagraph (a)(2)(B) requires that the actor makes an explicit or implicit coercive threat. The term "coercive threat" is defined in RCC § 22E-701, and includes an array of specified threats. The definition of "coercive threat" prohibits "communicat[ing]" specified harms such as accusing someone of a criminal offense, as well as sufficiently serious harms that would cause a reasonable person to comply. The verb "communicates" is intended to be broadly construed, encompassing all speech[12] and other messages,[13] which includes gestures or other conduct,[14] that are received and understood by another person. Subparagraph (a)(2)(C) requires that the actor use deception. The term "deception" is defined in RCC § 22E-701. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to the elements in subparagraphs (a)(2)(A)-(C).

Subparagraph (a)(2)(D) specifies two additional means of committing first degree kidnapping when the complainant is an incapacitated individual or under the age of 16. This subparagraph applies regardless of whether the complainant agrees to the confinement or movement. Sub-subparagraph (a)(2)(D)(i) requires that the actor was reckless as to the fact that the complainant is an incapacitated individual, and that a person with legal authority over the complainant who is acting consistent with that authority[15] has not given effective consent to the confinement or movement. The term "effective consent" is a defined term in RCC § 22E-701, which means "consent other

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[11] For example, a person who invites a guest to his home for dinner has "moved" and "confined" the guest, as the guest would not have gone to and remained at the person's home absent the dinner invitation. However, this would not constitute kidnapping, as the movement and confinement were consensual.

[12] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[13] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[14] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute communication, if it communicates that harm will continue in the future.

[15] If the person with legal authority over the complainant provides effective consent, but is not acting consistent with that authority, kidnapping liability may apply. For example, if a person with legal authority over the complainant consents to the complainant being taken and held for ransom, kidnapping liability may still apply notwithstanding the effective consent.

than consent induced by physical force, an explicit or implicit coercive threat, or deception. "Person with legal authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is an incapacitated individual," "a court-appointed guardian to the complainant" or "someone who is acting with the effective consent of such a guardian."[16] The sub-subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is incapacitated, and that a person with legal authority has not consented to the confinement or movement.[17] Under this sub-subparagraph, it is immaterial if the complainant consents to the movement or confinement.

Sub-subparagraph (a)(2)(D)(ii) requires that the actor was, in fact, 18 years of age or older, and was reckless as to the fact that the complainant is under 16 years of age and four years younger than the actor, and that a person with legal authority over the complainant has not given effective consent to the confinement or movement. "Person with legal authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is under 18 years of age," "[a] parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant" or "[s]omeone who is acting with the effective consent of such a parent or such a person."[18] The sub-subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is under the age of 16, and that a person with legal authority has not consented to the confinement or movement.[19] Under this sub-subparagraph, it is immaterial if the complainant consents to the movement or confinement.

Paragraph (a)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (a)(3)(A)-(H). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (a)(3)(A)-(H). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that one of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[20]

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[16] RCC § 22E-701.

[17] Whether there was a substantial risk that a person with legal authority would not have consented, and whether the actor's disregard of the risk was a gross deviation from the ordinary standard of conduct is a fact based analysis that may take into account the complainant's age, the nature of and motivation for the confinement or movement, or any other relevant facts.

[18] RCC § 22E-701.

[19] Whether there was a substantial risk that a person with legal authority would not have consented, and whether the actor's disregard of the risk was a gross deviation from the ordinary standard of conduct is a fact based analysis that may take into account the complainant's age, the nature of and purpose for the confinement or movement, or any other relevant facts.

[20] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

Subparagraph (a)(3)(A) specifies that first degree kidnapping includes acting "with intent to" hold the complainant for ransom or reward. Holding a person for ransom or reward requires demanding anything of value in exchange for release of the complainant.

Subparagraph (a)(3)(B) specifies that first degree kidnapping includes acting "with intent to" use the complainant as a shield or hostage. Holding a person as a shield or for hostage requires using the person's body as defense against potential attack, or to demand fulfillment of any condition in exchange for the person's release.

Subparagraph (a)(3)(C) specifies that first degree kidnapping includes acting "with intent to" facilitate the commission of a felony or the flight thereafter. The confinement or movement of the person must aid the commission or flight from the felony.[21] Many offenses, such as robbery or sexual assaults, often involve confining or moving a person with intent to facilitate that offense. Although confinement or movement in the course of another offense may satisfy the elements of kidnapping per subparagraph (a)(3)(C), liability in these cases is limited by subsection (e), discussed below.

Subparagraph (a)(3)(D) specifies that first degree kidnapping includes acting "with intent to" inflict death or serious bodily injury. "Serious bodily injury" is a defined term under RCC § 22E-701 and means a bodily injury that involves: a risk of death; protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member or organ; or protracted loss of consciousness.

Subparagraph (a)(3)(E) specifies that first degree kidnapping includes acting "with intent to" commit a sexual offense, as defined under Chapter 13 of Title 22E, against the complainant.[22]

Subparagraph (a)(3)(F) specifies that first degree kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering death, serious bodily injury[23] or a sex offense as defined in Chapter 13 of Title 22E. This element may be satisfied if any person believes the complainant will not be released at all, or will only be released after having suffered death, serious

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[21] For example, a bank robber who seizes and drives off with a security guard to prevent the guard from calling for help may be convicted of kidnapping.

[22] There is some overlap between subsection (b)(4)(C) and subsection (b)(4)(E). For example, a defendant who interferes with another person's freedom of movement in order to commit a felony sexual offense could be prosecuted for kidnapping under both subsections. However, subsection (b)(4)(E) is both broader and narrower than subsection (b)(4)(C). It is broader in that intent to facilitate misdemeanor assault or sexual assaults would not suffice under (a)(3)(C). It is narrower however in that it requires intent to commit a sexual offense, but other means of facilitating misdemeanor assaults or sexual assaults would not be covered.

[23] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

physical injury, or being subjected to a sex offense. This element does not require that the actor actually intends to inflict death, serious bodily injury or to commit a sex offense.

Subparagraph (a)(3)(G) specifies that first degree kidnapping includes acting "with intent to" permanently leave a person with legal authority over the complainant without of custody of the complainant.[24] The term "person with legal authority over the complainant" is defined in RCC § 22E-701. Intent to temporarily interfere with lawful custody is insufficient.

Subparagraph (a)(3)(H) specifies that first degree kidnapping includes acing "with intent to" confine or move the complainant for 72 hours or more. This element may be satisfied if the actor actually confines or moves the complainant for 72 hours or more, or is practically certain that he or she will confine or move the complainant for 72 hours or more.

Subsection (b) defines the elements of second degree kidnapping. The elements of second degree kidnapping specified in paragraphs (b)(1) and (b)(2) are identical to the elements of first degree kidnapping that are specified in paragraphs (a)(1) and (a)(2).

Paragraph (b)(3) specifies that the accused must confine or move another person "with intent to" accomplish one of the goals listed in subparagraphs (b)(3)(A) or (b)(3)(B). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause one of the goals listed in subparagraphs (b)(3)(A) or (b)(3)(B). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that one of the goals actually occurred, just that the defendant believed to a practical certainty that one of the goals would occur.[25]

Subparagraph (b)(3)(A) specifies that second degree kidnapping includes acting "with intent to" inflict bodily injury. "Bodily injury" is a defined term under RCC § 22E-701, and means "physical pain, physical injury, illness, or impairment of physical condition."

Subparagraph (b)(3)(B) specifies that second degree kidnapping includes acting "with intent to" cause any person to believe that the complainant will not be released without suffering bodily injury.[26] This element may be satisfied if any person believes

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[24] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

[25] For example, an actor who confines another with intent to commit a sexual offense against that person may be convicted of kidnapping even if the actor does not actually commit the sexual offense.

[26] The seeming discrepancy between subsection (a)(3)(C) which requires intent to cause bodily injury and subsection (a)(3)(D) which requires intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is due to the different interests addressed in each subsection. Subsection (a)(3)(C) criminalizes cases in which the defendant had intent to inflict actual

the complainant will not be released at all, or will only be released after having suffered physical injury. This element does not require that the actor actually intends to inflict bodily injury.

Subsection (c) provides a defense to prosecution for under paragraphs (a)(3)(G) and (a)(3)(H) when complainant is under the age of 18, and the actor is either: a "close relative" of the complainant, who acts with intent[27] to assume full responsibility for the care and supervision of the complainant; or a person who reasonably[28] believes he or she is acting at the direction of a close relative who acts with the intent that the close relative will assume full responsibility for the care and supervision of the complainant. In addition, subparagraphs (c)(1)(B) and (c)(2)(B) require that the actor did not cause bodily injury or threaten to cause bodily injury to the complainant, or cause or threaten to cause the complainant to engage in a sexual act or sexual contact. The term "close relative" is defined in RCC §22E-701 to mean the complainant's parents, grandparents, siblings, children, cousins, aunts, or uncles. More distant relatives are not included within the definition, and cannot rely on this exception to liability.

Subsection (d) specifies relevant penalties for first and second degree kidnapping. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (d)(3) specifies three penalty enhancements. If the government proves at least one of the penalty enhancements listed under paragraph (d)(3), the penalty classification for first and second degree kidnapping may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6. [29]

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injury, whereas subsection (a)(3)(D) criminalizes cases in which the defendant merely had intent to *put another person in fear*, regardless of whether the defendant actually intended to inflict any injury on the complainant. Since subsection (a)(3)(D) only requires intent to cause another to be in fear, a more stringent requirement of intent to cause a person to believe the complainant will not be released without having suffered *significant* bodily injury is appropriate.

[27] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.

Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase.

[28] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[28] S*ee, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[29] If general penalty enhancements under RCC §22E-606 or §22E-607 apply to this offense, the penalty for RCC §22E-606 and §22E-607 shall be based on the classification of the relevant unenhanced gradation of this offense.

Subparagraph (d)(3)(A) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined in RCC § 22E-701. Under subparagraph (d)(3)(A), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is a gross deviation from the ordinary standard of conduct.

Subparagraph (d)(3)(B) requires that the accused commits kidnapping by recklessly causing the confinement or movement by displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include kidnappings in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.[30] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[31] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Subparagraph (d)(3)(C) specifies that a "recklessly" mental state applies to this enhancement, which requires that the actor consciously disregarded that the display or use of the weapon or imitation weapon caused the confinement or movement. However, the subparagraph also uses the term "in fact,"[32] to specify that no culpable mental state required as to whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Subparagraph (d)(3)(C) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[33] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[34] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it

[30] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

[31] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to criminal threats, RCC § 22E-1204.

[32] RCC § 22E-207.

[33] While the RCC § 22E-701 definitions of "law enforcement officer" and "public safety employee" refer to some persons only when on-duty (e.g., a campus officer), this provision on committing the offense with the purpose of harming the complainant because of their status as a law enforcement officer or public safety employee applies to committing the offense against an off-duty person based on their on-duty role. For example, a defendant who kidnaps an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing kidnapping with the purpose of harming the complainant due to his status as a law enforcement officer.

[34] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor consciously desired to harm a person of such a status.

Subsection (e) provides that convictions for first or second degree kidnapping and a separate offense merge if the offenses arose from the same act or course of conduct and the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[35] The subsection specifies that the court will follow the procedures in RCC § 22E-214 (b) and (c) to effect the merger.

Subsection (f) cross-references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised kidnapping statute changes current District law in eight main ways.*

First, the revised kidnapping offense requires that the actor confines or moves another person with intent to hold the person for ransom, inflict bodily injury, or commit other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[36] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[37] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving a person, while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Under the revised kidnapping statute, confining or moving another with intent to enact revenge or to seek companionship, or other purpose would not constitute

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[35] This provision is intended to re-instate D.C. Court of Appeals (DCCA) case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should merge. The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of kidnapping because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may still be convicted of kidnapping because the duration of the confinement far exceeded what would normally be associated with a robbery. *See e.g., Sinclair v. United States,* 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[36] D.C. Code § 22-2001;

[37] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford,* 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

kidnapping, unless the actor had intent to achieve one of the goals listed in subparagraphs (a)(3)(A)-(H) or (b)(3)(A)-(B).[38] Codifying a new kidnapping offense based on the actor's intent improves the proportionality of the RCC by separately labeling and penalizing more harmful and dangerous forms confinement or movement.[39]

Second, the RCC kidnapping offense is divided into two penalty gradations based on the actor's intent in confining or moving the complainant. The current kidnapping statute has only one penalty grade. By contrast, the revised statute differentiates between intents which present a lower degree of harm or risk, from those that create a greater degree of harm or risk of more serious injury. This change improves the proportionality of the revised offense.

Third, the RCC kidnapping offense provides a defense under subsection (c) if the actor is a "close relative" of a complainant and had intent to assume full responsibility for the care and supervision of the complainant, or if the actor reasonably believed he or she was acting at the direction of a close relative, with intent that the close relative would assume full responsibility for care and supervision of the complainant. In addition, the defense requires that the actor did not cause or threaten to cause bodily injury to the complainant, or cause or threaten to cause the complainant to engage in a sexual act or sexual contact. The current kidnapping statute provides an exception to liability if the victim is a minor, and the defendant is the victim's parent. However, the current statute does not specify any further conditions for the exception, and it is unclear whether the current statute's parental exception applies in all kidnapping cases or is inapplicable if the parent uses force or threats to restrain the child. Case law has not resolved this ambiguity.[40] By contrast, the revised kidnapping statute's defense applies to close relatives[41] not just parents of the complainant. However, the defense requires that the actor had intent to assume full responsibility for the care and supervision of the complainant and that the actor did not cause bodily injury or threaten to cause bodily injury. The defense does not apply if the actor confined or moved another person without that person's consent, by causing or threatening to cause bodily injury.[42] The defense also does not apply if the actor had any intent other than to assume full responsibility for

[38] For example, a person who confines another with intent to enact revenge may have intent to cause bodily injury, or intent to cause another person to believe that the complainant will not be released without suffering significant bodily injury.

[39] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

[40] In *Byrd v. United States*, 705 A.2d 629, 633 (D.C. 1997), the DCCA held that a person acting *in loco parentis* may not rely on the parental exception if "the defendant has engaged in separate felonious conduct during the kidnapping which exposes the child to a serious risk of death or bodily injury." However, the DCCA explicitly declined to decide "whether a biological parent may similarly forfeit the protection of the exception." *Id*. at 634 n. 7.

[41] As defined in RCC § 22E-701, which includes a parent, grandparent, sibling, child cousin, aunt, or uncle.

[42] For example, a non-custodial parent that uses force to restrain a child with intent to assume custody of that child may still be convicted of kidnapping under the revised statute.

the care and supervision of the complainant.[43] The defense under subsection (c) recognizes the diminished culpability and risk to the complainant in cases where the actor is related to the complainant, and no force or threats were used.[44] However, the District's parental kidnapping statute[45] may still provide liability in such conduct by a relative. Changing the parental defense to include a broader array of relatives but limiting the defense to cases in which the actor did not cause bodily injury or threaten to cause bodily injury, improves the proportionality of the revised offenses.

Fourth, the RCC kidnapping states that if the confinement or movement was incidental to the commission of any other offense, convictions for kidnapping and the other offense shall merge.[46] Under current DCCA case law a defendant may be convicted of both kidnapping and another offense that arise from the same act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[47] By contrast, the RCC kidnapping statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[48] which required courts to make a determination in each case as to whether the kidnapping was merely incidental to another offense.[49] Where, as is common,[50] the confinement or movement is incidental to another offense,[51] the authorized punishment for the other offense is sufficient. The RCC kidnapping sentencing provision improves the proportionality of the offense.

Fifth, the RCC kidnapping statute incorporates multiple penalty enhancements based on the status of the complainant, and the use of a dangerous weapon or imitation dangerous weapon, into new penalty enhancements, and caps the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the

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[43] For example, a parent who holds his own child for ransom may still be convicted of kidnapping under the revised statute.

[44] *See*, *Byrd*, 705 A.2d at 633 (noting that the current kidnapping statute was with the intent that "a parent who kidnapped a child, however misguidedly, out of affection and disagreement over custody should not be prosecuted for that act alone").

[45] D.C. Code § 16-1022.

[46] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

[47] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[48] 692 A.2d 913 (D.C. 1997). In *Parker,* the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (en banc) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

[49] *E.g., West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[50] Many offenses against persons commonly involve some type of significant, non-consensual confinement or movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[51] *E.g., Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

commission of a kidnapping offense,[52] without specifying whether or how these enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined, but the combination of at least some of these enhancements has been upheld.[53] By contrast, under the revised kidnapping statute, the penalty for first or second degree kidnapping cannot be enhanced more than once based on any of the listed enhancements.[54] While multiple penalty enhancements may be charged, proof of just one is sufficient to increase the penalty class severity, and proof of others does not change the maximum statutory penalty for the crime.[55] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing aggravated forms of the offense from being penalized the same as much more serious offenses.[56]

Sixth, the RCC kidnapping statute provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute has no gradations and does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[57] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC kidnapping statute authorizes enhanced penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[58] robbery[59], and homicide offenses,[60] and reflect some unique vulnerabilities

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[52] *See,* e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

[53] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States,* 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[54] For instance, the status of the complainant and the defendant's use of a weapon.

[55] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

[56] For example, under current law the unarmed kidnapping of a 65 year old taxi cab driver is subject to two penalty enhancements under D.C. Code § 22-3601, and § 22-3751, each of which permits a sentence 1 ½ times the maximum sentence otherwise allowed. Kidnapping ordinarily carries a maximum sentence of 30 years. If these enhancements are both applied, kidnapping a 65 year old taxi driver would be subject to a maximum 60 year sentence, the same as first degree murder. D.C. Code § 22-2104.

[57] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[58] RCC § 22E-1202

[59] RCC § 22E-1201.

of such complainants.[61] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on the complainant's status.[62] Including recklessness as to the complainant being an on-duty law enforcement officer, public safety employee, a vulnerable adult, or on-duty transportation worker as a penalty enhancement to kidnapping removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

Seventh, the revised kidnapping statute provides new, heightened penalties based on the offense being committed for the purpose of harming the complainant because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute has no gradations and does not reference a purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[63] By contrast, the revised kidnapping statute includes a penalty enhancement for committing the offense with the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[64] Authorizing heightened penalties for committing kidnapping with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Eighth, the revised kidnapping statute incorporates penalty enhancements for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual

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[60] RCC §§ 22E-1101 - 1102.

[61] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

[62] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

[63] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee);

[64] D.C. Code § 22-851. Subparagraph (d)(3)(C) of the RCC kidnapping statute provides liability for kidnapping committed with the purpose of harming the complainant because of the complainant's status as a District official.

physical possession of [a weapon]";[65] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[66] provided that the accused also constructively possessed the weapon.[67] There is no requirement under D.C. Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[68] By contrast, the penalty enhancement under the revised kidnapping statute requires that the actor actually displayed or used[69] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon or imitation weapon readily available is insufficient to satisfy the penalty enhancement under subparagraph (d)(3)(B), although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[70] Including use of a dangerous weapon or imitation dangerous weapon within the kidnapping statute as penalty enhancement improves the proportionality of punishment by matching more severe penalties to kidnappings in which the actor actually uses or displays a weapon.

Beyond these eight changes to current District law, seven other aspect of the revised kidnapping statute may constitute a substantive change of law.

First, the RCC kidnapping statute specifies that the actor must have "knowingly" confined or moved another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[71] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[72] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the

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[65] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[66] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[67] *Cox v. United State*s, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

[68] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[69] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may satisfy the penalty enhancement for kidnapping under subparagraph (d)(3)(C).

[70] *See* D.C. Code § 22-4514(b); RCC § 22E-4102.

[71] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").

[72] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").

offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[73] The revised kidnapping statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[74] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the RCC kidnapping offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current statute broadly states that a person commits kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[75] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[76] which includes forcible seizures[77], or restraining a person by threat of force.[78] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will."[79] The revised kidnapping statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC kidnapping statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under the

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[73] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.

[74] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[75] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[76] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

[77] *E.g., Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[78] *E.g., Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[79] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

current kidnapping statute.[80] By contrast, the revised kidnapping statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[81]

Fourth, when the complainant is under the age of 16[82] or is incapacitated, the RCC kidnapping statute requires that the actor be reckless as to the fact that a person with legal authority over the complainant has not effectively consented to the confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[83] It is unclear under current law whether, and under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant has not effectively consented to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Fifth, the RCC kidnapping statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[84] With the exception of "enticing," discussed below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a person includes conduct not

[80] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g.*, *Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

[81] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

[82] This form of kidnapping also requires that the actor is 18 years of age or older, and at least four years older than the complainant.

[83] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

[84] D.C. Code § 22-2001.

covered by confining and moving another.[85] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms, and it is unclear how omitting these terms changes the scope of the offense. The RCC kidnapping statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[86] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[87]

Sixth, the RCC's kidnapping statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[88] Under a plain language reading, the current kidnapping statute provides liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the kidnapping to be "involuntary" in nature.[89] The RCC's kidnapping statute resolves this ambiguity by providing that kidnapping requires actually confining or moving a person without that person's effective consent. A person cannot commit kidnapping merely by offering some reward, without actually confining or moving another person.[90] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the kidnapping statute.[91]

Seventh, the RCC kidnapping statute does not separately criminalize a conspiracy to commit kidnapping. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[92] The current kidnapping statute's reference to a

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[85] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC kidnapping offense, the mere use of flattery to confine or move someone would be insufficient.

[86] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

[87] Since the RCC kidnapping statute requires intent to achieve one of the goals under paragraph (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using physical force, coercive threats, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using physical force, coercive threats, or deception.

[88] D.C. Code § 22-2001.

[89] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

[90] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[91] Since the RCC kidnapping statute requires intent to achieve one of the goals under subsection (b)(3), it is unlikely, though possible, that a defendant could satisfy all the elements of kidnapping without using force, threat of force, or deception. For example, it is unlikely a person would hold another person hostage or for ransom without using force, threat of force, or deception.

[92] D.C. Code § 22-2001. "If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to

conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC kidnapping statute, conspiracy to commit kidnapping is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a change in current law.[93] This change improves the clarity and consistency of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The RCC kidnapping statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia."[94] This language apparently is intended to ensure that District courts have jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[95] Consequently, although the DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[96] The RCC kidnapping statute eliminates jurisdiction language specific to kidnapping. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[97] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[98] District courts would therefore have jurisdiction over conspiracies to commit kidnapping outside of the District. Omitting special jurisdiction

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have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01."

[93] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.

[94] D.C. Code § 22-2001.

[95] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

[96] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.

[97] *Baish*, 460 A.2d at 40–41.

[98] RCC § 22E-303(c).

language from the kidnapping statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

RCC § 22E-1402. Criminal Restraint.

Explanatory Note. *This section establishes the criminal restraint offense for the Revised Criminal Code. This offense criminalizes knowingly confining or moving a person without that person's effective consent. The offense is identical to the RCC's kidnapping offense, except that criminal restraint does not require intent to hold that person for ransom or another specified purpose [1] Along with the revised kidnapping[2] offense, the revised criminal restraint offense replaces the kidnapping offense in the current D.C. Code,[3], and parts of several prostitution related statutes that involve restraining or moving another person.[4] The statute also includes penalty enhancements, which require that the accused commits criminal restraint with recklessness as to the fact that the complainant is a protected person; with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official; or by recklessly displaying or using a dangerous weapon or imitation dangerous weapon.*

Subsection (a) specifies the elements of criminal restraint. Paragraph (a)(1) specifies that criminal restraint requires the actor knowingly and substantially confines or moves another person. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would confine or move another person. Moving a person requires causing that person to move to another location when that person would not have done so absent the actor's intervention. Moving another person can include either moving a person against his or her will, such as by tying up and carrying away a person, or by causing the person to move by means of persuasion, threat, or deception. Confining a person requires causing that person to remain in a location when that person would not have done so absent the actor's intervention. Confining another person can include either physically trapping a person in a location against his or her will, such as by locking a person in a room, or by causing the person to remain in a location by means of persuasion, threat, or deception. Confining or moving a person per this subsection need not involve force, threats, or other forms of coercion.[5]

Subsection (a) also requires that the actor must *substantially* confine or move the complainant. This paragraph clarifies that momentary or trivial[6] confinement or movement is insufficient. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to this element. The actor must be practically certain that the confinement or movement was substantial.

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[1] *See* RCC § 22E-1402.
[2] RCC § 22E-1402.
[3] D.C. Code § 22-2001.
[4] D.C. Code § 22-2704; 22-2705; 22-2706; 22-2708; 22-2709.
[5] For example, a person who invites a guest to his home for dinner has "moved" and "confined" the guest, as the guest would not have gone to and remained at the person's home absent the dinner invitation. However, this would not constitute criminal restraint, as the movement and confinement were consensual.
[6] Confinement or movement may be trivial even if they are of significant duration. For example, if a person barricades a door to prevent another from leaving a building, but there is an alternate exit that is easily accessible, the interference would not be substantial regardless of how long the door remains barricaded.

Paragraph (a)(1) specifies prohibited means of confining or moving a person. Subparagraph (a)(1)(A) requires that the actor confines or moves the complainant by causing bodily injury to the complainant, or by using physical force. The term "bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of a physical condition." Subparagraph (a)(1)(B) requires that the actor makes an explicit or implicit coercive threat. The term "coercive threat" is defined in RCC § 22E-701, and includes an array of specified threats. Subparagraph (a)(1)(C) requires that the actor use deception. The term "deception" is defined in RCC § 22E-701. Per the rule of interpretation under RCC § 22E-207, the "knowingly" mental state also applies to the elements in subparagraphs (a)(1)(A)-(C).

Paragraph (a)(2) specifies two additional means of committing criminal restraint when the complainant is an incapacitated individual or under the age of 16. Under this paragraph it is irrelevant whether the complainant agrees to the confinement or movement. Subparagraph (a)(2)(A) requires that the actor was reckless as to the fact that the complainant is an incapacitated individual, and that a person with legal authority over the complainant who is acting consistent with that authority[7] has not given effective consent to the confinement or movement. "Person with legal authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is an incapacitated individual, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[8] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is incapacitated, and that a person with legal authority has not consented to the confinement or movement.[9] Under this subparagraph, it is immaterial if the complainant consents to the movement or confinement.

Subparagraph (a)(2)(B) requires that the actor was, in fact, 18 years of age or older, and was reckless as to the fact that the complainant is under 16 years of age and four years younger than the actor, and that a person with legal authority over the complainant has not given effective consent to the confinement or movement. "Person with legal authority over the complainant" is a defined term in RCC § 22E-701 which means, in relevant part, "[w]hen the complainant is incapacitated, the court-appointed guardian to the complainant engaging in conduct permitted under civil law controlling the actor's guardianship, or someone acting with the effective consent of such a guardian."[10] The subparagraph specifies that a "reckless" culpable mental state applies to this element, which requires that the accused consciously disregarded a substantial risk that the complainant is under the age of 16, and that a person with legal authority has not

[7] If the person with legal authority over the complainant provides effective consent, but is not acting consistent with that authority, criminal restraint liability may apply. For example, if a

[8] RCC § 22E-701.

[9] Whether there was a substantial risk that a person with legal authority would not have consented, and whether the actor's disregard of the risk was a gross deviation from the ordinary standard of conduct is a fact based analysis that may take into account the complainant's age, the nature of and purpose for the confinement or movement, or any other relevant facts.

[10] RCC § 22E-701.

consented to the confinement or movement.[11] Under this subparagraph, it is immaterial if the complainant consents to the movement or confinement.[12]

Subsection (b) specifies defenses to prosecution under this section. Paragraph (b)(1) provides two defenses when the complainant is under 18 years of age. Paragraph (b)(1) uses the term "in fact" a defined term in RCC § 22E-207, which specifies that there is no culpable mental state required as to the complainant's age. Subparagraph (b)(1)(A) provides an exclusion to liability when the complainant is under the age of 18, and the actor is a close relative or a former legal guardian with authority to control the complainant's freedom of movement who acts "with intent to"[13] assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat. Subparagraph (b)(1)(B) provides an exclusion to liability if the actor reasonably believes[14] he or she is acting at the direction of a close relative. In addition, the actor must act with intent that the close relative will assume full responsibility for the care and supervision of the complainant, and did not cause bodily injury or use an explicit or implicit coercive threat. The term "close relative" is defined in RCC § 22E-701, and means a parent, grandparent, child, sibling, aunt, or uncle. The defenses under paragraph (b)(1) do not preclude criminal liability under any other offenses.[15] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[16]

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[11] Whether there was a substantial risk that a person with legal authority has not consented, and whether the actor's disregard of the risk was a gross deviation from the ordinary standard of conduct is a fact based analysis that may take into account the complainant's age, the nature of and purpose for the confinement or movement, or any other relevant facts.

[12] For example, if a person lures a child to enter and remain in his basement by promising to give the child candy, criminal restraint liability may apply even if the child willingly entered and remained in the basement.

[13] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain he or she would assume full responsibility for the care and supervision of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor assumed full responsibility for the care and supervision of the complainant, only that he or she believed to a practical certainty that he or she would do so.

Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase.

[14] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[15] For example, although the defense under paragraph (b)(1)(A) bars criminal restraint liability when a close relative moves a child with intent to assume full responsibility and care over the child, this does not preclude liability for parental kidnapping under RCC § 16-1022, provided the elements of that offense are satisfied.

[16] **S***ee, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

Paragraph (b)(2) provides two additional defenses to prosecution under paragraph (a)(1) of this section. Subparagraph (b)(2)(A) specifies that it is a defense that the actor is, in fact, is a transportation worker who moves the complainant while in the course of the worker's official duties.[17] Paragraph (b)(2)(B) specifies that it is a defense that the actor is, in fact, a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity.[18]

Paragraph (c) specifies two affirmative defenses. RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Under paragraph (c)(1), it is an affirmative defense to prosecution under paragraph (a)(1) that the actor lacked effective consent to confine or move the complainant due to the use of deception, but the actor did not have intent to[19] proceed by the infliction of bodily injury or an explicit or implicit coercive threat[20] if the deception should fail.[21]

Under paragraph (c)(2), it is an affirmative defense to prosecution under paragraph (a)(2) if the actor reasonably believes[22] that a person with legal authority over the complainant would have given effective consent to the conduct constituting the offense. This defense applies if the actor has not communicated with a person with legal authority over the complainant, but reasonably believes that such a person *would* effectively consent to the confinement or movement. The determination of whether the actor reasonably believed that a person with legal authority over the complainant would have effectively consented is a fact-specific inquiry. The complainant's age, the nature of and motivation for the confinement or movement, and any other relevant

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[17] For example, if a 12 year old child gets on a public bus while unaccompanied by a parent or guardian, the bus driver would technically satisfy the elements of criminal restraint under subparagraph (a)(2)(B), by moving the complainant without consent of a person with legal authority over the complainant. This defense bars criminal liability for this conduct.

[18] For example, a store owner who convinces a 12 year old child unaccompanied by a parent or guardian to enter the store would technically satisfy the elements of criminal restraint under subparagraph (a)(2)(B), by moving the complainant without consent of a person with legal authority over the complainant. This defense bars criminal liability for this conduct.

[19] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would proceed by the infliction of bodily injury or a coercive threat if the deception should fail. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor proceeded with the infliction of bodily injury or a coercive threat, only that the actor believed to a practical certainty that he or she would do so if the deception failed.

[20] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.

[21] Deception can fail either by the complainant realizing that he or she has been deceived, or by a third party intervening on behalf of the complainant. The defendant's motive for deceiving the other person, whether the defendant was armed, or an actual attempt to use force or threats may all be relevant to determinations of the defendant's willingness to resort to force or threats should the deception fail.

[22] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

circumstances may be taken into account. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[23]

Subsection (d) specifies relevant penalties for the criminal restraint offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (d)(2) specifies three penalty enhancements. If the government proves at least one of the penalty enhancements listed under paragraph (d)(2), the penalty classification for criminal restraint may be increased in severity by one penalty class. These penalty enhancements may apply in addition to any penalty enhancements authorized by RCC Chapter 6. [24]

Subparagraph (d)(2)(A) requires that the actor was reckless as to the complainant being a protected person. The term "protected person" is defined under RCC § 22E-701. Under sub-subparagraph (a)(2)(B)(i), the actor must have been reckless as to the complainant being a protected person, a culpable mental state defined in RCC § 22E-206, meaning the accused must consciously disregard a substantial risk that the complainant is a "protected person," and that disregard of that risk is a gross deviation from the ordinary standard of conduct.

Subparagraph (d)(2)(B) requires that the accused commits the offense by recklessly displaying or using a dangerous weapon or imitation weapon. The phrase "by displaying or using a dangerous weapon or imitation dangerous weapon" should be broadly construed to include criminal restraints in which the accused only momentarily displays such a weapon, or slightly touches the complainant with such a weapon.[25] The term "use" is intended to include making physical contact with the weapon, and conduct other than oral or written language, symbols, or gestures, that indicates the presence of a weapon.[26] The terms "dangerous weapon" or "imitation weapon," are defined in RCC § 22E-701. Sub-subparagraph (a)(2)(C) specifies that a "recklessly" culpable mental state applies to this penalty enhancement, which requires that the actor consciously disregarded a substantial risk that he or she would display or use a dangerous weapon or imitation weapon. However, the sub-subparagraph also uses the term "in fact," a defined term in RCC § 22E-207, to specify that there is no culpable mental state required as to

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[23] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[24] If general penalty enhancements under RCC §22E-606 or §22E-607 apply to this offense, the penalty for RCC §22E-606 and §22E-607 shall be based on the classification of the relevant unenhanced gradation of this offense.

[25] For example, assuming the other elements of the offense are proven, rearranging one's coat to provide a momentary glimpse of part of a knife, or holding a sharp object to someone's back without actually causing injury, may be sufficient for liability under paragraph (a)(3).

[26] For further detail on what conduct constitutes "using" a dangerous weapon, see Commentary to criminal threats, RCC § 22E-1204.

whether the implement used or displayed was a dangerous weapon or imitation dangerous weapon.

Subparagraph (d)(2)(C) requires that the actor has the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or public official. This requires that the accused acted with "purpose," a term defined at RCC § 22E-206, which means that the actor must consciously desire to harm that person because of his or her status as a law enforcement officer, public safety employee, or District official.[27] Harm may include, but does not require bodily injury. Harm should be construed more broadly to include causing an array of adverse outcomes.[28] "Law enforcement officer," "public safety employee," and "public official" are all defined terms in RCC § 22E-701. Per RCC § 22E-205, the object of the phrase "with the purpose" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. Here, it is not necessary to prove that the complainant who was harmed was a law enforcement officer, public safety employee, or District official, only that the actor believed to a practical certainty that the complainant that he or she would harm a person of such a status.

Subsection (e) provides that convictions for criminal restraint and a separate offense merge if the offenses arose from the same act or course of conduct and the confinement or movement was incidental to the commission of the other offense. Confinement or movement is incidental to another offense when the actor's primary purpose in confining or moving the other person was to commit the other offense, provided that the movement or confinement did not exceed what is normally associated with the other offense.[29] The subsection specifies that the court will follow the procedures in RCC § 22E-214 (b) and (c) to effect the merger.

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[27] While the RCC § 22E-701 definitions of "law enforcement officer" and "public safety employee" refer to some persons only when on-duty (e.g., a campus officer), this provision on committing the offense with the purpose of harming the complainant because of their status as a law enforcement officer or public safety employee applies to committing the offense against an off-duty person based on their on-duty role. For example, a defendant who restrains an off-duty police officer in retaliation for the officer arresting the defendant's friend would constitute committing criminal restraint with the purpose of harming the complainant due to his status as a law enforcement officer.

[28] For example, confining or moving a person without consent may constitute harm, even if no bodily injury occurs, because it is an interference with the person's freedom of movement.

[29] This provision is intended to re-instate DCCA case law prior to *Parker v. United States*, 692 A.2d 913 (D.C. 1997). Prior to *Parker*, District courts employed a fact-based inquiry to determine whether convictions for kidnapping and other offenses that arise from a single act or course of conduct should merge. In *Parker*, the DCCA held that instead of a fact-based inquiry, courts should only use a *Blockburger* elements test to determine if convictions for kidnapping and separate offenses should merge. The restraint need not be necessarily associated with commission of the other offense. For example, a person who commits robbery by forcing a person to walk into an adjacent room to locate valuables would not be guilty of criminal restraint because the movement was incidental to the robbery. However, a person who confines another for a full day in order to facilitate commission of a robbery may still be convicted of a criminal restraint because the duration of the confinement far exceeded what would normally be associated with a robbery. *See, e.g., Sinclair v. United States,* 388 A.2d 1201 (D.C. 1978) (kidnapping was not incidental to robbery when the defendant held a person at gunpoint in a car and drove 25 blocks away); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978) (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and

Subsection (f) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal restraint statute changes current District law in seven main ways.*

First, the RCC criminal restraint offense codifies as a separate offense for confining or moving another person when the motive of the perpetrator is not ransom, the infliction of bodily injury, or other particularly harmful or dangerous acts. The current kidnapping statute requires that the defendant hold a person "for ransom, reward, *or otherwise*[.]"[30] The D.C. Court of Appeals (DCCA) has interpreted the "or otherwise" language broadly and held that "[t]he motive behind the kidnapping is unimportant, so long as the act was done with the expectation of benefit to the transgressor."[31] By contrast, the RCC divides the current kidnapping offense into two primary offenses, with criminal constraint providing liability for confining or moving another person while the revised kidnapping requires an added wrongful intent that makes the confinement or movement especially dangerous, harmful, or terrifying. Codifying a new criminal restraint offense improves the proportionality of the RCC by separately labeling and penalizing less harmful and dangerous forms of confinement or movement.[32]

Second, the criminal restraint offense provides a defense when the complainant is under the age of 18, and the actor is either a close relative or a former legal guardian with authority to control the complainant's freedom of movement.[33] The current kidnapping statute provides an exception to liability if the victim is a minor, and the actor is the victim's parent. By contrast, in certain circumstances the RCC criminal restraint statute extends the exception to close relatives and former legal guardians. The revised criminal restraint statute recognizes that under certain circumstances, a close relative or former legal guardian confining or moving a child does not warrant criminal liability under the criminal restraint statute.[34] Extending the parental exception to include other authority figures improves the proportionality of the revised offense.

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asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[30] D.C. Code § 22-2001.

[31] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (quoting *United States v. Wolford,* 144 U.S.App.D.C. 1, 5-6, 444 F.2d 876, 880-81 (1971) (internal quotations omitted). For example, restraining another person in order to enact revenge, or out of a desire for companionship could sustain a kidnapping conviction under current law. *See Walker*, 617 A.2d at 527.

[32] For example, a person who in the heat of the moment blocks a door to prevent his significant other to leave in the midst of an argument may be guilty of kidnapping under current law, and subject to the same penalty as a person who, after substantial planning, forcibly seizes a person, transports them to another location, and holds them for ransom on fear of death. Under the RCC, these two types of conduct would be penalized differently, as a criminal restraint and kidnapping.

[33] When the actor is a close relative or former legal guardian, the exception also requires that the actor acts with intent to assume full responsibility for the care and supervision of the complainant, and does not cause bodily injury or use a coercive threat.

[34] Application of this defense does not preclude liability under any other statute. A close relative may still be convicted of parental kidnapping under RCC § 16-1022, provided the elements of that offense are satisfied

Third, the RCC criminal restraint statute bars multiple convictions for criminal restraint and any other offense if the confinement or movement was incidental to the commission of the other offense.[35] Under current DCCA case law a person may be convicted of both kidnapping and another offense that arise from the same act or course of conduct, as long as kidnapping and the other offense each include "at least one element which the other one does not."[36] By contrast, the RCC criminal restraint statute reinstates the fact-based test applied by the DCCA prior to *Parker v. United States*,[37] which required courts to make a determination in each case as to whether the confinement or movement was merely incidental to another offense.[38] Where, as is common,[39] such confinement or movement is incidental to another offense,[40] the authorized punishment for the other offense is sufficient. The RCC criminal restraint sentencing provision improves the proportionality of the offense.

Fourth, the RCC criminal restraint statute incorporates multiple penalty enhancements based on the status of the complainant, capping the effect of these enhancements. The D.C. Code currently provides multiple penalty enhancements for the commission of a kidnapping offense,[41] without specifying whether or how these enhancements may be combined or "stacked" when multiple enhancements are applicable to a single charge. DCCA case law has not addressed whether most combinations of these penalty enhancements can be combined, but the combination of at least some of

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[35] By barring sentences for kidnapping, the revised statute allows for the possibility that convictions for kidnapping and the other offense may be entered for purposes of appeal. If the conviction for the other offense is reversed on appeal, the appellate court may order a lower court to sentence the defendant for the surviving kidnapping conviction.

[36] *Malloy v. United States*, 797 A.2d 687, 691 (D.C. 2002)

[37] 692 A.2d 913 (D.C. 1997). In *Parker,* the DCCA applied a new test for how to determine, in the absence of legislative intent, whether charged offenses should merge. The *Parker* ruling applied the new "elements" test the DCCA first adopted in *Byrd v. United States*, 598 A.2d 386 (D.C.1991) (*en banc*) because there was no legislative intent discernible as to whether kidnapping should merge with murder.

[38] *E.g., West v. United States*, 599 A.2d 788, 793 (D.C. 1991); *Vines v. United States*, 540 A.2d 1107, 1109 (D.C. 1988); *Robinson v. United States*, 388 A.2d 1210, 1211–12 (D.C. 1978).

[39] Many offenses against persons commonly involve some type of significant, non-consensual interference with another person's freedom of movement. For example, victims of robberies, assaults, sexual assaults, and homicides are frequently subjected to threats or physical restraint that prevent them from fleeing. Under current District law, such offenses against persons typically would provide the basis for a kidnapping charge. In practice, however, kidnapping charges are not typically brought in cases with such offenses against persons.

[40] *E.g., Robinson*, 388 A.2d at 1212–13 (holding that when defendant dragged a person 63 paces over the course of a few moments in order to commit a sexual assault, the "seizure and asportation was clearly incidental to the crime of assault with intent to rape" and that the conduct should not constitute two separate crimes.).

[41] *See,* e.g., D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-4502 (enhanced penalty for committing kidnapping "while armed" or with a dangerous weapon "readily available").

these enhancements has been upheld.[42] By contrast, under the criminal restraint statute, the penalty for criminal restraint cannot be enhanced more than once based on any of the listed penalty enhancements.[43] While multiple penalty enhancements may be charged, proof of just one is sufficient to increase the penalty class in severity and proof of others does not change the maximum statutory penalty for the crime.[44] Capping the effect of penalty enhancements improves the proportionality of the District law by preventing aggravated forms of the offense from being penalized the same as much more serious offenses.

Fifth, the RCC penalty enhancements in criminal restraint statute provides new, heightened penalties based on recklessness as to the status of the complainant as a protected person, which includes on-duty law enforcement officers, on-duty public safety employee, on-duty transportation workers. The current kidnapping statute does not reference the status of the complainant, but multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[45] Currently, the D.C. Code does not enhance crimes based on the status of the complainant as an on-duty law enforcement officer, public safety employee, or on-duty transportation workers. By contrast, through its use of the term "protected person," the RCC criminal restraint statute authorizes heightened penalties if the accused is reckless as to the fact the complainant is an on-duty law enforcement officer, on-duty public safety employee, or on-duty transportation worker. Such penalties are consistent with enhancements for assault-type,[46] robbery[47], and homicide offenses,[48] and reflect some unique vulnerabilities of such complainants.[49] Requiring a reckless culpable mental state is also consistent with many current statutes that authorize enhanced penalties based on the complainant's status.[50] Including recklessness as to the complainant being an on-duty

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[42] Convictions have been upheld applying multiple enhancements. *C.f. Forte v. United States,* 856 A.2d 567 (D.C. 2004) (holding that "double enhancement" under senior citizen penalty enhancement statute and repeat offender statute was proper).

[43] For instance, the status of the complainant and the defendant's use of a weapon.

[44] The existence of more than one aggravating factors may be a significant factor in sentencing, however.

[45] D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee); D.C. Code § 22-3611 (minors); D.C. Code § 22-3601 (persons over 65 years of age); D.C. Code §§ 22-3751; 22-3752 (taxicab drivers); and D.C. Code §§ 22-3751.01; 22-3752 (transit operators and Metrorail station managers); and D.C. Code § 22-3602 (members of a citizen patrol).

[46] RCC § 22E-1202.

[47] RCC § 22E-1201.

[48] RCC §§ 22E-1101 - 1102.

[49] For example, on-duty law enforcement and public safety officers performing investigative duties and private vehicle-for-hire services drivers may often enter situations where they are isolated with persons in enclosed places and more susceptible to unwanted interference with their personal movements; vulnerable adults may be targeted due to their limited ability to evade interference with their freedom of movement.

[50] Under current District law it is a defense to the senior citizen complainant enhancement that "the accused knew or reasonably believed the complainant was not 65 years old or older at the time of the offense, or could not have known or determined the age of the complainant because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Similarly, under the current minor complainant enhancement, it is a defense that "the accused reasonably believed that the complainant was not a minor [person less than 18 years old] at the time of the offense." D.C. Code § 22-3611(b). The current assault of a law enforcement officer offense requires that the defendant was

law enforcement officer, public safety employee, a vulnerable adult, or on-duty transportation worker as penalty enhancement removes a possible gap in current law, and improves the consistency and proportionality of the revised code.

Sixth, the revised statute includes a penalty enhancement based on the crime being committed for the purpose of harming the complainant because of his or her status as a law enforcement officer, public safety employee, or District official. The current kidnapping statute does not reference acting with the purpose of harming the complainant because of the status of the complainant, although multiple statutes in the current D.C. Code authorize enhanced penalties for kidnapping committed against certain groups of persons.[51] By contrast, the criminal restraint statute includes a penalty enhancement for committing the offense with the purpose of harming another person due to that person's status as a law enforcement officer, public safety employee, or District official. In practice, this change only affects law enforcement officers and public safety employees who are not District employees, as kidnapping of any District employee is subject to more severe statutory penalties under current District law.[52] Authorizing heightened penalties for criminal restraint with the purpose of harming the complainant because of the complainant's status as a law enforcement officer or public safety employee removes a possible gap in current law, and improves the consistency and proportionality of penalties.

Seventh, the criminal restraint statute includes a penalty enhancement for "displaying or using" a dangerous weapon or imitation dangerous weapon. Current D.C. Code § 22-4502 provides enhanced penalties for committing kidnapping "while armed" or "having readily available" a dangerous weapon. District case law on D.C. Code § 22-4502 holds that the penalty enhancements are authorized if the accused either had "actual physical possession of [a weapon]";[53] or if the weapon was merely in "close proximity or easily accessible during the commission of the underlying [offense],"[54] provided that the accused also constructively possessed the weapon.[55] There is no requirement under D.C.

[51] D.C. Code § 22-3602 (providing an enhanced penalty for kidnapping committed against "a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol"); D.C. Code § 22-851 (District official or employee while in the course of their duties or on account of those duties, or actions against a family member of a District official or employee);

[52] D.C. Code § 22-851. Subparagraph (d)(2)(C) of the RCC criminal restraint statute provides liability for criminal restraints with the purpose of harming the complainant because of the complainant's status as a District official.

[53] *Johnson v. United States*, 686 A.2d 200, 205 (D.C. 1996).

[54] *Clyburn v. United States*, 48 A.3d 147, 154 (D.C. 2012) (reversing sentencing enhancement under D.C. Code § 22-4502 when rifle was located in a different room from where defendant committed the underlying offense); *cf. Guishard v. United States*, 669 A.2d 1306, 1310 (D.C. 1995) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was in a dresser drawer in the same room as the underlying offense).

[55] *Cox v. United State*s, 999 A.2d 63, 69 (D.C. 2010) ("to have a weapon 'readily available,' one must at a minimum have constructive possession of it. To prove constructive possession, the prosecution was required to show that Cox knew the pistol was present in the car, and that he had not merely the ability, but also the intent to exercise dominion or control over it.").

Code § 22-4502 that the accused actually used the weapon to commit kidnapping.[56] By contrast, the penalty enhancement requires that the actor actually displayed or used[57] a dangerous weapon or imitation dangerous weapon. Merely possessing or having a weapon readily available is insufficient to satisfy the penalty enhancement subparagraph (d)(2)(B), although such conduct is criminalized elsewhere in current law and the RCC as a separate offense with a lower penalty.[58] Including use of a dangerous weapon or imitation dangerous weapon as a penalty enhancement improves the proportionality of punishment by matching more severe penalties to criminal restraints in which the defendant actually uses a weapon.

Beyond these seven changes to current District law, nine other aspects of the revised criminal restraint offense may constitute substantive changes to current District law.

First, the RCC criminal restraint statute specifies that the actor must "knowingly" confine or move another person. The current kidnapping statute references as one means of committing the offense that the actor had "intent to hold or detain,"[59] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. In one case the DCCA stated that the current kidnapping statute requires that the actor had "specific intent to detain the complainant"[60] although it is unclear whether the DCCA in that case was referring only to the defendant's motive rather than their awareness of the objective elements of the offense. Current District practice appears to treat the kidnapping as a "general intent" offense.[61] The revised criminal restraint statute specifies that a "knowingly" culpable mental state applies to the element of confining or moving the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[62] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

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[56] *See*, *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (affirming sentencing enhancement under D.C. Code § 22-4502 when firearm was within arm's length, but no evidence that the firearm was ever used to further any crime).

[57] "Using" a weapon includes physically touching another person with the weapon. For example, if all other offense elements are satisfied, placing a knife or firearm to the complainant's back and telling them to walk to another location may satisfy the penalty enhancement under subparagraph (d)(3)(C) for kidnapping.

[58] *See* D.C. Code § 22-4514(b); RCC § 22E-4102; 22E-4104.

[59] *See* D.C. Code § 22-2001 ("…holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise…").

[60] *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for 'ransom or reward or otherwise' and that such detention was involuntary or by use of coercion; the detention may be for any purpose that the defendant believes might benefit him.").

[61] Redbook § 4.303 Kidnapping requires that the accused acted "voluntarily and on purpose, and not by mistake or accident," which accords with the jury instructions treatment of "general intent," not "specific intent" offenses. See Redbook § 3.100 Defendant's State of Mind.

[62] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

Second, the RCC criminal restraint offense requires that the complainant did not effectively consent to the interference, other than in cases involving complainants under the age of 16, or who are incapacitated. The current kidnapping statute is silent as to whether and by what means the actor must confine or move the complainant. The current statute broadly states that a person commits kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual",[63] but none of these terms are statutorily defined. The DCCA has generally recognized that kidnapping requires an "involuntary seizure,"[64] which includes forcible seizures[65], or restraining a person by threat of force.[66] Current District practice also recognizes that a person can commit kidnapping by "seiz[ing], confin[ing], abduct[ing], or carr[ying] away [the complainant] against his/her will"[67] The revised criminal restraint statute specifies that the confinement or movement must be without effective consent of the complainant, except in cases where the complainant is under the age of 16 or incapacitated. The revised language improves the clarity and proportionality of the offense.

Third, the RCC criminal restraint statute provides defenses if the actor is a transportation worker who moves the complainant while in the course of the worker's official duties, or a person who moves the complainant solely by persuading the complainant to go to a location open to the general public to engage in a commercial or other legal activity. This defense recognizes that in these circumstances, moving an incapacitated individual or child under the age of 16 does not warrant criminalization even if a person with legal authority over the complainant has not effectively consented. The current kidnapping statute does not specify whether this type of movement constitutes an offense, and there is no DCCA case law on point. To resolve this ambiguity, the revised criminal restraint statute clarifies that these types of movements of incapacitated individual and children under the age of 16 is not criminalized. This change improves the clarity and proportionality of the revised statute.

Fourth, the RCC criminal restraint statute requires that the actor must "substantially" confine or move the complainant. The current kidnapping statute does not explicitly include any substantiality element, and the DCCA has never discussed in a published opinion whether momentary or trivial confinement or movement suffices under

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[63] The current statute states that a person can commit kidnapping by "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[,]" D.C. Code § 22-2001.

[64] *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992) (noting that "involuntary seizure is the very essence of the crime of kidnapping"); *Davis v. United States*, 613 A.2d 906, 912 (D.C. 1992) ("To prove a kidnapping, the government must show that the defendant confined the complainant with specific intent to detain the complainant for "ransom or reward or otherwise" and that such detention was involuntary or by use of coercion[.]")

[65] *E.g., Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (holding that evidence showing defendant grabbed victim by the hair and pushing her into a changing room was sufficient to prove that she had been seized and detained involuntarily).

[66] *E.g., Battle v. United States*, 515 A.2d 1120 (D.C. 1986) (defendant committed kidnapping by displaying a gun, got into complainant's car, and drove the car away to a different location where the complainant would be held).

[67] D.C. Crim. Jur. Instr. § 4.303 Kidnapping.

the current kidnapping statute.[68] By contrast, the revised criminal restraint statute requires that the actor must "substantially" confine or move the complainant. This excludes momentary or trivial confinement or movement. The precise effect on current law is somewhat unclear, as there is no case law on point. Requiring that the actor "substantially" confine or move the complainant improves the proportionality of the RCC by excluding cases that only involve trivial or momentary interference.[69]

Fifth, when the complainant is under the age of 16 or is incapacitated, the RCC criminal restraint statute requires that the actor be reckless as to the fact that a person with legal authority over the complainant has not effectively consented to the confinement or movement. The current kidnapping statute does not specify when confining or moving a person who is under the age of 16 or is incapacitated constitutes kidnapping, and there is no relevant DCCA case law on point.[70] It is unclear under current law whether, and under what circumstances, a person would be guilty of kidnapping for confining or moving a person without effective consent of a person with legal authority over the complainant. The revised statute resolves this ambiguity by requiring that the actor at least be reckless as to whether a person with legal authority over the complainant has not effectively consented to the confinement or movement. This change improves the clarity, completeness, and perhaps the proportionality, of the revised statute.

Sixth, the RCC criminal restraint statute requires that the actor confines or moves another person. The current kidnapping statute criminalizes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever[.]"[71] With the exception of "enticing," discussed below, replacing these verbs with "confines" and "moves" does not appear to change current District law. The ordinary definitions of the verbs "seizing," "confining," "kidnapping," "abducting," "concealing," and "carrying away" all constitute confining or moving another person. However, it is possible that "inveigling" and "decoying" a

[68] DCCA case law discussing whether kidnapping should merge with other offenses has suggested that relatively brief interference with another person's freedom of movement can constitute kidnapping. *E.g.*, *Sinclair v. United States*, 388 A.2d 101, 1204 (D.C. 1978) (noting that "victims of [rape or robbery] are detained against their will while the criminal is accomplishing his objective"). This case law implies that even the brief detention associated with an ordinary street robbery is sufficient for kidnapping. However, the DCCA has never specifically decided whether on its own, such a brief detention would satisfy the elements of kidnapping.

[69] If a defendant intended to interfere with a person's freedom of movement to a substantial degree but failed to do so and was only able to interfere in an insubstantial manner, attempt liability may still be applicable depending on the facts of the case.

[70] *But see*, *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005) (holding that convictions for kidnapping and enticing a minor do not merge, noting that "the kidnapping statute requires . . . that the complainant was seized involuntarily through the defendant's use of mental or physical coercion; however, consent is never a valid defense to child enticement, and therefore the government is not required to show that the child was taken involuntarily."). This language suggests that kidnapping requires, even in the case of minors, that the defendant seize another person "involuntarily", and that kidnapping does not criminalize moving or confining a minor by means of enticement.

[71] D.C. Code § 22-2001.

person includes conduct not covered by confining and moving another.[72] The terms "inveigling" and "decoying" are not defined in the current statute, and there is no DCCA case law defining these terms. The RCC criminal restraint statute resolves this ambiguity by requiring that the actor confine or move another person, without that person's effective consent.[73] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense.

Seventh, the RCC's criminal restraint statute omits the word "entices." The current kidnapping statute states that a person commits kidnapping by "enticing . . . any individual . . . with intent to hold or detain such individual for ransom, reward, or otherwise[.]"[74] Under a plain language reading, the current kidnapping statute provides liability for merely enticing a person with intent to hold or detain that person for some personal benefit, even if the person was never actually held. However, the DCCA has never discussed in a published opinion whether such conduct would actually constitute kidnapping, and such an interpretation would run counter to case law requiring the kidnapping to be "involuntary" in nature.[75] The RCC's criminal restraint statute resolves this ambiguity by providing that the offense requires actually confining or moving a person without that person's effective consent. A person cannot commit criminal restraint merely by offering some reward, without actually confining or moving another person.[76] These limitations improve the clarity and proportionality of the offense, by more clearly defining the scope of the offense, and only including conduct dangerous enough to warrant the penalties under the criminal restraint statute.

Eighth, the RCC criminal restraint statute provides an affirmative defense when the actor obtained consent by deception and did not intend to obtain consent by inflicting bodily injury or making a coercive threat should the deception fail. The current D.C. Code kidnapping statute does not reference use of "deception," but it does include the terms "inveigle" and "decoy" which, at least considered alone, may allow for kidnapping liability for the use of deception.[77] The DCCA has never discussed in a published opinion whether deception that causes a person to change how they otherwise would

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[72] For example, the word "inveigles" may include causing a person to move by means of flattery. Under the RCC criminal restraint offense, the mere use of flattery to confine or move someone would be insufficient.

[73] Or without the effective consent of a person with legal authority over the complainant if the complainant is an incapacitated individual, or under the age of 16.

[74] D.C. Code § 22-2001.

[75] *C.f. Walker*, 617 A.2d at 527 (noting that "involuntary seizure is the very essence of the crime of kidnapping").

[76] However, a person can commit kidnapping by initially enticing another person with offer of some benefit as a means of luring the other person to move to or remain in a particular location as long as the actor confines or moves a person without effective consent.

[77] D.C. Code § 22-2001. ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years."). One meaning of "inveigle" is "to win over by wiles." Merriam Webster Dictionary Online, at https://www.merriam-webster.com/dictionary/inveigle. However, in addition to "inveigle," the plain text of the current statute also to requires "holding or detaining, or with the intent to hold or detain…" which suggests that mere substantial movement or confinement by deception may be inadequate for liability.

exercise their freedom of movement can alone constitute kidnapping, absent proof that the defendant would have resorted to force or threats should the deception fail.[78] Federal courts interpreting an analogous federal kidnapping statute[79] are split as to whether deception alone can constitute kidnapping.[80] The revised statute resolves this ambiguity, by including an affirmative defense that the actor used deception but did not intend to resort to force or coercive threats. The revised language improves the clarity and proportionality[81] of the offense.

Ninth, the revised statute does not separately criminalize a conspiracy to commit criminal restraint. The District's current kidnapping statute specifically provides that any person who conspires to commit kidnapping "shall be deemed to have violated the provisions of this section."[82] The current kidnapping statute's reference to a conspiracy, however, does not specify what culpable mental states, if any, apply to the conspiracy. By contrast, under the RCC criminal restraint statute, conspiracy to commit criminal restraint is subject to the RCC's general conspiracy statute. The RCC's general conspiracy statute details the culpable mental state and other requirements for proof of a conspiracy in a manner broadly applicable to all offenses. To the extent that the RCC's general conspiracy provision differs from the law on conspiracy as applied to the current kidnapping statute, relying on the RCC's general conspiracy provision may constitute a

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[78] *Miller v. United States*, 138 F.2d 258, 260 (8th Cir.1943) (defendant initially deceived complainant by lying about taking her to see her dying grandfather, then enslaved complainant and kept her in servitude by using beatings and death threats).

[79] *United States v. Wolford*, 444 F.2d 876, 879-80 (D.C. Cir. 1971) ("For all practical purposes, the conduct prohibited by section 2101 is identical to that proscribed by the Federal Kidnaping Act, as presently worded, 18 U.S.C. 1201 (1964),[6] with the exception of the requirement of the federal statute that the complainant be transported in interstate or foreign commerce. For this reason, and because both statutes were enacted by Congress, decisions construing the meaning and application of the Federal Kidnaping Act may be resorted to as an aid in determining the meaning of the similar language employed in the District statute.); D.C. Crim. Jur. Instr. § (noting that the District's kidnapping statute is "intended to cover the same acts as the federal kidnapping statute 18 U.S.C. § 1201 (a)(1)").

[80] *United States v. Corbett*, 750 F.3d 245, 246 (2d Cir. 2014) ("Other circuits differ as to whether a defendant who first "takes" control of his victim by "decoy" or trick must intend to back up his pretense with physical or psychological force in order to "hold" the unwilling victim under the statute. *Compare United States v. Boone,* 959 F.2d 1550, 1555 & n. 5 (11th Cir.1992) (requiring that the defendant "ha[ve] the willingness and intent to use physical or psychological force to complete the kidnapping in the event that his deception fail[s]"), *with United States v. Hoog,* 504 F.2d 45, 50–51 (8th Cir.1974) (finding the evidence to be sufficient where the defendant promised the victim a ride and then kept her in his car by inventing an emergency detour).").

[81] Absent the RCC specification that consent by deception must be accompanied by an intent to use bodily injury or threat of bodily injury if necessary, a broad range of otherwise accepted, legal conduct may fall within the scope of the RCC criminal restraint and current kidnapping statute. For example, if a defendant lures another person to a location, and convinces the person to remain in that location by false promise of employment, the defendant could be convicted of criminal restraint even if the defendant had no intent to use force or threats to compel the person to remain.

[82] D.C. Code § 22-2001. ("If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

change in current law.[83] This change improves the clarity and consistency of the revised offense.

One other change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The RCC criminal restraint statute does not contain special provisions regarding jurisdiction. The current kidnapping statute states that "[t]his section shall be held to have been violated if the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia."[84] This language apparently is intended to ensure that District courts have jurisdiction over kidnappings that do not occur entirely within the District of Columbia. However, it is unclear whether this language changes the scope of jurisdiction that a District court would otherwise have over kidnapping cases. The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[85] Consequently, although the DCCA has not applied this rule to kidnapping cases, it seems that District courts would have jurisdiction over any case in which a person was seized or held within the District, regardless of whether the person was initially seized outside of the District, or if the person were seized within the District and transported out of the District.[86] The RCC criminal restraint statute eliminates jurisdiction language specific to kidnapping and criminal restraint. In addition to general case law providing authority for offenses if "one of several constituent elements to the complete offense" occurs within the District,"[87] RCC § 22E-303 specifically provides jurisdiction for conspiracies formed within the District when the object of the conspiracy is engage in conduct outside of the District if the conduct would constitute a crime under D.C. Code.[88] District courts would therefore have jurisdiction over conspiracies to commit criminal restraint outside of the District. Omitting special jurisdiction language from the criminal restraint statute improves the law's clarity by omitting unnecessary language and making the offense more consistent with other offenses.

[83] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy.
[84] D.C. Code § 22-2001.
[85] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).
[86] For example, a person who attempts to lure a person in another jurisdiction into the District for purposes of kidnapping that person may be guilty of attempted kidnapping, assuming that the defendant's conduct satisfied the dangerous proximity test.
[87] *Baish*, 460 A.2d at 40–41.
[88] RCC § 22E-303(c).

RCC § 22E-1403. Blackmail.

Explanatory Note. *This section establishes the blackmail offense for the Revised Criminal Code (RCC). The offense criminalizes compelling a person to act, or refrain from acting, by means of certain coercive threats. While some RCC crimes explicitly address commission by use of a coercive threat,[1] and many more RCC crimes may be committed by using a coercive threat,[2] the RCC blackmail statute is intended to criminalize various types of conduct that are not otherwise addressed. The revised blackmail statute does not apply to the use of coercive threats to make a complainant transfer, use, give control over, or allow the actor to damage property; to allow the actor to enter or remain on property; or to remain in or move to a particular location. and categorically excludes ordinary, legal employment actions. Due to its breadth, the social harm addressed by the blackmail statute overlaps with several other offenses that involve the use of coercive threats to compel a person to act or refrain from acting in a particular manner.[3] The general merger provision under RCC § 22E-214 applies to blackmail and these other offenses when they arise from the same act or course of conduct. The RCC blackmail statute also includes a defense that precludes criminal liability in certain cases where the defendant acted with a socially desirable purpose. The revised statute replaces the current blackmail statute in D.C. Code § 22-3252.*

Paragraph (a)(1) specifies that blackmail requires that the accused purposely causes a person to engage in, or refrain from any act. This requires that the other person acts, or refrains from acting, in a way that the person would not have absent the accused's intervention. The subsection specifies that a "purposely" culpable mental state applies, which requires that the actor consciously desired that he or she would cause the other person to act, or refrain from acting. A threat that does not cause another person to act or refrain from acting, or an actor who does not consciously desire that the threat causes the complainant to engage in or refrain from an action, does not commit blackmail.

Paragraph (a)(2) specifies that the actor must have caused another person to act or refrain from acting by communicating, explicitly or implicitly, that any person will commit any of the acts listed in subparagraphs (a)(2)(A)-(G). The communication does not require any precise words; it may be bluntly spoken, or done by innuendo or suggestion.[4] The verb "communicates" is intended to be broadly construed, encompassing all speech[5] and other messages,[6] which includes gestures or other

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[1] These RCC offenses include: extortion RCC § 22E-2301, forced labor RCC § 22E-1601; and sexual assault RCC § 22E-1301. Unlike extortion, which requires that the actor uses coercive threats to obtain property of another, blackmail broadly criminalizes the use of coercive means to compel a person to engage in or refrain from engaging in any conduct.

[2] These RCC offenses include criminal restraint, RCC § 22E-1402, and many other offenses that require conduct occur without the complainant's effective consent. The term "effective consent" includes consent obtained by means of a coercive threat.

[3] For example, sexual assault RCC § 22E-1301; forced labor, RCC § 22E-1601; forced commercial sex, RCC § 22E-1602.

[4] *Griffin v. United States*, 861 A.2d 610, 616 (D.C. 2004) (citing *Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000)).

[5] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

conduct,[7] that are received and understood by another person. Per the rule of interpretation under RCC § 22E-207, the "purposely" mental state also applies to this element. The actor must consciously desire that the other person would fear that if he or she does not conform his or her behavior to the actor's demands, then any person will resort to the coercive means listed in subparagraphs (a)(2)(A)-(D).

Subparagraph (a)(2)(A) specifies that blackmail includes threatening to take or withhold action as a public official, or to cause a public official to take or withhold action. This form of blackmail includes threats to cite someone for violation of a regulation, make an arrest, or deny the award of a government contract or permit.[8] The term "public official" is defined in RCC § 22E-701, and means a "a government employee, government contractor, law enforcement officer, or public official as defined in D.C. Code § 1-1161.01(47)."

Subparagraph (a)(2)(B) specifies that blackmail incudes threatening to accuse another person of a crime. Under this form of blackmail, it is immaterial whether the accusation is accurate.[9]

Subparagraph (a)(2)(C) specifies that blackmail includes threatening to expose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate hatred, contempt, ridicule, or other significant injury to personal reputation, or a significant injury to credit or business reputation. This subparagraph does not require that the asserted secret or fact be true or false. Threats to reveal minimally embarrassing information would not suffice under this form of blackmail. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[10] This form of blackmail also includes threats to expose secrets, assert facts, etc., that would tend to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. A person who is already subject to hatred, contempt, and ridicule may still be the target of this form of threat.[11]

Subparagraph (a)(2)(D) specifies that blackmail includes threatening to significantly impair the reputation of a deceased person. This subparagraph does not

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[6] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[7] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute a communication, if it communicates that harm will continue in the future.

[8] In some cases, threatening to take official action may fall under the defense under subsection (d).

[9] However, when the actor believes the accusation is accurate, the defense under subsection (d) may apply.

[10] D.C. Code § 22-3252.

[11] For example, even if it is well known that a person has engaged in numerous acts of infidelity, a threat to reveal an additional act of infidelity may still constitute blackmail under this paragraph.

include threats to impair a deceased person's reputation to a trivial degree. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail.[12]

Subparagraph (a)(2)(E) specifies that blackmail includes threatening to notify a federal, state, or local government agency or official of, or to publicize, another person's immigration or citizenship status.

Subparagraph (a)(2)(F) specifies that blackmail includes threatening to restrict a person's access to a controlled substance that the person owns, or to prescription medication that the person owns. As this form of blackmail requires that the other person already owns the controlled substance or prescription medication, a threat to refuse to sell or provide a controlled substance or prescription medication does not constitute blackmail under this subparagraph.

Subparagraph (a)(2)(G) specifies that blackmail includes threatening that any other person will engage in conduct that constitutes a criminal offense against persons as defined in Subtitle II of Title 22E, or a property offense as defined in Subtitle III of Title 22E. This form of blackmail does not include threats to commit any other types of criminal offenses.[13] The use of "in fact" indicates that no culpable mental state is required as to whether the threatened conduct constitutes an offense against persons or a property offense. However, it must be proven that the actor threatened that a person would engage in conduct that satisfies all elements of an offense against persons or property offense, including any culpable mental states.

Subsection (b) establishes two exclusions to liability under this section. Paragraph (b)(1) specifies that threats of ordinary and legal employment or business actions are not a basis for liability under the subparagraph (a)(2)(C) of the blackmail statute. This exclusion recognizes that ordinary and legal employment and business relationships may involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way[14], and such conduct does not constitute a crime under this section.[15]

Paragraph (b)(2) specifies that blackmail does not include causing a person to do any of the acts listed under subparagraphs (b)(2)(A)-(C). The blackmail offense provides broad liability for use of threats to compel a person to engage in any act, but is not intended to replace or add liability to those RCC offenses that already specifically address the use of threats to compel a person to act in a particular way.[16] Consequently, this paragraph eliminates liability under the revised blackmail statute when a more

[12] D.C. Code § 22-3252.

[13] For example, threatening to engage in disorderly conduct, a public order offense would not satisfy this element.

[14] For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

[15] Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

[16] For example, sexual assault specifically addresses the use of coercion to compel a person to engage in a sexual act or sexual contact. The revised criminal code's extortion RCC § 22E-2301 and forced labor RCC § 22E-1601 offenses also specifically address commission of those crimes by means of coercive threats.

narrowly-tailored RCC offense addresses the actor's conduct.[17] Subparagraph (b)(2)(A) excludes causing a person to transfer, use, give control over property, or to give consent to damage property. The term "use" is intended to include use of both tangible[18] and intangible property.[19] This subparagraph prevents extortion, robbery, criminal damage to property, and other offenses that involve taking, using, controlling, or damaging property[20] being prosecuted as blackmail. Subparagraph (b)(2)(B) excludes causing a person to remain in or move to a location. This subparagraph is intended to prevent conduct that constitutes criminal restraint or kidnapping from being prosecuted as blackmail.[21] Subparagraph (b)(2)(C) excludes causing a person to consent to another person entering or remaining in a location. This subparagraph is intended to prevent trespass or burglary from being prosecuted as blackmail.[22]

Subsection (c) provides three affirmative defenses to blackmail under particular circumstances, and specifies the burden of proof. RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Paragraph (c)(1) defines an affirmative defense that recognizes that criminal liability is not appropriate under certain circumstances when the actor causes a person to act or refrain from acting for certain benign purposes. The defense is only available to prosecutions under subparagraphs (a)(2)(A)-(F). The defense has two main components. First, under subparagraph (c)(1)(A), the actor must reasonably believe[23] that the accusation or assertion was true[24], that the official action was justified,[25] or that the

[17] The harm in coercing a person to act is largely determined by the nature of the coerced act; coercing a person to engage in a sexual act is more wrongful than coercing a person to pay a small sum of money. The RCC recognizes this by defining various offenses based on the type of conduct that the complainant is coerced into performing. Sexual assault is a more serious offense than 5th degree extortion. Blackmail is a residual offense, which can include compelling a person to perform an act that could be quite harmful. When the RCC has specified particular coerced acts as warranting less severe penalties, such as 5th degree extortion, it would be inappropriate to convict the person for blackmail, which is intended to cover potentially much more harmful conduct.

[18] For example, using threats to cause a person to allow the actor to operate a motor vehicle would fall under this inclusion.

[19] For example, using threats to cause a person to allow a person to make copies of audio recordings would fall within this exception.

[20] Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

[21] Criminal restraint and kidnapping both require that the actor *substantially* confines or moves the complainant. RCC §§ 22E-1401, 1402. The exclusion under this subparagraph applies even if the confinement or movement is not substantial.

[22] For example, if a person obtains consent to enter another person's property by threatening to reveal the property owner's humiliating secret, trespass liability would apply instead of blackmail.

[23] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[24] An actor who threatened to accuse a person of a criminal offense believing that the person had not actually committed the offense would not be able to claim this defense.

photograph, video, or audio recording was authentic.[26] Second, under subparagraph (c)(1)(B) the actor must have acted with the purpose to compel another person to desist or refrain from criminal[27] or tortious activity[28], or behavior harmful to any person's physical mental health[29]; to take reasonable action related to the wrong that is the subsection of the accusation[30], assertion[31], or invocation of official action[32]; or to refrain from taking any action or responsibility that the defendant believes the other unqualified.[33] Although people often act with mixed motives, the defense is only available if the actor would not have acted absent one of the benign purposes listed in this subsection. If the actor coerces another person and inadvertently brings about one of the benign ends listed in this subsection, the defense is not available.

Paragraph (c)(2) defines the elements of an effective consent affirmative defense. RCC § 22E-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCC § 22E-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. This defense requires that the defendant reasonably believes[34] that the complainant gives effective consent to the conduct constituting the offense.[35] The term "effective consent" is defined in RCC §

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[25] An actor who threatened to rescind a business license believing that rescinding the license was not actually warranted would not be able to claim this defense.

[26] An actor who threatened to publish a photograph that had been doctored to portray another person engaged in a sexually explicit act would not be able to claim this defense.

[27] For example, a passenger riding in a car with a drunk driver threatening to report the person's drunk driving to authorities unless he pulls over.

[28] For example, threatening to expose a person's embarrassing secret in order to prevent that person from committing the tort of intentional infliction of emotional distress.

[29] For example, threatening to reveal an embarrassing secret about another person in order to coerce that person into obtaining necessary emergency medical care.

[30] Whether an action is reasonably related to the wrong depends on the totality of the circumstances, including the nature of the harm sought to be addressed, the effort and cost imposed on the coerced person, and the availability of alternative means of addressing the wrong. For example, if a prosecutor threatens to charge a defendant with an additional criminal offense unless the defendant agrees to plead guilty to a separate charge, the threat of the additional charge may be reasonably related to the wrong that is the subject of the accusation. Even when the demanded action is clearly related to the subject of the wrong, the demand must still be reasonable. For example, threatening to accuse a person of theft unless that person returns the stolen property to its rightful owner may be reasonable. However, an unreasonable demand would include threatening to accuse another of theft unless the other person pays the original property owner an amount several times the value of the stolen property.

In addition, threatening to publish nude or sexually explicit photographs, videos, or audio recordings unless the person provides additional nude or sexually explicit photographs, videos or recordings would not satisfy this element of the defense.

[31] For example, threatening to reveal that a person has been having an extra-marital affair unless that person agrees to put an end to the affair.

[32] For example, a health inspector threatening to repeal a restaurant's license unless the owners bring their restaurant into compliance with health codes.

[33] For example, threatening to reveal prior corrupt acts of prospective political candidate unless that person declines to run for office.

[34] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[35] This defense is most likely to arise when a complainant consents to another person using blackmail-type threats in order to prevent the complainant from succumbing to some form of temptation. For example, if a

22E-701. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (d)(2) states that a person convicted under subparagraph (a)(2)(A) of the RCC blackmail offense shall not be subject to the abuse of government power penalty enhancement in RCC § 22E-610 for the same conduct.

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The RCC's revised blackmail statute replaces the blackmail statute in the current D.C. Code.*[36] *The revised blackmail statute makes five substantive changes to current District law that improve the clarity and proportionality of the code, fills gaps in the current code, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised blackmail offense requires that the actor actually compels another person to engage in, or refrain from, any act. The current blackmail offense only requires threats *with intent* to cause another to do or refrain from doing any act.[37] By contrast, the revised offense requires that the accused actually succeed in compelling another person to act or refrain from acting.[38] Requiring that the defendant actually compel another person to act or refrain from acting improves the proportionality of the RCC, and is consistent with the RCC's extortion offense,[39] which requires that the defendant actually takes, obtains, transfers, or exercises control over property of another.

Second, the revised blackmail offense changes the scope of threats as compared to the current blackmail statute. The current blackmail statute includes threats to accuse any person of a crime; to expose a secret or publicize an asserted fact tending to subject any person to hatred, contempt, or ridicule; to impair the reputation of any person, including a deceased person; to distribute a photograph, video, or audio recording tending to subject another person to hatred contempt, ridicule, embarrassment, or other injury to reputation; or to notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status.[40] By contrast, the revised blackmail offense also includes four additional threats: (1) to commit an offense against persons as defined in subtitle II of Title 22E, or a property offense as defined in subtitle III of Title 22E; (2) to assert a fact about another person that would tend to impair that person's credit or business repute; (3) to take or withhold action as an official; or (4) to restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns. This change closes a gap in

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person is worried he may behave irresponsibly in the future, and asks a friend to use blackmail-type threats in order to coerce the person into behaving responsibly, the defense would apply.

[36] D.C. Code § 22–3252.

[37] D.C. Code § 22-3252.

[38] Even if the accused fails to compel the other person to act or refrain from acting, attempt liability may apply depending on the specific facts of the case.

[39] RCC § 22E-2301.

[40] D.C. Code § 22-3252.

current District law, and makes the revised blackmail offense more consistent with the revised extortion offense.[41]

Third, the revised blackmail offense excludes liability when the actor's threats constituted normal and legal employment or business practices. The current D.C. Code blackmail statute does not include an exclusion for ordinary and legal employment or businesses practices, and there is no District case law on point. By contrast, the revised blackmail statute excludes threats that are part of ordinary and legal employment or business practices and involve threats to reveal embarrassing information in order to coerce another party to act or refrain from acting in a particular way.[42] Such conduct may have social benefits and criminalization would be inappropriate.[43] This change improves the proportionality of the revised statutes.

Fourth, the revised blackmail offense recognizes three exclusions to liability for conduct covered more specifically by other revised offenses. First, the revised offense does not include use of threats to cause a person to transfer, use, give control over, or consent to damage property. The current D.C. Code blackmail statute includes the use of various types of threats to obtain property of another, or to cause a person to do any act, and potentially overlaps with the several other D.C. Code offenses such as extortion and robbery.[44] Similarly, the revised blackmail statute also overlaps with numerous property offenses.[45] By contrast, to address this overlap, the revised blackmail statute excludes uses of threats to cause a person to transfer, use, give control over, or consent to damage

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[41] RCC § 22E-2301. The revised extortion statute covers obtaining property of another by means of a "coercive threat," a defined term which includes several types of threats. The revised blackmail offense includes all types of threats included in the definition of "coercive threat," except for the catch-all provision, which includes any threats to "cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." RCC § 22E-701. The revised blackmail statute does not include a catch-all provision, because blackmail includes compelling a person to commit or refrain from any act. Including a catch-all provision in the revised blackmail statute would be overbroad and criminalize minor negotiations that are part of everyday life.

[42] For example, a manager may threaten to reveal an employee's malfeasance in the workplace to upper management unless the employee changes his behavior.

[43] Threats that go beyond ordinary and legal employment or business actions are subject to liability. For example, if a business owner threatens to reveal highly embarrassing personal information unless another business owner agrees to provide services for free, this exclusion to liability would not apply.

[44] Numerous property offenses in the current D.C. Code criminalize taking or using property without consent. These offenses may include taking or using property when the consent was obtained by one of the threats enumerated in the current blackmail statute. For example, the current unauthorized use of a motor vehicle offense may include compelling a person to grant permission to use an automobile by threatening to reveal an embarrassing secret about that person. Other similar current offenses that may overlap with the current blackmail statute include: credit card fraud, D.C. Code § 22-3223; identity theft, unlawful operation of a recording device in a motion picture theater, D.C. Code § 22–3214.02; financial exploitation of a vulnerable adult or elderly person, D.C. Code § 22-933.01.

[45] Numerous property offenses can be committed by means of a coercive threat, and are intended to be excluded from the revised blackmail statute. These offenses include: unauthorized use of property, RCC § 22E-2102; unauthorized use of a motor vehicle, RCC § 22E-2103; unlawful creation or possession of a recording, RCC § 22E-2105; unlawful operation of a recording device in a motion picture theater, RCC § 22E-2106; payment card fraud, RCC § 22E-2202; identity theft, RCC § 22E-2205; financial exploitation of a vulnerable adult, RCC § 22E-2208; and criminal graffiti, RCC § 22E-2504.

property.[46] This limitation on liability prevents multiple convictions for offenses addressing the same social harm. Second, the revised offense excludes causing a person to remain in or move to a location. The current D.C. Code blackmail statute does not include this limitation, and there is no District case law on point. The current blackmail potentially overlaps with the D.C. Code kidnapping offenses.[47] By contrast, the revised statute includes this limitation to prevent the less serious offense of criminal restraint from being charged as blackmail. Third, the revised offense excludes causing another person to consent to allow a person to enter or remain in a location.[48] The current blackmail statute does not include this limitation. By contrast, the revised statute includes this limitation to prevent the less serious offense of trespass from being charged as blackmail. These exclusions to liability address overlap between the revised blackmail offense and other lesser offenses, and improves the clarity and proportionality of the revised criminal code.

Fifth, the revised blackmail offense includes a defense that the actor believed the accusation, assertion, or secret to be true, and acted with certain benign purposes. The current blackmail statute does not include any defenses, and there is no relevant D.C. Court of Appeals (DCCA) case law. By contrast, the revised blackmail offense includes a defense, which allows an actor to use certain threats to compel another person to act or refrain from acting in cases when criminal liability would be inappropriate. This revision improves the clarity and proportionality of the revised criminal code.

Beyond these five main changes to current District law, four other aspects of the revised blackmail statute may constitute substantive changes to current District law.

First, the revised blackmail offense requires a culpable mental state of purpose. The current blackmail statute does not specify a culpable mental state as to threatening another, but requires that the actor did so "with intent to obtain property of another or to cause another to do or refrain from doing any act."[49] The term "intent" as used in the current statute is not defined, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute applies the RCC standardized definition of "purposely." Applying at least a knowing culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American

[46] Many other property offenses may overlap with blackmail. For example, using a coercive threat to compel a person to consent to use copy a sound recording could constitute unlawful creation or possession of a recording under RCC § 22E-2105.

[47] The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current kidnapping statute includes "seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual *by any means whatsoever*[.]" It is possible that confining a person under threat of revealing a deeply embarrassing secret would constitute both kidnapping and blackmail under the current D.C. Code.

[48] The current blackmail statute criminalizes causing a person to engage in, or refrain from, any act, by use of certain enumerated threats. The current unlawful entry offense criminalizes entering property "without lawful authority[.]" Entering property with consent obtained by threat could constitute entering "without lawful authority," creating overlap between the current blackmail and unlawful entry statutes.

[49] D.C. Code § 22-3252 (a).

jurisprudence.[50] Using the purposeful culpable mental state is justified due to the breadth of the revised blackmail statute, which includes causing a person to do, or refrain from doing, any act. Since people routinely, and legally, engage in threatening behavior in everyday life, not desiring to cause fear but knowing the behavior will do so,[51] criminalization would be inappropriate. However, requiring only a knowing mental state would criminalize a broad array of cases in which the actor merely knew that, due to the otherwise legal threat, another person would react in some manner.[52] Requiring a purposeful mental state improves the proportionality of the revised criminal code.

Second, the revised blackmail offense includes threats that any person will engage in the conduct specified in subparagraphs (a)(2)(A)-(G). The current blackmail statute does not specify whether it includes threats that another person will carry out the threatened conduct, and there is no DCCA case law on point. Specifying that blackmail includes threats that any person will carry out the threatened conduct improves the clarity of the revised criminal code, and make the offense consistent with the revised extortion statute.[53]

Third the revised blackmail statute, through application of the general merger provision under RCC § 22E-214, prevents multiple convictions for blackmail and other offenses that address more specific instances of coercive threats causing harms, or address the same basic social harm. The current D.C. Code does not include a general merger provision, and the DCCA has held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.[54] There is no District case law that squarely addresses whether blackmail merges with other overlapping offenses, however in dicta the DCCA has suggested that a person may be convicted of both blackmail and a separate offense that involves blackmail.[55] Resolving this ambiguity, the RCC general merger provision provides that multiple convictions for 2 or more offenses arising from the same act or course of conduct merge whenever one offense is "defined to prohibit a designated kind of conduct generally, and the other is defined to prohibit a specific instance of such conduct,"[56] or when "one offense reasonably accounts for the other offense given the harm or wrong, culpability, and

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[50] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[51] For example, telling someone that if they don't stop illegal conduct they will be reported the activity to the police may be perceived as a threat, but the purpose is to cause a person to cease further criminal activity.

[52] For example, it is legal to threaten to accuse a person of a crime. In most cases a person making such a threat will *know* that the other person will act in some manner that he or she would not have absent the threat. However, this knowledge alone should not create criminal liability. Only when the person makes the threat with the *purpose* of causing the other person to act is criminal liability justified.

[53] RCC § 22E-2301. The revised extortion statute criminalizes taking property of another by means of a "coercive threat." The term "coercive threat" is defined as a threat that "any person" will engage in one of the enumerated types of conduct. RCC § 22E-701.

[54] *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991).

[55] *See*, *Hall v. United States*, 343 A.2d 35, 39 (D.C. 1975) (holding that convictions for simple assault and obstructing justice do not merge, because it is possible to commit obstructing justice without necessarily committing a simple assault. The DCCA noted that "acts such as blackmail and unfulfilled threats of violence could support an obstructing justice charge.").

[56] RCC § 22E-214 (a)(2)(C).

penalty proscribed by each[.]"[57] Numerous offenses in the RCC criminalize use of coercive threats to compel another person to act in specific manner. For example, sexual assault[58] criminalizes compelling a person to engage in or submit to a sexual act or contact; forced labor[59] criminalizes compelling a person to perform labor or services, and forced commercial sex[60] criminalizes compelling a person to engage in commercial sex acts. In most cases, a person who commits these offenses will also satisfy the elements of blackmail.[61] If the other offense and blackmail arise from the same act or course of conduct, the offenses will merge as provided in RCC § 22E-214. Other offenses criminalize use of coercion to compel a person to act in a specific manner, whereas blackmail more broadly criminalizes compelling a person to engage in, or refrain from, any act. The authorized penalties for these offenses reflect the relative seriousness of being coerced to engage in the specific acts required for each offense.[62] It would be disproportionately severe for an actor to be convicted of both the separate offense and blackmail based on the same act or course of conduct. This change improves the clarity and proportionality of the revised criminal code.

Fourth, the revised blackmail offense includes an affirmative effective consent defense. The current blackmail statute does not specify any defenses, and there is no relevant DCCA case law on whether a person a person may consent to be threatened in such a manner. To resolve this ambiguity, the revised blackmail offense includes an affirmative defense that the complainant effectively consented to the conduct constituting the offense. While it may be highly unusual for a person to give effective consent to another to cause them to engage in an act by the specified types of communication, should such effective consent exist it would negate the harm the blackmail offense is intended to address. This revision improves the clarity and the proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

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[57] RCC § 22E-214 (a)(4).
[58] RCC § 22E-1301.
[59] RCC § 22E-1601.
[60] RCC § 22E-1602.
[61] It is possible to commit these offenses without satisfying the elements of blackmail, and therefore the offenses do not merge under a strict *Blockburger* elements test under current DCCA case law and codified in RCC § 22E213 (a)(1). Each of these offenses includes the use of a "coercive threat." The term "coercive threat" is defined in RCC § 22E-701, and includes threats to "cause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply." This catch-all provision in the "coercive threat" definition is not included in the blackmail statute. A person committing these offenses using a threat that satisfies the catch-all, but not the threats specified in the blackmail statute, would not be guilty of blackmail.
[62] For example, forced commercial sex and criminal restraint may both be committed using identical threats. However, the penalties for forced commercial sex are significantly higher than for criminal restraint, due to the particular harmfulness of coercing someone into engaging in commercial sex acts.

RCC § 22E-1501. Criminal Abuse of a Minor.

Explanatory Note. *The RCC criminal abuse of a minor offense proscribes a broad range of conduct in which there is harm to a minor's bodily integrity or mental well-being, including conduct that constitutes fourth degree assault, criminal threats, offensive physical contact, criminal restraint, stalking, or electronic stalking as those crimes are defined in the RCC.*[1] *The penalty gradations are primarily based on the degree of bodily harm or mental harm. Along with the revised criminal neglect of a minor offense,*[2] *the revised criminal abuse of a minor offense replaces the child cruelty offense*[3] *and the failure to provide for a child offense*[4] *in the current D.C. Code. Insofar as it is applicable to the current child cruelty offense, the revised criminal abuse of a minor statute also replaces the current enhancement for certain crimes committed against minors.*[5]

There are three degrees of the RCC criminal abuse of a minor statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[6] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is under the age of 18 years. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is under 18 years of age in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is under the age of 18 years.

Paragraph (a)(2) and subparagraphs (a)(2)(A) and (a)(2)(B) specify the two types of prohibited conduct in first degree criminal abuse of a minor, the highest grade of the revised offense.

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[1] RCC §§ 22E-1202 (assault), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802 (electronic stalking).
[2] RCC § 22E-1502.
[3] D.C. Code § 22-1101.
[4] D.C. Code § 22-1102.
[5] D.C. Code § 22-3611.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

Subparagraph (a)(2)(A) establishes liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Subparagraph (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" to the complainant is "purposely," a term defined in RCC § 22E-206 to here mean the accused must consciously desire that his or her conduct causes "serious mental injury" to the complainant. Subparagraph (a)(2)(B) establishes liability causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness, to the complainant. Subparagraph (a)(2)(B) specifies that the culpable mental state for causing "serious bodily injury" to the complainant is "recklessly," a term defined in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will cause serious bodily injury to the complainant.

Paragraph (b)(2) specifies the prohibited conduct for second degree of the criminal abuse of a minor statute—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "significant bodily injury" to the complainant.

Paragraph (c)(2) and subparagraphs (c)(2)(A) and (c)(2)(B) specify the two types of prohibited conduct for third degree criminal abuse of a minor, the lowest grade of the revised offense. Paragraph (c)(2) and subparagraph (c)(2)(A) establish liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the elements in subparagraph (c)(2)(A). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "serious mental injury" to the complainant.

Paragraph (c)(2) and subparagraph (c)(2)(B) establish liability for the final type of liability in third degree criminal abuse of a minor—the accused must, "in fact," commit a "predicate offense against persons" against the complainant. "Predicate offense against persons" is defined in paragraph (e)(2) as the RCC offenses of fourth degree assault (RCC § 22E-1202(d)), criminal threats (RCC § 22E-1204), offensive physical contact (RCC § 22E-1205), criminal restraint (RCC § 22E-1404), stalking (RCC § 22E-1801), and electronic stalking (RCC § 22E-1802). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (d) codifies an exclusion from liability for criminal abuse of a minor. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. The actor does not commit an offense under the revised statute when, in fact, the actor's conduct is specifically permitted by a District

statute or regulation. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[7]

Subsection (e) codifies an affirmative defense to the revised criminal abuse of a minor statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC. The affirmative defense is limited to subsection (b)—causing "significant bodily injury," as that term is defined in RCC § 22E-701—and subsection (c)—causing "serious mental injury," as that term is defined in RCC § 22E-701, or engaging in a specified "RCC predicate offense against persons," defined in paragraph (g)(2) of the revised statute, such as fourth degree assault or criminal restraint. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a minor due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

The defense has two requirements. First, per paragraph (e)(1), the actor must not be "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in subsection (e), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under the age of 18 years, RCC § 22E-701 defines a "person with legal authority over the complainant" as the "parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent under civil law" is further defined in RCC § 22E-701.

The effect of paragraph (e)(1) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense.[8] However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[9]

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[7] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[8] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[9] These defenses have different requirements than the effective consent defense in subsection (e). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

The second requirement for the defense is in paragraph (e)(2). The actor must reasonably believe[10] that a "person with legal authority over the complainant," acting consistent with that authority, would give "effective consent" to the conduct constituting the offense under subsection (b) or subsection (c). The defense applies if the actor has not communicated with a person with legal authority over the complainant, but reasonably believes that such a person, acting consistent with that authority, *would* effectively consent to the conduct. The determination of whether the actor reasonably believed that a person with legal authority over the complainant, acting consistent with that authority, would have effectively consented is a fact-specific inquiry. The complainant's age, the nature of and motivation for the conduct, and any other relevant circumstances may be taken into account. The "in fact" specified in subsection (e) applies to paragraph (e)(2) and no culpable mental state, as defined in RCC § 22E-205, applies to paragraph (e)(2). It is not necessary to prove that the actor desired or was practically certain that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense. However, the actor must subjectively believe, and that belief must be reasonable, that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[11] There is no effective consent defense under paragraph (e)(2) when the actor makes an unreasonable mistake as to whether a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense.

Subsection (f) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) codifies a definition of "predicate offense against persons" for the offense and cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal abuse of a minor statute clearly changes current District law in five main ways.*

First, the revised criminal abuse of a minor statute does not criminalize as a completed offense conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes not only actual "maltreatment" of a complainant, but also causing a "grave risk of bodily injury," without any distinction in

[10] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[11] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

penalty.[12] In contrast, the revised criminal abuse of a minor statute does not criminalize as a completed offense mere risk creation. Conduct that results in a risk of serious bodily injury, death, significant bodily injury, serious mental injury, or bodily injury from consumption of a controlled substance or alcohol is criminalized by the revised criminal neglect of a minor statute (RCC § 22E-1502). The RCC criminal neglect of a minor statute does not include any other risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. However, conduct that results in a risk of physical or mental harm, including "bodily injury," may also constitute attempted criminal abuse of a minor. This change improves the organization, clarity, and proportionality of the revised statute.

Second, the revised criminal abuse of a minor statute partially grades the offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury." The current District child cruelty statute is silent as to whether the offense covers purely psychological harms.[13] However, DCCA case law is clear that the current child cruelty statute extends at least to serious psychological harm.[14] Moreover, the current child cruelty statute provides for the same penalties whether such harm was inflicted "intentionally, knowingly, or recklessly."[15] In contrast, the revised criminal abuse of a minor statute specifically prohibits "serious mental injury," as defined in RCC § 22E-701. There are two gradations for "serious mental injury" in the revised statute depending on the culpable mental state—purposely causing "serious mental injury" in first degree criminal abuse of a minor and recklessly causing "serious mental injury" in third degree criminal abuse of a minor. This change improves the clarity, consistency, and proportionality of the revised statute.

Third, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant." The current child cruelty statute requires that the complainant be under 18 years of age,[16] but does not state any requirements for the defendant's relationship to the complainant. As a result, the current statute significantly overlaps with the District's current assault statutes,[17] which are also subject to separate enhancements for harming a minor.[18] In contrast, the revised criminal abuse of a minor statute limits liability to a person that is reckless as to the fact that he or

[12] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and, for either basis of liability, providing for a maximum term of imprisonment of 10 years).
[13] D.C. Code § 22-1101.
[14] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro v. United States*, 859 A.2d 149, 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).
[15] D.C. Code § 22-1101(a), (b), (c).
[16] D.C. Code § 22-1101.
[17] D.C. Code §§ 22-404; 22-404.01.
[18] D.C. Code § 22-3611.

she has a "responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a parent, guardian, teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal abuse of a minor offense thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years and who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a minor, but only for persons with a duty of care to the complainant they harm.[19] Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary overlap between the revised statute and other RCC offenses against persons, including assault.

Fourth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement as a crime committed against a minor. Under current District law, first degree child cruelty is subject to a penalty enhancement if the defendant is 18 years of age or older and is at least two years older than a complainant under the age of 18 years.[20] There is no case law interpreting this enhancement as applied to child cruelty.[21] The current child cruelty statute and the penalty enhancement significantly overlap, effectively allowing a substantial increase in penalties for the same conduct whenever the actor is an adult. In contrast, the revised criminal abuse of a minor statute does not provide an enhancement based on the complainant's status as a minor. This change improves the proportionality of the revised criminal abuse of a minor statute, and reduces unnecessary overlap.

Fifth, the revised criminal abuse of a minor statute is not subject to a separate penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and does not grade the offense by the use or display of a weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of serious crimes,

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[19] Under the general merger provision in RCC § 22E-214, the predicate offenses for third degree criminal abuse of a minor are intended to merge into a conviction for criminal abuse of a minor when arising from the same course of conduct.

[20] D.C. Code § 22-3611. The enhancement refers to a "minor" instead of a "child," but defines a "minor" as a person under the age of 18. D.C. Code § 22-3611(c)(3). Under the enhancement, the defendant "may" receive a fine of up to 1½ times the maximum fine for first degree child cruelty, a term of imprisonment of up to 1½ times the maximum term of imprisonment for first degree child cruelty, or both. D.C. Code § 22-3611(a).

[21] However, the DCCA has declined to allow enhancement of another offense where the enhancement concerns an element in the underlying offense. The DCCA has held that the "while armed" enhancement in D.C. Code § 22-4502(a)(1) may not apply to the offense of assault with a dangerous weapon because the offense already provides for an enhancement. *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [the "while armed" enhancement in D.C. Code § 22-4502(a)(1)] may not apply to [assault with a dangerous weapon] since [the assault with a dangerous weapon offense] provides for enhancement and is a more specific and lenient provision."). Similarly, it could be argued that the enhancement for crimes against a minor enhances a crime which is already enhanced due to the complainant being under 18 years of age.

including first degree child cruelty, "while armed with" or "having readily available" a dangerous weapon.[22] In contrast, the revised criminal abuse of a minor statute does not grade the offense based on the use or display of a dangerous weapon, and is not subject to a separate while armed weapons enhancement. The focus of the offense is on the betrayal of trust to the victim and the harm suffered by the minor. Use or display of a dangerous weapon to commit conduct that satisfies the revised criminal abuse of a minor statute may be chargeable under another RCC offense against persons, such as the RCC assault statute (RCC § 22E-1202). Or, an individual who possesses a dangerous weapon while committing criminal abuse of a minor may be subject to liability for possessing a dangerous weapon in furtherance of a crime of violence per RCC § 22E-4104. This change improves the proportionality of the revised statute.

Beyond these five changes to current District law, eight other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised criminal abuse of a minor statute specifically bases liability on "serious mental injury," a term defined in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm.[23] DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[24] but the court has not articulated a precise definition of the required harm. Resolving this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" differs from the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[25] by adding the requirement that the harm be "substantial" and "prolonged."

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[22] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2).

[23] D.C. Code § 22-1101.

[24] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[25] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly

These requirements reflect DCCA case law supporting a high standard for psychological harm for child cruelty,[26] but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change improves the clarity and completeness of the revised statute.

Second, the revised criminal abuse of a minor statute prohibits committing stalking (RCC § 22E-1801), electronic stalking (RCC § 22E-1802), criminal threats (RCC § 22E-1204), or criminal restraint (RCC § 22E-1404) against the complainant. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury,[27] but the court has not articulated a precise definition of the required harm. Resolving this ambiguity, the revised statute reflects current case law by including "serious mental injury" in first degree and third degree criminal abuse of a minor, and by providing liability for separately codified criminal conduct that may cause psychological harms in third degree criminal abuse of a minor. This change improves the clarity, consistency, and completeness of the revised statute.

Third, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under the age of 18 years. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing the culpable mental state for this element. However, under the current penalty enhancement for certain crimes against minors, including first degree child cruelty, it is an affirmative defense that "the accused reasonably believed that the victim was not a [person under 18 years old] at the time of the offense."[28] Resolving this ambiguity, the revised criminal abuse of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under the age of 18 years. The "reckless" culpable mental state in the revised criminal abuse of a minor statute preserves the substance of this defense.[29] This change improves the clarity, completeness, and proportionality of the revised criminal abuse of a minor statute.

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aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[26] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro v. United States*, 859 A.2d 149, 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[27] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[28] D.C. Code § 22-3611(b).

[29] "Reckless" is defined in RCC § 22E-206 and means that the accused must consciously disregard a substantial risk that the complainant was under 18. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the

Fourth, the revised criminal abuse of a minor statute specifies the types of physical injury that are a basis for liability. The current first degree child cruelty statute prohibits, in part, "tortures,"[30] "beats,"[31] "maltreats,"[32] and "causes bodily injury,"[33] and second degree child cruelty prohibits, in part, "maltreats."[34] The current statute does not define these terms, however. DCCA case law suggests that "bodily injury" in the child cruelty statute is a relatively low threshold,[35] but the required amount of physical harm is unclear. Similarly, the DCCA has not determined the required amount of physical harm for "tortures," "beats," or "maltreats."[36] Resolving this ambiguity, the revised criminal abuse of a minor statute specifies the minimal degree of physical harm required for each grade of the offense. For first degree, the minimal degree of physical harm required is "serious bodily injury," and for second degree, it is "significant bodily injury." For third degree, the minimal degree of physical harm required is either "bodily injury," as required by fourth degree assault, or conduct that satisfies offensive physical contact (RCC § 22E-1205) or criminal restraint (RCC § 22E-1404). The specified types of "bodily injury" in the revised statute are defined in RCC § 22E-701 and are intended to cover conduct prohibited by the words "tortures," "beats," "maltreats," and "causes bodily injury" in the current child cruelty statute. The RCC definition of "bodily injury" in RCC § 22E-701 ("physical pain, physical injury, illness, or impairment of physical condition") in particular, accords with the limited DCCA case law on "bodily injury" in the current child cruelty statute.[37] Use of the defined term "bodily injury" clarifies that not only physical contacts that result in pain are criminal under the RCC criminal abuse of a minor statute, but also potentially painless harms such as sickness[38] or impaired

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offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[30] D.C. Code § 22-1101(a).

[31] D.C. Code § 22-1101(a).

[32] D.C. Code § 22-1101(a).

[33] D.C. Code § 22-1101(a).

[34] D.C. Code § 22-1101(b)(1).

[35] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[36] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).

[37] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[38] Recklessly engaging in nonconsensual physical contact that transmits a disease to a complainant may suffice for criminal abuse of a minor. However, particular care should be given to the gross deviation from the ordinary standard of conduct requirement in the RCC definition of recklessness. For example, a sneezy parent who disregards a substantial risk that he will transmit a cold virus to a complainant under the age of 18 years by living in proximity to the complainant would not ordinarily satisfy the requirement of bodily injury. However, if a parent intentionally sneezes in a minor's face, there would be liability for third degree criminal abuse of a minor if pain, illness, or impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts of the case.

physical conditions.[39] This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the parental defense in RCC § 22E-408 applies to the revised criminal abuse of a minor statute, limiting liability for certain conduct undertaken with the intent of safeguarding or promoting the welfare of the complainant. The District's current child cruelty statute is silent as to whether there is a defense for parental discipline. However, while there is no case law on the applicability of a parental defense to child cruelty, the DCCA has recognized the defense for assault and has extended the parental discipline defense beyond parents to persons standing *in loco parentis* to the child.[40] The DCCA has not addressed the limits of permissible force in the parental discipline defense other than generally requiring that the force be "reasonable."[41] The parental defense in RCC § 22E-408 clarifies the scope of the parental defense as applied to RCC offenses against persons such as criminal abuse of a minor. This change improves the clarity and completeness of the law.

Sixth, the revised criminal abuse of a minor statute no longer separately criminalizes creating "a grave risk of bodily injury to a child, and thereby causes bodily injury." The current first degree child cruelty statute requires, in part, both that the defendant "engage[] in conduct which creates a graves risk of bodily injury to a child" and that the defendant "thereby cause[] bodily injury."[42] However, it is unclear whether or how this requirement differs from the alternative bases of liability in the current first degree child cruelty statute ("beats" or "maltreats" a child). No DCCA case law interprets this part of the current child cruelty statute. Resolving this ambiguity, the revised criminal abuse of a minor statute is limited to causing specific types of physical or mental harm. Conduct that results in a risk of serious bodily injury, death, significant bodily injury, serious mental injury, or bodily injury from consumption of a controlled substance or alcohol is criminalized by the revised criminal neglect of a minor statute

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[39] For example, a parent who intentionally feeds a minor food laced with drugs would face liability under third degree criminal abuse of a minor if pain, illness, or impairment of the minor's physical condition results, and possibly a higher gradation depending on the facts. If no "bodily injury" results, the parent may face liability under third degree of the revised criminal neglect of a minor statute for creating a substantial risk of "bodily injury" due to consumption of a controlled substance without a valid prescription.

[40] *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (finding that there was no evidence that appellant stood *in loco parentis* with his 13-year-old cousin because the record reflected "at best . . . that appellant *helped* on occasion with the basic running of the household," that disciplinary authority over the cousin had never been "specifically delegated" to appellant, and appellant had not "assumed any obligations (such as financial support) that would be 'associated with one standing as a natural parent to a child.'") (emphasis in original) (quoting *Fuller v. Fuller*, 135 U.S. App. D.C. 353 (1969). The court in *Martin* stated that "*in loco parentis* refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation. . . . It embodies the ideas of both assuming the parental status and discharging the parental duties." *Martin*, 452 A.2d at 362 (internal citations omitted). The court noted that *in loco parentis* involves "more than a duty to aid or assist . . . It arises only when one is willing to assume *all* the obligations and to receive *all* the benefits associated with one standing as a natural parent to a child." *Id*. (emphasis in original) (internal citations omitted).

[41] *See, e.g.*, *Newby v. United States*, 797 A.2d 1233, 1241-42 (endorsing the common law "reasonable force" standard); *Florence v. United States*, 906 A.2d 889, 893 ("The [parental discipline defense] is established where the defendant uses reasonable force for the purpose of exercising parental discipline.").

[42] D.C. Code § 22-1101(a).

(RCC § 22E-1502). The RCC criminal neglect of a minor statute does not include any other risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. However, conduct that results in a risk of physical or mental harm, including "bodily injury," may also constitute attempted criminal abuse of a minor. This change improves the clarity of the statute.

Seventh, the revised criminal abuse of a minor statute codifies an effective consent affirmative defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current child cruelty statute does not address whether consent of the complainant or of a parent or guardian is a defense to liability. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[43] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[44] It is unclear whether this District case law for assault would apply to child cruelty. Resolving this ambiguity, the revised criminal abuse of a minor statute codifies an effective consent affirmative defense for an actor that is not a "person with legal authority over the complainant." Due to this exclusion, the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a "person with legal authority over the complainant" as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn't foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides without prior consultation with the parent to let a minor climb the tree that results in a significant bodily injury. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised criminal abuse of a minor statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current child cruelty statute does not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for child cruelty. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[45] This change improves the clarity, consistency, and proportionality of the revised statute.

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[43] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

[44] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

[45] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised criminal abuse of a minor statute codifies a culpable mental state of "reckless" for causing serious bodily injury in first degree and serious mental injury or significant bodily injury in second degree. The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[46] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms[47] in a manner consistent with the Model Penal Code definitions. The revised criminal abuse of a minor statute codifies a culpable mental state of "reckless," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" for these types of harm because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "reckless." In addition, the definition of "reckless" in RCC § 22E-206 is consistent with DCCA case law.[48] This change clarifies the statute.

Second, the revised criminal abuse of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[49] Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[50] These changes improve the clarity and consistency of the revised statute.

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legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[46] D.C. Code § 22-1101(a), (b).

[47] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[48] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).

[49] D.C. Code § 22-1101(a).

[50] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

RCC § 22E-1502. Criminal Neglect of a Minor.

Explanatory Note. *The RCC criminal neglect of a minor offense proscribes a broad range of conduct in which there is a risk of harm to a minor's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a minor, the RCC criminal neglect of a minor offense prohibits failing to provide a minor with necessary items or care, as well as abandoning a minor. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a minor offense,[1] the revised criminal neglect of a minor offense replaces the child cruelty offense[2] and the failure to provide for a child offense[3] in the current D.C. Code.*

There are three degrees of the RCC criminal neglect of a minor statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[4] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is under the age of 18 years. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is under 18 years of age in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is under the age of 18 years.

Paragraph (a)(2) specifies additional requirements for first degree criminal neglect of a minor, the highest grade of the revised offense. The accused must have created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or death. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(1) applies to all elements in paragraph (a)(2). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience serious bodily injury or

[1] RCC § 22E-1501.
[2] D.C. Code § 22-1101.
[3] D.C. Code § 22-1102.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, daycare provider, or babysitter, depending on the facts of a case.

death. "Serious bodily injury" is a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Paragraph (b)(2) and subparagraphs (b)(2)(A) and (b)(2)(B) specify the two types of prohibited conduct in second degree criminal neglect of a minor. Paragraph (b)(2) and subparagraph (b)(2)(A) establish liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to all the elements in paragraph (b)(2) and subparagraph (b)(2)(A). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that the actor will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury."

Paragraph (b)(2) and subparagraph (b)(2)(B) establish liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to all the elements in paragraph (b)(2) and subparagraph (b)(2)(B). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "serious mental injury."

Paragraph (c)(2) and its subparagraphs and sub-subparagraphs specify the three types of prohibited conduct in third degree criminal neglect of a minor, the lowest grade of the revised offense. Paragraph (c)(2) and subparagraph (c)(2)(A) establish liability for "knowingly" leaving the complainant in any place "with intent" to abandon the complainant. Per the rule of interpretation in RCC § 22E-207, the "knowingly" culpable mental state applies to all elements in subparagraph (c)(2)(A) until "with intent to" is specified. "Knowingly" is a defined term in RCC § 22E-206 which, applied here, means the accused is practically certain that his or her conduct will result in leaving the complainant in any place. The accused must also act "with intent to" abandon the complainant. "Intent" is a defined term in RCC § 22E-206 which, applied here, means the accused was practically certain that he or she would abandon the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such abandonment actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that abandonment would result.

Paragraph (c)(2), subparagraph (c)(2)(B), and sub-subparagraph (c)(2)(B)(i) establish liability for failing to make a reasonable effort to provide food, clothing, or other items or care for the complainant that are "essential to the physical health, mental health, or safety of the complainant." Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in subparagraph (c)(2)(B) applies to all elements in sub-subparagraph (c)(2)(B)(i). "Recklessly" is defined term in RCC § 22E-206 that here

means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care that are "essential to the physical health, mental health, or safety of the complainant."

Paragraph (c)(2), subparagraph (c)(2)(B), and sub-subparagraph (c)(2)(B)(ii) establish liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "bodily injury" from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a "controlled substance" or marijuana.[5] "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." "Controlled substance" is also a defined term in RCC § 22E-701. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in subparagraph (c)(2)(B) applies to all elements in sub-subparagraph (c)(2)(B)(ii). "Recklessly" is defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.

Subsection (d) codifies two exclusions from liability for criminal neglect of a minor. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. Under the first exclusion in paragraph (d)(1), the actor does not commit an offense under the revised statute for conduct that, in fact, constitutes surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq.* Paragraph (d)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor's conduct constitutes surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et seq.* Under the second exclusion in paragraph (d)(2), the actor does not commit an offense under the revised statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Paragraph (d)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[6]

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[5] Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48–901.02(4)), but also separately modifies that general definition (see D.C. Code § 48–904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a parent who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a small child if it is proven that such conduct creates a substantial risk that the complainant would experience a bodily injury from the smoke.

[6] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

Subsection (e) codifies an affirmative defense to the revised criminal neglect of a minor statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC. The affirmative defense is limited to subsection (b)—22e-1303creating or failing to mitigate remedy a risk of "significant bodily injury" or "serious mental injury" as those terms are defined in RCC § 22E-701—and subparagraph (c)(2)(B)—failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption.

The defense has two requirements. First, per paragraph (e)(1), the actor must not be "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is under the age of 18 years, RCC § 22E-701 defines a "person with legal authority over the complainant" as the "parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant, or someone acting with the effective consent of such a parent or such a person." "Person acting in the place of a parent under civil law" is further defined in RCC § 22E-701.

The effect of paragraph (e)(1) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense.[7] However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[8]

The second requirement for the defense is in paragraph (e)(2). The actor must reasonably believe[9] that a "person with legal authority over the complainant," acting consistent with that authority, would give "effective consent" to the conduct constituting the offense under subsection (b) or subparagraph (c)(2)(B).[10] The defense applies if the actor has not communicated with a person with legal authority over the complainant, but reasonably believes that such a person, acting consistent with that authority, *would* effectively consent to the conduct. The determination of whether the actor reasonably believed that a person with legal authority over the complainant, acting consistent with that authority, would have effectively consented is a fact-specific inquiry. The complainant's age, the nature of and motivation for the conduct, and any other relevant circumstances may be taken into account. The "in fact" specified in subsection (e) applies to paragraph (e)(2) and no culpable mental state, as defined in RCC

[7] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[8] These defenses have different requirements than the effective consent defense in subsection (e). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[9] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[10] The "conduct that constitutes the offense" in paragraph (e)(2) includes an omission. The paragraph does not use the term "omission," but the offense includes a failure to mitigate or remedy a risk and encompasses omissions.

§ 22E-205, applies to paragraph (e)(2). It is not necessary to prove that the actor desired or was practically certain that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense. However, the actor must subjectively believe, and that belief must be reasonable, that a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[11] There is no effective consent defense under paragraph (e)(2) when the actor makes an unreasonable mistake as to whether a person with legal authority over the complainant, acting consistent with that authority, would give effective consent to the conduct constituting the offense.

Subsection (f) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal neglect of a minor statute clearly changes current District law in six main ways.*

First, the revised criminal neglect of a minor statute prohibits leaving a complainant with intent to abandon him or her as an offense distinct from the revised criminal abuse of a minor statute. The current second degree child cruelty statute prohibits, in relevant part, "expos[ing] a child, or aid[ing] and abet[ting] in exposing a child in any highway, street, field house, outhouse or other place, with intent to abandon the child,"[12] as well as "maltreat[ing]" a child.[13] Both these means of committing second degree child cruelty have the same maximum ten year penalty.[14] There is no case law defining the meaning of "exposing." In contrast, in the RCC, abandoning a complainant under the age of 18 years is criminalized by the criminal neglect of a minor statute instead of the revised criminal abuse of a minor statute (RCC § 22E-1501). Abandonment alone, absent any actual harm, is comparatively less serious than the physical or mental injury required in the revised criminal abuse of a minor statute. However, higher gradations of the revised criminal neglect of a minor statute or other RCC offenses may apply to abandonment that involves a risk of serious injury or any

[11] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[12] D.C. Code § 22-1101(b)(2).

[13] D.C. Code § 22-1101(b)(1).

[14] D.C. Code § 22-111(c)(2). In addition to abandoning a child, the current second degree cruelty statute prohibits "engag[ing] in conduct which causes a grave risk of bodily injury to a child." D.C. Code § 22-1101(b)(2). It also has a maximum term of imprisonment of ten years. D.C. Code § 22-111(c)(2).

actual harm.[15] This change reduces unnecessary overlap between offenses and improves the organization and proportionality of the revised offense.

Second, the revised criminal neglect of a minor statute incorporates liability for a failure to provide certain items and care for a complainant under 18 years of age. Current D.C. Code § 22-1102 prohibits a parent or guardian of "sufficient financial ability" from refusing or neglecting to provide the "food, clothing, and shelter as will prevent the suffering and secure the safety" of a child under 14 years of age.[16] The offense has a maximum term of imprisonment of three months.[17] In contrast, in the RCC, failing to support a minor is criminalized as part of the revised criminal neglect of a minor statute[18] and is no longer a separate offense. Also, unlike the current failure to support offense, which is limited to children under 14 years of age,[19] the failure to support gradation in the revised criminal neglect of a minor statute applies to any complainant under 18 years of age so that it matches the current child cruelty statute[20] and revised criminal abuse of a minor[21] statute. This change reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised statute.

Third, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. The current second degree child cruelty statute criminalizes actual "maltreatment," causing a "grave risk of bodily injury," and "exposing a child . . . with intent to abandon it," without any distinction in penalty.[22] In contrast, the revised criminal neglect of a minor statute is limited to conduct that does not actually harm the complainant. First degree and second degree of the revised criminal neglect of a minor statute prohibit endangering the complainant and third degree prohibits failing to provide for the complainant, abandoning the complainant or creating a risk of bodily injury due to consumption of alcohol or a controlled substance. However, if the complainant sustains physical or mental injury as a result of the neglect, there may be liability under the revised criminal abuse of a minor statute (RCC § 22E-1501) or other

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[15] If leaving the complainant with intent to abandon him or her results in a *risk* of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the abandonment, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.

[16] D.C. Code § 22-1102.

[17] D.C. Code § 22-1102.

[18] The specification of failing to support the complainant as third degree criminal neglect of a minor does not preclude the possibility that such failure to support may, depending on the facts of the case, be charged as a more serious gradation or offense. If failing to provide the necessary items or care results in a risk of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to first degree or second degree criminal neglect of a minor. Moreover, if the complainant sustains physical or mental injury, or death, as a result of the failure to provide, there may be liability under the revised criminal abuse of a minor statute, RCC § 22E-1501, the revised assault statute, RCC § 22E-1202, or the revised homicide statutes, RCC §§ 22E-1101 – 22E-1103.

[19] D.C. Code § 22-1102

[20] D.C. Code § 22-1101.

[21] RCC § 22E-1501.

[22] D.C. Code § 22-1101(b)(1), (c)(2) (second degree child cruelty statute prohibiting "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child" and providing for either basis of liability a maximum term of imprisonment of 10 years).

RCC offenses against persons. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised criminal neglect of a minor statute partially grades the offense based on creating a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury." The current second degree child cruelty offense prohibits, in part, creating "a grave risk of bodily injury."[23] However, the statute does not define "bodily injury." DCCA case law on the current child cruelty statute suggests "bodily injury" may have a relatively low threshold for physical harm,[24] but does not provide a general definition. With regard to mental injury, the DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children."[25] However, the DCCA has not discussed whether a risk of extreme emotional pain or suffering is sufficient for the "grave risk of bodily injury" prong of the current second degree child cruelty offense. In contrast, the revised criminal neglect of a minor statute partially grades the offense based on whether there is a risk of "serious bodily injury or death," "significant bodily injury," or "serious mental injury" and defines those terms in RCC § 22E-701. These types of "bodily injury" are consistent with the RCC assault statute (RCC § 22E-1202). The RCC criminal neglect of a minor statute does not criminalize a risk of "bodily injury" other than bodily injury due to the complainant's drug or alcohol consumption because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. This change improves the clarity and proportionality of the revised child neglect statute.

Fifth, the revised criminal neglect of a minor statute limits liability for a risk of bodily injury to a risk of bodily injury due to drug or alcohol consumption. The current second degree child cruelty offense prohibits, in part, creating "a grave risk of bodily injury."[26] The statute does not define "bodily injury." DCCA case law on the current child cruelty statute suggests "bodily injury" may have a relatively low threshold for physical harm,[27] but does not provide a general definition. In contrast, the revised criminal neglect of a minor statute limits liability for creating a risk of bodily injury to a risk of "bodily injury" due to the complainant consuming alcohol or consuming or inhaling, without a valid prescription, a controlled substance or marijuana. If the actor recklessly creates such a risk of a higher level of "bodily injury," such as "significant bodily injury," there is liability under first degree or second degree of the RCC criminal neglect of a minor statute. The RCC criminal neglect of a minor statute does not criminalize a risk of "bodily injury" other than bodily injury due to the complainant's

[23] D.C. Code § 22-111(b)(1).
[24] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").
[25] *Alfaro*, 859 A.2d at 153-54; *see also Speaks*, 959 A.2d at 717 (stating that the evidence permitted a reasonable juror to conclude beyond a reasonable doubt that two minor children "sustained emotional pain and suffering and a battery (*i.e.* they were 'terrified' and 'screaming')" and permitting separate convictions for second degree child cruelty under the "grave risk of bodily injury" prong).
[26] D.C. Code § 22-111(b)(1).
[27] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

drug or alcohol consumption because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars. Conduct that results in a risk of "bodily injury" in contexts other than the complainant's drug or alcohol consumption may constitute attempted criminal abuse of a minor.[28] This change improves the clarity, consistency, and proportionality of the revised statutes, and may remove a possible gap in liability.

Sixth, the revised criminal neglect of a minor statute limits liability to individuals that are "reckless" as to the fact that they have "a responsibility under civil law for the health, welfare, or supervision of the complainant." The current child cruelty statute does not state any requirements for the defendant's relationship to the child, and the DCCA has sustained second degree child cruelty convictions for creation of a "grave risk of bodily injury" when an individual has no relationship to the child.[29] There is no DCCA case law interpreting the scope of the abandonment prong of second degree child cruelty. The failure to support a child offense in D.C. Code § 22-1102, however, is limited to a "parent or guardian."[30] In contrast, all gradations of the revised criminal neglect of a minor statute require that the defendant is "reckless" as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the minor (e.g., a parent, guardian, teacher, doctor, daycare provider, or babysitter may be liable for the offense). The revised criminal neglect of a minor offense thus provides a distinct charge for individuals with responsibilities under civil law for complainants under the age of 18 years who subject to a risk of harm those they are supposed to protect. The revised statute applies a culpable mental state of "reckless" as to the fact that the defendant has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change improves the proportionality and consistency of revised offenses.

Beyond these six changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised criminal neglect of a minor statute requires a culpable mental state of "knowingly" for "leav[ing]" the complainant. The abandonment prong in the current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly," but also requires the conduct occur "with intent to abandon the child."[31]

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[28] In addition, if an actor recklessly creates, or fails to mitigate or remedy, a risk that a complainant would experience bodily injury from consumption of drugs or alcohol, and "bodily injury" results, there would be liability under the RCC criminal abuse of a minor statute (RCC § 22E-1501).

[29] *See, e.g.*, *Coffin v. United States*, 917 A.2d 1089, 1090, 1093 (affirming appellant's convictions for attempted second degree child cruelty when appellant drove a car dangerously while intoxicated with two children in the back seat that were not in seatbelts because he created a grave risk of bodily injury to the child passengers); *Speaks v. United States*, 959 A.2d 712, 713, 714, 716-17 (D.C. 2008) (affirming three counts of second degree cruelty to children while armed (which was subsequently amended to remove the "armed" element) when the appellant carjacked a vehicle containing three small children and crashed the vehicle into a parked car).

[30] D.C. Code § 22-1102.

[31] D.C. Code § 22-1101(b)(2).

While the meaning of these culpable mental states is not defined in the current child cruelty statute, case law has briefly interpreted these terms[32] in a manner consistent with the Model Penal Code definitions. Instead of this ambiguity, the revised criminal neglect of a minor statute codifies a culpable mental state of "knowingly" for the element "leaves the complainant in any place" and provides that leaving the complainant must be done "with the intent of" abandoning the complainant. This change resolves the inconsistent culpable mental states in the current statute[33] and clarifies the law.

Second, the failure to support gradation in the revised criminal neglect of a minor statute broadly includes failures to provide "supervision, medical services, medicine, or other items or care essential for the health or safety of the child." The current failure to support a child offense in D.C. Code § 22-1102 refers only to "food, clothing, and shelter."[34] However, the DCCA has stated that "the broad sweep" of the current statute includes a duty of providing medical care.[35] Current District statutes defining a "neglected child" for civil purposes also specifically refer to a lack of parental "care or control necessary for [the child's] physical, mental, or emotional health."[36] The list of items and care in the revised third degree criminal neglect of a minor statute reflects the DCCA's expansive interpretation of current D.C. Code § 22-1102 and the broad sweep of relevant civil laws in the District. This change reduces possible gaps in the law and improves consistency with the civil statutes.

Third, the failure to support gradation of the revised criminal neglect of a minor statute requires that the defendant "fails to make a reasonable effort" to provide the specified support. The current statute in D.C. Code § 22-1102 refers only to a person "of sufficient financial ability, who shall refuse or neglect to provide…" the specified support.[37] The DCCA has not interpreted the limits of this language. In the revised statute, however, a person must only fail to make a "reasonable effort" to provide the specified support. The revised language would preclude liability where a person does not provide necessary support due, not only to insufficient financial ability, but also due to factors such as a hospitalization or other incapacity.[38] This change improves the clarity and proportionality of the revised statute.

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[32] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[33] It is unclear in the current child cruelty statute how a person could "recklessly" abandon a child "with intent to abandon" the child. However, a knowledge requirement as to leaving the child and an intent requirement as to abandonment, as these terms are defined in the RCC, are compatible. See, generally, Commentary to RCC § 22E-206.

[34] D.C. Code § 22-1102.

[35] *Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980).

[36] D.C. Code § 16-2301(9A).

[37] D.C. Code § 22-1102.

[38] The District's current civil statutes define "neglected child," in part as "a child:…(ii) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian; (iii) whose parent, guardian, or custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity." D.C. Code § 16-2301(9)(A).

Fourth, the revised criminal neglect of a minor statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. It is unclear whether the current child cruelty statute includes failing to mitigate or remedy a risk of harm to the complainant. Current first degree child cruelty criminalizes, in part, conduct that "maltreats" the complainant or "creates a grave risk of bodily injury to a child and thereby causes bodily injury."[39] Current second degree child cruelty criminalizes, in part, conduct that "maltreats" a child,[40] as well as conduct that "causes a grave risk of bodily injury" to a child.[41] "Maltreats" is not statutorily defined and there is no DCCA case law regarding whether the current child cruelty offense extends to failing to mitigate or remedy a risk of harm. The current failure to support statute in D.C. Code § 22-1102 criminalizes the refusal or neglect to provide "food, clothing, and shelter as will prevent the suffering and secure the safety of such child,"[42] but is silent as to failing to mitigate or remedy a risk and there is no case law on point. However, in the context of parental duties, the DCCA also has recognized the "unique obligation of parents to take affirmative actions for their children's benefit."[43] Resolving this ambiguity, the revised criminal neglect of a minor statute clarifies that not only creating risks to a child, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[44] However, although technically superfluous, given that neglect offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. This change clarifies the revised statute.

Fifth, the revised criminal neglect of a minor statute requires a culpable mental state of "reckless" as to the fact that the complainant is under 18 years of age. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a "child." There is no DCCA case law discussing if there is a culpable mental state for this element. However, under the current enhancement for certain crimes against minors it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years

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[39] D.C. Code §22-1101(a). First degree child cruelty also prohibits "tortures" and "beats" a child. *Id.*
[40] D.C. Code § 22-1101(b)(1).
[41] D.C. Code § 22-1101(b)(1).
[42] D.C. Code § 22-1102.
[43] *Young v. United States*, 745 A.2d 943, 948 (D.C. 2000). Similarly, the DCCA has used the common law to find that there is a common law duty of parents to provide medical care for their dependent children. *Faunteroy v. United States*, 413 A.2d at 1299-300 (D.C. 1980) ("The cases of several state courts hold there is a 'common law natural duty of parents to provide medical care for their minor dependent children. . . . Since no statute for the District operates to specifically abolish it, this duty remains the common law of this jurisdiction."). To the extent that the common law imposes a duty to aid a child, the DCCA may find a common law duty in the District. *See generally* § 6.2.Omission to act, 1 Subst. Crim. L. § 6.2 (3d ed.)
[44] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c), (d) ("(c) 'Omission' means a failure to act when (1) a person is under a legal duty to act and (2) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. (d) For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law.").

old] at the time of the offense."[45] The "reckless" culpable mental state in the revised criminal neglect of a minor statute preserves the substance of this defense.[46] This change improves the clarity, completeness, and proportionality of the revised statute.

Sixth, for liability, the revised criminal neglect of a minor statute requires a "substantial risk" of the specified physical or mental harm. The current second degree child cruelty offense prohibits "engag[ing] in conduct which causes a grave risk of bodily injury."[47] There is no DCCA case law discussing the meaning of "grave risk." However, in an attempted second degree cruelty to children case, the DCCA affirmed a conviction based upon the defendant creating a "grave or substantial risk of bodily injury,"[48] suggesting that "grave" and "substantial" are interchangeable, equivalent terms. The revised criminal neglect of a minor statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires, in relevant part, that a risk be "substantial." However, given that neglect offenses will often depend on the nature of the risk to the complainant, the revised statute specifies the "substantial" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[49] This change improves the clarity and consistency of the revised statute.

Seventh, the revised criminal neglect of a minor statute specifically bases liability on "serious mental injury" in RCC § 22E-701. The current District child cruelty statute is silent as to whether it includes psychological harm. DCCA case law is clear that the current child cruelty statute extends at least to serious psychological injury,[50] but the

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[45] D.C. Code § 22-3611(b).

[46] "Reckless" is defined in RCC § 22E-206 and, as applied here, means that the accused must consciously disregard a substantial risk that the complainant was under the age of 18 years. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness or knowledge as to the age of the complaining witness because the accused would not consciously disregard a substantial risk (recklessness) or be practically certain (knowledge) that the complainant was under 18 years of age. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[47] D.C. Code § 22-111(b)(1).

[48] *Dorsey v. United States*, 902 A.2d 107, 112-13 (D.C. 2006) (discussing the Model Penal Code definition of "recklessly" and affirming the appellant's conviction for attempted second degree cruelty to children because the appellant "created a grave or substantial risk of bodily injury when he struck [the child] in the face and disregarded 'the risk of fractures of the orbital eye socket.'").

[49] For example, where a parent gives her sick child with cancer an experimental and dangerous drug prescribed by the child's oncologist, the fact that the parent *knows* (i.e. is practically certain) that doing so will create a risk of serious bodily injury or death to the child does not, by itself, establish first degree child neglect. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was *substantial* under the circumstances.

[50] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be

court has not articulated a precise definition of the requisite psychological harm. Instead of this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision[51] by adding the requirement that the harm be "substantial" and "prolonged." by adding the requirement that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse,[52] but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. This change clarifies the law.

Eighth, the revised criminal neglect of a minor statute codifies an effective consent affirmative defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current child cruelty statute does not address whether consent of the complainant or of a parent or guardian is a defense to liability. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[53] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[54] It is unclear whether this District case law for assault would apply to child cruelty. Resolving this ambiguity, the revised criminal neglect of a minor statute codifies an effective consent affirmative defense for an actor that is not a "person with legal authority over the complainant." Due to this exclusion, the defense applies to individuals that have a duty of care to the minor, but do not rise to the level of a "person with legal authority over the complainant" as that term is defined in the RCC, such as a parent or guardian. The defense eliminates liability where the actor knows that they have

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serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[51] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[52] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children" and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[53] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

[54] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

no effective consent by the person with legal authority (e.g., they are absent or the contract for the childcare services didn't foresee the eventuality), and the requirements in the limited duty of care defense (RCC § 22E-408(a)(4)) are too stringent. For example, the defense would cover the babysitter who decides to let a minor briefly play outside in the snow without gloves if the babysitter can't find them or there aren't any available. This change improves the clarity, consistency, and proportionality of the revised statutes.

Ninth, the revised criminal neglect of a minor statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current child cruelty statute does not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for child cruelty. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[55] This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly" for the element "created, or failed to mitigate or remedy, a substantial risk." The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[56] While the meaning of "recklessly" is not defined in the current child cruelty statute, case law has briefly interpreted these terms,[57] in a manner consistent with the Model Penal Code definitions. The revised criminal neglect of a minor statute codifies a culpable mental state of "recklessly," which is defined in RCC § 22E-206. It is unnecessary to codify the higher culpable mental states of "intentionally" and "knowingly" because under the general rule of construction in RCC § 22E-206, they satisfy the lower culpable mental state of "recklessly." In addition, the definition of "recklessly" in RCC § 22E-206 is consistent with DCCA case law.[58] This change clarifies the revised statute.

Second, subsection (f) of the revised criminal neglect of a minor statute codifies an exclusion from liability for surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq*. It is inconsistent for an individual who surrenders a newborn child in accordance with D.C. Code § 4-145.01 *et. seq.* to face criminal liability. Current

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[55] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[56] D.C. Code § 22-1101(a), (b).

[57] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[58] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002).

D.C. Code § 4-1451.02 states such a person "shall not . . . be prosecuted for the surrender of the newborn."[59] This change clarifies the revised statute.

Third, the revised criminal neglect of a minor statute categorizes a person under the age of 18 as a "minor" and defines the revised offense in terms of the age of the complainant. The current child cruelty statute requires that the complainant be "a child under 18 years of age."[60] Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[61] These changes improve the clarity and consistency of the revised statute.

[59] D.C. Code § 4-1451.02(a) ("Except when there is actual or suspected child abuse or neglect, a custodial parent who is a resident of the District of Columbia may surrenders a newborn in accordance with this chapter and shall have the right to remain anonymous and to leave the place of surrender at any time and shall not be pursued by any person at the time of surrender or prosecuted for the surrender of the newborn.").

[60] D.C. Code § 22-1101(a).

[61] For example, the current child sexual abuse statutes consider a complainant under the age of 16 years to be a "child." D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

Explanatory Note. *The RCC criminal abuse of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is harm to a vulnerable adult or elderly person's bodily integrity or mental well-being, including conduct that constitutes fourth degree assault, criminal threats, offensive physical contact, criminal restraint, stalking, or electronic stalking as those crimes are defined in the RCC.*[1] *The penalty gradations for the revised offense are primarily based on the degree of bodily harm or mental harm. Along with the revised criminal neglect of a vulnerable adult or elderly person offense,*[2] *the revised criminal abuse of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person offense and penalties;*[3] *neglect of a vulnerable adult or elderly person offense and penalties;*[4] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[5]

There are three degrees of the RCC criminal abuse of a vulnerable adult or elderly person statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[6] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is a "vulnerable adult" or "elderly person" in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701.

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[1] RCC §§ 22E-1202(d) (fourth degree assault), 22E-1204 (criminal threats), 22E-1205 (offensive physical contact), 22E-1404 (criminal restraint), 22E-1801 (stalking), 22E-1802 (electronic stalking).
[2] RCC § 22E-1504.
[3] D.C. Code §§ 22-933, 22-936.
[4] D.C. Code §§ 22-934, 22-936.
[5] D.C. Code § 22-935.
[6] Such a duty of care to the complainant may arise, for example, from the actor being a parent, guardian, teacher, doctor, or caregiver, depending on the facts of a case.

Paragraph (a)(2) and subparagraphs (a)(2)(A) and (a)(2)(B) specify the three types of prohibited conduct in first degree criminal abuse of a vulnerable adult or elderly person, the highest grade of the revised offense.

Subparagraph (a)(2)(A) specifies liability for one type of prohibited conduct in first degree criminal abuse of a vulnerable adult or elderly person—causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Subparagraph (a)(2)(A) specifies that the culpable mental state for causing "serious mental injury" is "purposely," a term defined in RCC § 22E-206 that, applied here, means the accused must consciously desire that the accused causes "serious mental injury" to the complainant. Subparagraph (a)(2)(B) specifies the second type of prohibited conduct for first degree criminal abuse of a vulnerable adult or elderly person—causing "serious bodily injury," a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness, to the complainant. Subparagraph (a)(2)(B) specifies that the culpable mental state for causing "serious bodily injury" is "recklessly," a term defined in RCC § 22E-206 that, applied here, means being aware of a substantial risk that the accused will cause serious bodily injury to the complainant.

Paragraph (b)(2) specifies the prohibited conduct in second degree criminal abuse of a vulnerable adult or elderly person—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "significant bodily injury" to the complainant.

Paragraph (c)(2) and subparagraphs (c)(2)(A) and (c)(2)(B) specify the two types of prohibited conduct for third degree criminal abuse of a vulnerable adult or elderly person, the lowest grade of the revised offense. Paragraph (c)(2) and subparagraph (c)(2)(A) establish liability for causing "serious mental injury," a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning," to the complainant. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to the elements in subparagraph (c)(2)(A). "Recklessly" is a defined term in RCC § 22E-206 that here means the accused is aware of a substantial risk that he or she will cause "serious mental injury" to the complainant.

Paragraph (c)(2) and subparagraph (c)(2)(B) establish liability for the final type of liability in third degree criminal abuse of a vulnerable adult or elderly person —the accused must, "in fact," commit a "predicate offense against persons" against the complainant. "Predicate offense against persons" is defined in paragraph (g)(2) as the RCC offenses of fourth degree assault (RCC § 22E-1202(d)), criminal threats (RCC § 22E-1204), offensive physical contact (RCC § 22E-1205), criminal restraint (RCC § 22E-1404), stalking (RCC § 22E-1801), and electronic stalking (RCC § 22E-1802). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental

state requirement as to given element, here whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (d) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. An actor does not commit an offense under the revised criminal abuse of a vulnerable adult or elderly person statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[7]

Subsection (e) codifies two defenses for the revised criminal abuse of a vulnerable adult or elderly person statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (e)(1) codifies a defense for subparagraph (a)(2)(B) of first degree of the revised criminal abuse of a vulnerable adult or elderly person statute—causing "serious bodily injury," as that term is defined in RCC § 22E-701.

Paragraph (e)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (e)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. First, per subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(i), the injury must be caused by a "lawful cosmetic or medical procedure." The "lawful" requirement applies both to a cosmetic procedure and a medical procedure. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is caused by a lawful cosmetic or medical procedure. A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they are otherwise legal under District or federal law. Cosmetic procedures that are legal[8] also are within the scope of the defense.

In the alternative, subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(ii) apply if the injury is caused by an omission. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is caused by an "omission," a defined term in RCC § 22E-701. An omission

[7] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[8] *See,* e.g., D.C. Code § 47–2853.81. Scope of practice for cosmetologists.

includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

Subparagraph (e)(1)(B) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "a court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of subparagraph (e)(1)(B) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense[9] to first degree criminal abuse of a vulnerable adult or elderly person. However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[10]

Subparagraph (e)(1)(C) specifies the final requirement for the defense under paragraph (e)(1)—the actor must "reasonably believe"[11] that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The provision in subparagraph (e)(1)(C) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults and elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (e)(1)(C) permits complainants that are vulnerable adults or elderly persons to give effective consent in certain situations, the defendant's believe that such an individual gave "consent" may not be reasonable, and the defense would not apply.

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[9] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[10] These defenses have different requirements than the effective consent defense in paragraph (e)(1). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[11] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

The "in fact" specified in paragraph (e)(1) applies to the requirements in subparagraph (e)(1)(C). No culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(1)(C). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[12] There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Finally, subparagraph (e)(1)(C) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury of engage in the omission. As is discussed above, due to the "in fact" specified in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(1)(C). However, the actor must subjectively believe, and that belief must be reasonable,[13] that there is effective consent to consent to cause the injury of engage in the omission. There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the type of injury or omission to which effective consent is given.[14]

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[12] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[13] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[14] For example, if, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor unreasonably believes that the complainant gives effective consent to cause "serious bodily injury," the effective consent defense does not apply, and the actor may be guilty of fourth degree assault as a predicate offense against persons in third degree of the revised statute. However, the inverse is also true. If, as part of a lawful medical procedure, the complainant gives effective consent to the actor to cause "bodily injury," and the actor *reasonably* believes that the complainant gives

Paragraph (e)(2) codifies a defense for second degree (subsection (b)) of the revised statute—causing "significant bodily injury," as that term is defined in RCC § 22E-701—and third degree (subsection (c)) of the revised statute—causing "serious mental injury," as that term is defined in RCC § 22E-701, or engaging in a specified "RCC predicate offense against persons," defined in paragraph (g)(2) of the revised statute, such as fourth degree assault or criminal restraint. An actor that commits a predicate offense against persons, but does not have liability for criminal abuse of a vulnerable adult or elderly person due to a successful affirmative defense, would still have liability for the predicate offense against persons if the requirements of that offense are met.

Paragraph (e)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (e)(2) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements to the defense. The requirement in subparagraph (e)(2)(A) that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, is identical to the requirement in subparagraph (e)(1)(B), discussed above.

Subparagraph (e)(2)(B) requires that the actor "reasonably believes"[15] that the either the complainant or a "person with legal authority over the complainant" acting consistent with that authority gives "effective consent" to the actor to engage in the conduct specified in sub-subparagraphs (e)(2)(B)(i) and (e)(2)(B)(ii). The provision in subparagraph (e)(2)(B for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults or elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 and is defined to incorporate the RCC definition of "consent." These terms, and their applicability to the defense in paragraph (e)(1) for first degree criminal abuse of a vulnerable adult or elderly person, are discussed above. This discussion also applies to the defense to second degree and third degree in subparagraph (e)(2)(B).

The "in fact" specified in paragraph (e)(2) applies to subparagraph (e)(2)(B) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the effective consent of one of the specified persons. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[16]

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effective consent to "serious bodily injury," the effective consent defense does apply, and the actor is not guilty of first degree of the revised statute.

[15] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[16] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in

There is no effective consent defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Sub-subparagraphs (e)(2)(B)(i), (e)(2)(B)(ii), and (e)(2)(B)(iii) specify alternate bases for the defense under paragraph (e)(2). First, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(i) require that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to cause the injury. As is discussed above, due to the "in fact" specified in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B) or the following sub-subparagraphs. However the actor must subjectively believe, and that belief must be reasonable[17] that there is effective consent to cause the injury. There is no effective consent defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the injury to which effective consent is given.

In the alternative, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(ii) apply if the injury is caused by an omission and the complainant or a "person with legal authority over the complainant" acting consistent with that authority, gave effective consent to the actor to engage in the omission. As specified by use of "in fact" in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the injury is caused by an "omission," a defined term in RCC § 22E-701. An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

Finally, and in the alternative, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(iii) require that the actor reasonably believes that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to engage in a lawful sport, occupation, or other concerted

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'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[17] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

activity.[18] As noted above, there is no effective consent defense when the actor makes an unreasonable mistake as to the conduct to which effective consent is given. Sub-subparagraph (e)(2)(B)(iii) further requires that the actor's infliction of the injury is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's infliction of the injury is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the injury is not a reasonably foreseeable hazard.

Subsection (f) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) codifies a definition of "predicate offense against persons" for the offense and cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal abuse of a vulnerable adult or elderly person statute clearly changes current District law in six main ways.*

First, the revised abuse of a vulnerable adult or elderly person statute includes a gradation for causing "significant bodily injury," which is defined in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "physical pain or injury,"[19] "serious bodily injury,"[20] or "permanent bodily harm"[21] resulted. The statute does not define any of these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[22] but there is no DCCA case law interpreting "serious bodily injury" or "permanent bodily harm." It is unclear how "serious bodily injury" and "permanent bodily harm" differ, if at all, particularly given that DCCA case law for the current aggravated assault statute includes permanent bodily injury in the definition of "serious bodily injury."[23] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute includes an additional gradation for causing "significant bodily

[18] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

[19] D.C. Code § 22-933(1); D.C. Code § 22-936(a).

[20] D.C. Code § 22-936(b).

[21] D.C. Code § 22-936(c).

[22] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[23] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

injury," using the revised definition for that term in RCC § 22E-701. Both the current[24] and revised[25] assault statutes use "significant bodily injury" to partially grade the offenses, and the revised definition is modified from the definition in the current assault with significant bodily injury statute.[26] This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing the death of a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on the death of the vulnerable adult or elderly person.[27] The current statute provides a maximum term of imprisonment of 20 years for such conduct, which is inconsistent with applicable homicide penalties currently in the D.C. Code.[28] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute does not grade based on the death of the vulnerable adult or elderly person. The RCC homicide offenses, through penalty enhancements for killing a "protected person,"[29] provide enhanced liability for the death of a vulnerable adult or elderly person. This change reduces unnecessary overlap between the revised statute and RCC homicide offenses, and improves the proportionality and consistency of the revised statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute has two grades that provide liability for causing "serious mental injury," depending on whether the conduct is done purposely or recklessly. The current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted.[30] Such injury requires a culpable mental state of either "intentionally" or "knowingly," without distinction in penalty,[31] and neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised statute prohibits "purposely" causing "serious mental injury" in first degree criminal abuse of a vulnerable adult or elderly person and "recklessly" causing "serious mental injury" in third degree criminal abuse of a vulnerable adult or elderly person. Including a "recklessly" culpable mental state makes the revised criminal abuse of a vulnerable adult or elderly person statute consistent with the current[32] and revised[33] assault offenses and the current[34] and

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[24] D.C. Code § 22-404(a)(2).

[25] RCC § 22E-1202.

[26] D.C. Code § 22-404(a)(2) (assault with significant bodily injury statute defining "significant bodily injury" as an "injury that requires hospitalization or immediate medical attention.").

[27] D.C. Code § 22-936(c).

[28] Currently, the maximum penalty for first degree murder, absent aggravating circumstances, is 60 years. The maximum penalty for second degree murder, absent aggravating circumstances, is 40 years. If an aggravating circumstance is present, the maximum penalty for first and second degree murder is incarceration for life. Notably, one aggravating factor for both first and second degree murder is that the victim was "more than 60 years old." The maximum penalty for voluntary and involuntary manslaughter is 30 years.

[29] RCC §§ 22E-1101; 22E-1102.

[30] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[31] D.C. Code §§ 22-933 (abuse of a vulnerable adult or elderly person statute requiring a culpable mental state of "intentionally" or "knowingly."); 22-936 (penalty statute for abuse of a vulnerable adult or elderly person statute).

[32] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the

revised[35] criminal abuse of a minor statutes, which either require or have gradations for a "recklessly" culpable mental state. This change improves the consistency and proportionality of the revised statute.

Fourth, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of "recklessly" for physical harm. The current abuse of a vulnerable adult or elderly person statute requires a culpable mental state of either "intentionally" or "knowingly."[36] Neither the current statute nor case law defines these culpable mental state terms. In contrast, the revised first degree criminal abuse of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state for causing serious bodily injury, significant bodily injury, or bodily injury. The "recklessly" culpable mental state is consistent with gradations in the current[37] and revised[38] assault offenses and the current[39] and revised[40] criminal abuse of a minor statutes. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute is no longer limited to "corporal means." The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[41] There is no case law regarding the phrase "corporal means." In contrast, the revised statute requires that the defendant "cause[]" the specified type of physical or mental injury by any means.[42] This change broadens the statute to potentially include drugging a complainant or using mechanical devices to inflict bodily injury. The requirement of causing injury by any means matches the current[43] and revised[44] assault

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culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses.

[33] RCC § 22E-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[34] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[35] RCC § 22E-1501 (requiring a culpable mental state of "recklessly" in several gradations).

[36] D.C. Code § 22-933.

[37] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in the commentary to the RCC assault and offensive physical contact offenses (RCC §§ 22E-1202 and 22E-1205).

[38] RCC § 22E-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[39] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[40] RCC § 22E-1501 (requiring a culpable mental state of "recklessly" in several gradations).

[41] D.C. Code § 22-933(1).

[42] For example, throwing a caustic substance on someone, causing burns, or mixing a toxic ingredient in someone's food.

[43] *See, e.g.*, D.C. Code §§ 22-404(a)(2) ("causes significant bodily injury to another."); 22-404.01(a)(1), (2) ("causes serious bodily injury.").

[44] RCC § 22E-1202.

statutes and the current[45] child cruelty and revised[46] criminal abuse of a minor statutes. This change reduces an unnecessary gap in the offense's coverage and improves the consistency of the statute with similar statutes.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that reckless as to the fact that "he or she has a responsibility under civil law for the health, welfare, or supervision" of the complainant. The current abuse of a vulnerable adult or elderly person statute does not state any requirements for the defendant's relationship to the complainant.[47] As a result, the current statute significantly overlaps with the District's current assault statutes,[48] which are also subject to separate enhancements for harming an elderly person.[49] However, the current neglect of a vulnerable adult or elderly person statute requires "a duty to provide [necessary] care and services" to the vulnerable adult or elderly person statute.[50] Regarding mental states, the current abuse of a vulnerable adult or elderly person statute requires an "intentionally" culpable mental state, and the current neglect statute requires "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty."[51] There is no DCCA case law interpreting "intentionally" in the abuse statute, but the DCCA has generally found that "wanton, reckless, or willful indifference" in the neglect statute requires something similar to recklessness.[52] In contrast, the revised criminal abuse of a vulnerable adult or elderly person statute limits liability to a person that is "reckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant." This change narrows the scope of liability for the offense to those persons with a duty of care to the complainant (e.g., a teacher, doctor, or caretaker). The revised criminal abuse of a vulnerable adult or elderly person offense thus provides a distinct charge for individuals with responsibilities under civil law who harm those they are supposed to protect. The revised offense still overlaps in many respects with assault and other offenses that are predicates for third degree criminal abuse of a vulnerable adult or elderly person statute, but only for persons with a duty of care to the complainant they harm.[53] Individuals who do not satisfy this requirement may still have liability under other revised offenses, such as assault (RCC § 22E-1202), criminal threats (RCC § 22E-1204), criminal restraint (RCC § 22E-1404), or offensive physical contact (RCC § 22E-1205). This change reduces unnecessary overlap between the revised statute and other RCC offenses against persons, including assault.

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[45] D.C. Code § 22-1101(a) ("causes bodily injury.").
[46] RCC § 22E-1501.
[47] D.C. Code § 22-933.
[48] D.C. Code §§ 22-404; 22-404.01.
[49] D.C. Code § 22-3601.
[50] D.C. Code § 22-934.
[51] D.C. Code § 22-934.
[52] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).
[53] Under the general merger provision in RCC § 22E-214, the predicate offenses for third degree criminal abuse of a vulnerable adult or elderly person are intended to merge into a conviction for criminal abuse of a vulnerable adult or elderly person when arising from the same course of conduct.

Beyond these six changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that would constitute stalking, electronic stalking, criminal threats, or criminal restraint, as defined by the RCC. The current abuse of a vulnerable adult or elderly person statute prohibits, in part, conduct that "threatens to inflict physical pain or injury,"[54] uses "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening,"[55] or involves "unreasonable confinement or involuntary seclusion, including but not limited to, the forced separation from other persons against his or her will or the directions of any legal representative."[56] There is no DCCA case law interpreting the meaning of these provisions in the current statute, or how such conduct may differ from conduct covered in other current statutes that prohibit threats,[57] stalking,[58] or involuntary confinement.[59] Resolving this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute clearly states that third degree includes the RCC offenses of stalking, criminal threats, or criminal restraint. The revised stalking (RCC § 22E-1801), electronic stalking (RCC § 22E-1802), and criminal threats (RCC § 22E-1204) statutes cover threats of "physical pain or injury" and "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening" in the current statute, and the revised criminal restraint statute (RCC § 22E-1404) covers conduct involving unreasonable confinement or involuntary seclusion in the current statute. This change improves the clarity of the revised offense and creates consistency between the revised offense and other closely related offenses pertaining to such as criminal threats and restraint.

Second, the revised criminal abuse of a vulnerable adult or elderly person statute prohibits behavior that satisfies fourth degree assault as defined in RCC § 22E-1202(d) and offensive physical contact as defined in RCC § 22E-1205. The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[60] The DCCA has interpreted "physical pain or injury…or other corporal means" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[61] but did not provide a definition of the terms. The revised abuse of a vulnerable adult or elderly person statute establishes that, whether or not it would constitute a physical injury by corporal means, causing "bodily injury," as required by fourth degree

[54] D.C. Code § 22-933(1).
[55] D.C. Code § 22-933(2).
[56] D.C. Code § 22-933(3).
[57] D.C. Code §§ 22-404(a)(1); 22-1810.
[58] D.C. Code § 22-3133.
[59] D.C. Code § 22-2001.
[60] D.C. Code § 22-933(1).
[61] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

assault, or offensive physical contact is within the scope of the offense. This change clarifies and potentially fills a gap in the current statute.

Third, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a vulnerable adult or elderly person.[62] There is no DCCA case law discussing if there is a culpable mental state for this element. However, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[63] To resolve these ambiguities, the revised criminal abuse of a vulnerable adult or elderly person statute consistently requires a "recklessly" culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. The "recklessly" culpable mental state matches the culpable mental state for the fact that the complainant is under the age of 18 years in the revised criminal abuse of a minor and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502), and the "protected person" gradations in the revised assault statute (RCC § 22E-1202). A "recklessly" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[64] This change improves the consistency and proportionality of the revised offense.

Fourth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "bodily injury" in RCC § 22E-701. The District's current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "physical pain or injury" or "serious bodily injury" results.[65] The current statute, however, does not define these terms. The

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[62] The current neglect of a vulnerable adult or elderly person statute requires a culpable mental state of "intentionally or knowingly." D.C. Code § 22-933. Surprisingly, "vulnerable adult" or "elderly person" are not codified elements of the current criminal abuse of a vulnerable adult or elderly person offense in D.C. Code § 22-933, nor is proof that the complainant is a "vulnerable adult" or "elderly person" codified as an element in the offense's penalty provisions. D.C. Code §§ 22-933, 22-936.

[63] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 22-3601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[64] "Reckless" is defined in RCC § 22E-206 and means that the accused must consciously disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant, per the current enhancement for crimes against senior citizens, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial risk that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[65] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress,"

DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[66] but did not provide a definition of either term. There is no DCCA case law interpreting "serious bodily injury" in the current abuse of a vulnerable adult or elderly person statute.[67] Resolving this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute[68] and would appear to encompass "permanent bodily harm" in the current abuse of a vulnerable adult or elderly person statute. It is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. The revised definition of "bodily injury" in RCC § 22E-701 encompasses the limited DCCA case law interpreting "bodily injury" for the current abuse of a vulnerable adult or elderly person statute, as well as the alternative basis for liability in the current statute, that the conduct cause "physical pain."[69] This change improves the clarity, consistency, and proportionality of the revised abuse of a vulnerable adult or elderly person statute.

Fifth, the revised criminal abuse of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on

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"permanent bodily harm," or death the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a).

[66] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[67] However, there is DCCA case law interpreting "serious bodily injury" in the current aggravated assault statute. "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[68] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[69] D.C. Code § 22-933(1) ("[i]nflicts or threatens to inflict physical pain or injury . . . by corporal means.").

whether "severe mental distress" resulted,[70] but the statute does not define the term and there is no DCCA case law. Resolving this ambiguity, RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[71] This change improves the clarity and consistency of the revised offense.

Sixth, the revised criminal abuse of a vulnerable adult or elderly person statute requires a culpable mental state as to the resulting physical or mental injury. The current abuse of a vulnerable adult or elderly person statute requires culpable mental states of "intentionally or knowingly" as to the prohibited conduct.[72] However, the current offense's penalty gradations do not specify culpable mental states for whether the prohibited conduct "causes" "serious bodily injury or severe mental distress"[73] or "permanent bodily harm or death."[74] The DCCA has not determined whether there is a culpable mental state for the resulting physical or mental harm in the abuse of a vulnerable adult or elderly person statute. Unlike the current statute, the revised statute clarifies that a culpable mental state applies to the resulting physical or mental harm—either "recklessly" or "purposely." This change improves the clarity, completeness, and proportionality of the revised statute.

Seventh, the revised criminal abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing "permanent bodily harm." The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "permanent bodily harm" resulted,[75] providing a maximum term of imprisonment of 20 years for such conduct. The current statute does not define "permanent bodily harm" and there is no comparable grade in the District's current assault statutes. However, the current aggravated assault statute does prohibit "serious bodily injury"[76] and DCCA case law includes permanent bodily injury in the definition of "serious bodily injury."[77] To resolve this ambiguity, the revised criminal abuse of a

[70] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).
[71] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").
[72] D.C. Code § 22-933.
[73] D.C. Code § 22-936(b).
[74] D.C. Code § 22-936(c).
[75] D.C. Code § 22-936(c).
[76] D.C. Code § 22-404.01.
[77] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of

vulnerable adult or elderly person statute grades, in part, on whether "serious bodily injury" occurred, as that term is defined in RCC § 22E-701. This change improves the clarity and consistency of the revised statute.

Eighth, the revised criminal abuse of a vulnerable adult or elderly person statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current abuse of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although current D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[78] Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[79] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[80] It is unclear whether this District case law for assault would apply to abuse of a vulnerable adult or elderly person. Resolving this ambiguity, the revised criminal abuse of a vulnerable adult or elderly person statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. In particular, the new effective consent defenses in subsection (e) specifically address where the injury is caused by an "omission" if the complainant, or a "or person with legal authority over the complainant" acting consistent with that authority gives effective consent to the omission. This replaces in relevant part the exception in the current D.C. Code abuse or neglect of a vulnerable adult or elderly person statutes.[81] An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall. This change improves the clarity, consistency, and proportionality of the revised statutes.

Ninth, the revised criminal abuse of a vulnerable adult or elderly person statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current abuse of a vulnerable adult or elderly person

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jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[78] D.C. Code § 22-935.

[79] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").

[80] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

[81] D.C. Code § 22-935.

statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for those offenses. The exclusion resolves any apparent conflict within District laws. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[82] This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

[82] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

Explanatory Note. *The RCC criminal neglect of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is a risk of harm to a vulnerable adult or elderly person's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a vulnerable adult or elderly person, the RCC neglect of a vulnerable adult or elderly person offense prohibits failing to provide a vulnerable adult or elderly person with necessary items or care. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised criminal abuse of a vulnerable adult or elderly person offense, the revised criminal neglect of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person;*[1] *neglect of a vulnerable adult or elderly person;*[2] *and the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person.*[3]

There are three degrees of the RCC criminal neglect of a vulnerable adult or elderly person statute. Each gradation requires that the accused is "reckless" as to the fact that he or she has a "responsibility under civil law for the health, welfare, or supervision of the complainant"[4] (paragraph (a)(1) and subparagraph (a)(1)(A) for first degree, paragraph (b)(1) and subparagraph (b)(1)(A) for second degree, and paragraph (c)(1) and subparagraph (c)(1)(A)) for third degree). Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant has the specified responsibility to the complainant in subparagraph (a)(1)(A) for first degree, subparagraph (b)(1)(A) for second degree, and subparagraph (c)(1)(A)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant.

Each gradation of the offense further requires that the accused is "reckless" as to the fact that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state specified in paragraph (a)(1) for first degree, paragraph (b)(1) for second degree, and paragraph (c)(1)) for third degree, applies to the fact that the complainant is a "vulnerable adult" or "elderly person" in subparagraph (a)(1)(B) for first degree, subparagraph (b)(1)(B) for second degree, and subparagraph (c)(1)(B)) for third degree). "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22E-701.

Paragraph (a)(2) specifies the prohibited conduct for first degree criminal neglect of a vulnerable adult or elderly person, the highest grade of the revised criminal neglect

[1] D.C. Code §§ 22-933, 22-936.
[2] D.C. Code §§ 22-934, 22-936.
[3] D.C. Code § 22-935.
[4] Such a duty of care to the complainant may arise, for example, from the actor being a teacher, doctor, or caregiver, depending on the facts of a case.

of a vulnerable adult or elderly person offense—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury" or death. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(1) applies to this requirement. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that he or she created, or failed to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury" or death. "Serious bodily injury" is a term defined in RCC § 22E-701 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ, or protracted unconsciousness.

Subsection (b) specifies the prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person. Paragraph (b)(2) and subparagraph (b)(2)(A) specify one type of prohibited conduct—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the RCC and is defined in RCC § 22E-701 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2) and subparagraph (b)(2)(A). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury."

Paragraph (b)(2) and subparagraph (b)(2)(B) specify the second type of prohibited conduct for second degree criminal neglect of a vulnerable adult or elderly person—creating, or failing to mitigate or remedy, a substantial risk that a child would experience "serious mental injury." "Serious mental injury" is a term defined in RCC § 22E-701 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (b)(1) applies to the elements in paragraph (b)(2) and subparagraph (b)(2)(B). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience "serious mental injury."

Subsection (c) specifies the prohibited conduct for third degree criminal neglect of a vulnerable adult or elderly person. Subparagraph (c)(2)(A) specifies one type of prohibited conduct—failing to make a reasonable effort to provide food, clothing, or other items or care for the complainant that are "essential to the physical health, mental health, or safety of the complainant." Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "reckless" in paragraph (c)(1) applies to all the elements in subparagraph (c)(2)(A). "Reckless" is a term defined in RCC § 22E-206 which, applied here, means being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care and that the items or care are "essential to the physical health, mental health, or safety of the complainant."

Subparagraph (c)(2)(B) establishes liability for creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "bodily injury" from

consumption of alcohol, or consumption or inhalation, without a valid prescription, of a "controlled substance" or marijuana.[5] "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." "Controlled substance" is also a defined term in RCC § 22E-701. Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (c)(1) applies to all elements in subparagraph (c)(2)(B). "Recklessly" is defined term in RCC § 22E-206 that here means being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial risk that the complainant would experience bodily injury from consumption of alcohol, or consumption or inhalation, without a valid prescription, of a controlled substance or marijuana.

Subsection (d) codifies an exclusion from liability for the offense. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all exclusions from liability in the RCC. An actor does not commit an offense under the revised criminal neglect of a vulnerable adult or elderly person statute when, in fact, the actor's conduct is specifically permitted by a District statute or regulation. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here that the actor's conduct is specifically permitted by a District statute or regulation. For example, Title 22, Health, of the current D.C. Municipal Regulations, has regulations that will satisfy the exclusion from liability.[6]

Subsection (e) codifies two defenses for the revised criminal neglect of a vulnerable adult or elderly person statute. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all defenses in the RCC.

Paragraph (e)(1) codifies a defense for first degree (subsection (a)) of the revised criminal neglect of a vulnerable adult or elderly person statute—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "serious bodily injury," as that term is defined in RCC § 22E-701, or death.

Paragraph (e)(1) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of

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[5] Specific reference is made to marijuana to ensure that marijuana is categorically included, regardless of amount. Title 48 of the D.C. Code generally defines a controlled substance to include marijuana as a controlled substance (see D.C. Code § 48–901.02(4)), but also separately modifies that general definition (see D.C. Code § 48–904.01(a)(1A)(A)) to eliminate marijuana under 2 ounces possessed by a person 21 or over. Because marijuana is categorically included, a caregiver who legally possesses marijuana may, for example, still be liable for blowing smoke from the marijuana upon a vulnerable adult or elderly person if it is proven that such conduct creates a substantial risk that the complainant would experience bodily injury from the smoke.

[6] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

the defense in paragraph (e)(1) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements for the defense. First, per subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(i), the risk must be caused by a "lawful cosmetic or medical procedure." The "lawful" requirement applies both to a cosmetic procedure and a medical procedure. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the risk is caused by a lawful cosmetic or medical procedure. A medical procedure is an activity directed at or performed on an individual with the object of improving health, treating disease or injury, or making a diagnosis. Experimental medical procedures are included in this definition if they are otherwise legal under District or federal law. Cosmetic procedures that are legal[7] also are within the scope of the defense.

In the alternative, subparagraph (e)(1)(A) and sub-subparagraph (e)(1)(A)(ii) apply if the risk is caused by an omission. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the risk is caused by an "omission," a defined term in RCC § 22E-701. An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall.

Subparagraph (e)(1)(B) requires that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701. As specified by use of "in fact" in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to the fact that the actor is not "a person with legal authority over the complainant." When the complainant is an "incapacitated individual," RCC § 22E-701 defines a "person with legal authority over the complainant" as "a court-appointed guardian to the complainant, or someone acting with the effective consent of such a guardian." RCC § 22E-701 further defines "incapacitated individual."

The effect of subparagraph (e)(1)(B) is that an actor who is "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, does not have this effective consent defense[8] to first degree criminal neglect of a vulnerable adult or elderly person. However, such an actor may have a defense under either the parental or guardian defenses in RCC § 22E-408, which provide expansive defenses for specified parents and guardians and those acting with the effective consent of such a parent or guardian.[9]

Subparagraph (e)(1)(C) specifies the final requirement for the defense under paragraph (e)(1)—the actor must "reasonably believe"[10] that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority

[7] *See,* e.g., D.C. Code § 47–2853.81. Scope of practice for cosmetologists.

[8] The defense under paragraph (e)(1) is not available to an actor that is a "person with legal authority over the complainant" and there is no general effective consent defense in the RCC.

[9] These defenses have different requirements than the effective consent defense in paragraph (e)(1). For example, both the parental and guardian defenses in RCC § 22E-408 require that the actor's conduct be reasonable.

[10] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The provision in subparagraph (e)(1)(C) for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults and elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires some indication (by word or action) of agreement given by a person generally competent to do so. In addition, the RCC definition of "consent" excludes consent from a person that "[b]ecause of youth, mental disability, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." Thus, although subparagraph (e)(1)(C) permits complainants that are vulnerable adults or elderly persons to give effective consent in certain situations, the defendant's believe that such an individual gave "consent" may not be reasonable, and the defense would not apply.

The "in fact" specified in paragraph (e)(1) applies to the requirements in subparagraph (e)(1)(C). No culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(1)(C). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[11] There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Finally, subparagraph (e)(1)(C) requires that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to engage in the conduct that constitutes the offense. As is discussed above, due to the "in fact" specified in paragraph (e)(1), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(1)(C). However, the actor must subjectively believe, and that belief must be reasonable,[12] that

[11] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[12] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these

there is effective consent to consent to engage in the conduct that constitutes the offense. There is no effective consent defense under subparagraph (e)(1)(C) when the actor makes an unreasonable mistake as to the conduct to which effective consent is given.

Paragraph (e)(2) codifies a defense for second degree (subsection (b)) of the revised statute—creating, or failing to mitigate or remedy, a substantial risk that the complainant would experience "significant bodily injury" or "serious mental injury" as those terms are defined in RCC § 22E-701—and third degree (subsection (c)) of the revised statute—failing to make a reasonable effort to provide essential items or care or creating, or failing to remedy a risk of bodily injury from drug or alcohol consumption.

Paragraph (e)(2) uses the phrase "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" applies to all requirements of the defense in paragraph (e)(2) and its subparagraphs and sub-subparagraphs, and there is no culpable mental state requirement for these requirements.

There are several requirements to the defense. The requirement in subparagraph (e)(2)(A) that the actor is not "a person with legal authority over the complainant," as that term is defined in RCC § 22E-701, is identical to the requirement in subparagraph (e)(1)(B), discussed above.

Subparagraph (e)(2)(B) requires that the actor "reasonably believes"[13] that the either the complainant or a "person with legal authority over the complainant" acting consistent with that authority gives "effective consent" to the actor to engage in the conduct specified in sub-subparagraphs (e)(2)(B)(i) and (e)(2)(B)(ii). The provision in subparagraph (e)(2)(B for a "person with legal authority over the complainant acting consistent with that authority" giving effective consent to the actor is intended to cover guardians of vulnerable adults or elderly persons giving effective consent to the actor. "Effective consent" is a defined term in RCC § 22E-701 and is defined to incorporate the RCC definition of "consent." These terms, and their applicability to the defense in paragraph (e)(1) for first degree criminal neglect of a vulnerable adult or elderly person, are discussed above. This discussion also applies to the defense to second degree and third degree in subparagraph (e)(2)(B).

The "in fact" specified in paragraph (e)(2) applies to subparagraph (e)(2)(B) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B). It is not necessary to prove that the actor desired or was practically certain that the actor had the effective consent of one of the specified persons. However, the actor must subjectively believe, and that belief must be reasonable, that the actor has the required effective consent. Reasonableness is an objective standard that must take into

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questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[13] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

account certain characteristics of the actor but not others.[14] There is no effective consent defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the effective consent of the complainant or of the person acting with legal authority over the complainant. There is also no defense under subparagraph (f)(2)(B) when the actor makes an unreasonable mistake as to the fact that a person acting with legal authority over the complainant is acting consistent with their authority.

Sub-subparagraphs (e)(2)(B)(i) and (e)(2)(B)(ii) specify alternate bases for the defense under paragraph (e)(2). First, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(i) require that the actor "reasonably believes" that the complainant or a "person with legal authority over the complainant acting consistent with that authority" gives effective consent to engage in the conduct to constitute the offense.[15] As is discussed above, due to the "in fact" specified in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (e)(2)(B) or the following sub-subparagraphs. However the actor must subjectively believe, and that belief must be reasonable[16] that there is effective consent to engage in the conduct that constitutes the offense. There is no effective consent defense under subparagraph (e)(2)(B) when the actor makes an unreasonable mistake as to the conduct to which effective consent is given.

In the alternative, subparagraph (e)(2)(B) and sub-subparagraph (e)(2)(B)(ii) require that the actor reasonably believes that the complainant, or a "person with legal authority over the complainant" acting consistent with that authority, gives "effective consent" to the actor to engage in a lawful sport, occupation, or other concerted activity.[17] As noted above, there is no effective consent defense when the actor makes an unreasonable mistake as to the conduct to which effective consent is given. Sub-

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[14] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[15] The "conduct that constitutes the offense" in sub-subparagraph (e)(2)(B)(i) includes an omission. The sub-subparagraph does not use the term "omission," but the offense includes a failure to mitigate or remedy a risk and encompasses omissions.

[16] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[17] "Other concerted activity" includes informal activities that aren't normally conceived as a sport or occupational activity, for example sparring, playing "catch" with a baseball, or helping someone repair their car.

subparagraph (e)(2)(B)(ii) further requires that the actor's creation of the risk, or failure to mitigate or remedy the risk,[18] is a reasonably foreseeable hazard of that activity. As specified by the "in fact" in paragraph (e)(2), no culpable mental state, as defined in RCC § 22E-205, applies to the requirement that the actor's creation of, or failure to mitigate or remedy, the risk is a reasonably foreseeable hazard of a permissible activity. This is an objective determination and the defense does not apply if the infliction of the injury is not a reasonably foreseeable hazard.

Subsection (f) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal neglect of a vulnerable adult or elderly person statute changes current District law in three main ways.*

First, the revised criminal neglect of a vulnerable adult or elderly person statute is limited to conduct that does not actually harm a person. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[19] The penalties for the offense, however, partially grade the offense on actual harm to the vulnerable adult or elderly person,[20] and partially on a failure to discharge the required duty.[21] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute no longer grades the offense based on whether actual harm to the vulnerable adult or elderly person resulted. The revised statute is instead limited to creating, or failing to mitigate or remedy, a risk of harm to an elderly person or vulnerable adult, or a failure to provide necessary items or care. However, if physical or mental injury or death results, there still may be liability under the revised criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1503), the revised assault statute (RCC § 22E-1202), or the revised homicide offenses[22] (RCC §§ 22E-1101, 22E-1102, 22E-1103). This change reduces

[18] "Failure to mitigate or remedy" a risk in sub-subparagraph (e)(2)(B)(ii) encompass an omission even though the sub-subparagraph does not use the term "omission."

[19] D.C. Code § 22-934.

[20] The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[21] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

[22] The current abuse of a vulnerable adult or elderly person statute prohibits, in part, "intentionally or knowingly impos[ing] unreasonable confinement or involuntary seclusion." D.C. Code § 22-933(3). In one gradation of the current offense, if the defendant "causes permanent bodily harm or death," there is a maximum term of imprisonment of 20 years. D.C. Code § 22-934(c). The current statute does not specify any culpable mental state as to causing death and there is no DCCA case law, meaning that current District law may apply strict liability. For example if, after a defendant cuts off an elderly person's phone lines, the elderly person falls and dies because he or she cannot call for help, a court could find that the defendant "caused" the elderly person's death, even if the defendant was unaware that there was a risk of death. It is unclear whether current District homicide laws would cover imposing "unreasonable confinement or involuntary seclusion" that leads to death, as in this scenario.

unnecessary overlap between offenses and improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute applies a recklessness requirement rather than a reasonable person standard to whether items or care are essential for the well-being of the vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute requires "that a reasonable person would deem the items or care essential for the well-being of the vulnerable adult or elderly person."[23] It is unclear under the current statute what culpable mental state, if any, applies to the fact that the items or care are essential, although the statute's "reasonable person" standard may suggest a culpable mental state of negligence for this element. DCCA case law has not specifically addressed this culpable mental state, but has generally found that "wanton, reckless or willful indifference," two other culpable mental states specified in the current criminal neglect of a vulnerable adult or elderly person statute, requires something similar to recklessness.[24] In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute eliminates the current statute's reasonable person requirement and applies a "recklessly" culpable mental state as defined in RCC § 22E-206. As applied in the revised statute, "recklessly" requires that a person is aware of a substantial risk that the items or care are "essential for the health or safety of a vulnerable adult or elderly person." This change improves the clarity and proportionality of the revised offense.[25]

Third, the revised criminal neglect of a vulnerable adult or elderly person statute no longer requires as a distinct element that the defendant fail to discharge a duty to provide necessary care and services. The current D.C. Code neglect of a vulnerable adult or elderly person statute requires that the defendant "fail[] to discharge a duty to provide care and services necessary to maintain the physical and mental health" of a vulnerable adult or elderly person.[26] There is no case law regarding this phrase. Moreover, the D.C. Code does not specify any general defense for assault-type conduct committed with intent to fulfill a person's duty of care to another person, and there is no case law concerning such a general defense.[27] In contrast, the revised criminal neglect of a vulnerable adult or

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The revised criminal abuse of a vulnerable adult or elderly person statute no longer specifically prohibits "unreasonable confinement or involuntary seclusion," although this conduct appears to be covered under the revised criminal restraint offense (RCC § 22E-1404). However, the RCC has a revised negligent homicide offense (RCC § 22E-1103) that may cover this conduct, and, depending on the facts of the case, the revised manslaughter offense (RCC § 22E-1102) may cover it.

[23] D.C. Code § 22-934.

[24] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[25] Although "essential for the health or safety of a vulnerable adult or elderly person" is an element of third degree of the revised criminal neglect of a vulnerable adult or elderly person statute, the issue also may arise in the other degrees of the offense that prohibit "a substantial risk" of specified physical and mental harms. In these degrees, the "recklessly" culpable mental state would encompass recklessness as to whether items or care were essential for the health or safety of the vulnerable adult or elderly person.

[26] D.C. Code § 22-934.

[27] The DCCA has recognized a "lesser-evils" or "necessity" type of justification defense, however, that may apply in situations where an actor commits an assault-type act on a complainant as part of his or her duty of care to the complainant (e.g., a caretaker who restrains his ward to keep the ward from running into

elderly person statute requires as an element of the offense only that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant, is reckless as to having this responsibility, and commit otherwise specified conduct. The RCC general justification defense for parents, guardians, and others per RCC § 22E-408 limits liability when an otherwise criminal act is justifiably committed because of the actor's duty of care to the complainant. Under this defense, once an actor's burden of production is satisfied, the government must prove that the actor's conduct was a violation of his or her duty of care. Specifically, in a charge of third degree of the RCC criminal neglect of a vulnerable adult or elderly person statute, where an actor claims his or her conduct is in accord with his duty of care under RCC § 22E-408, the government then would need to prove that his or her failure to provide essential items or care was a violation of the actor's duty of care. Consequently, the effect of removing as a distinct element of the revised statute that the defendant fail to discharge a duty to provide necessary care and services is simply that the burden of alleging that such a failure was not a violation of the actor's duty of care falls upon the actor. This change improves the clarity and consistency of the revised statute.

Beyond these three substantive changes to current District law, seven other aspects of the statute may be viewed as a substantive change of law.

First, the revised criminal neglect of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness as to the fact that the complainant is a vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute is silent as to what culpable mental state, if any, applies to the fact that the complainant is a vulnerable adult or elderly person. There is no DCCA case law discussing the matter. However, the current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to a vulnerable adult or elderly person, which may imply awareness of the complainant's status which is the basis of the "duty." In a related statutory provision, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[28] To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute consistently requires a "reckless" culpable mental state as to the fact that the complainant is an elderly person or a vulnerable adult. The reckless culpable mental state requirement matches the culpable mental state required as to the fact that the complainant is under the age 18 years in the revised criminal abuse and criminal neglect of a minor statutes (RCC § 22E-1501 and § 22E-1502) and the "protected person" gradations in the revised assault statute

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traffic). *See Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the "pressure of circumstances," if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law.").

[28] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

(RCC § 22E-1202). A "reckless" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[29] This change improves the consistency and proportionality of the revised offense.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "substantial risk" of the specified physical or mental harm for liability. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[30] The penalties for the offense partially grade on a failure to discharge the required duty.[31] In such a situation, it appears that an actual risk of harm may not be necessary,[32] although failure to mitigate a risk has been the basis of liability in at least one case.[33] The revised criminal neglect of a vulnerable adult or elderly person statute clarifies that the required risk must be "substantial." The "substantial" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22E-206, also requires, in relevant part, that a risk be "substantial." However, given that neglect offenses will often depend on the nature of the risk to the vulnerable adult or elderly person, the revised statute specifies the "substantial" requirement to clarify the statute, particularly where the defendant is alleged

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[29] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). "Reckless" is defined in RCC § 22E-206 and means that the accused must consciously disregard a substantial risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental states of recklessness or knowledge as to the age of the complaining witness. The accused would not consciously disregard a substantial risk (recklessness) or be practically certain (knowledge) that the complainant was 65 years of age or older. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element. Criminal neglect of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[30] D.C. Code § 22-934.

[31] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days."). The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[32] For example, a caretaker who knowingly fails to discharge their duty to provide necessary medicine to a vulnerable person may be liable under the current statute even though the vulnerable person was not actually at risk of an adverse consequence due to the intervention of a third party.

[33] *Jackson v. United States*, 996 A.2d 796, 797, 798 (D.C. 2010) (finding the evidence sufficient for criminal neglect of a vulnerable adult because "a reasonable factfinder could conclude that, under the statute, appellant failed to take steps that a 'reasonable person would deem essential for the well-being of the complainant' when appellant was involved in an altercation with the vulnerable adult, which left visible and significant injuries, and appellant did not inform his supervisor or file an incident report as required by his job duties).

to act knowingly, intentionally, or purposely.[34] This change improves the clarity and consistency of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standard definitions for the terms "serious bodily injury" and "significant bodily injury" in RCC § 22E-701. The District's current neglect of a vulnerable adult or elderly person statute is graded, in part, on whether "serious bodily injury," "permanent bodily harm," or a lesser, unspecified, physical harm results.[35] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[36] but did not provide a general definition. There is no DCCA case law interpreting these terms for the current neglect of a vulnerable adult or elderly person statute. To resolve these ambiguities, the revised criminal neglect of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "significant bodily injury" per RCC § 22E-701. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute.[37] The revised definition of "serious bodily injury" would appear to encompass "permanent bodily harm" in the current neglect of a vulnerable adult or elderly person statute, but it is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. This change improves the clarity, consistency, and proportionality of the revised statute.

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[34] For example, where a caregiver gives an elderly person with cancer an experimental and dangerous drug prescribed by the elderly person's oncologist, the fact that the caregiver *knows* (i.e. is practically certain) that doing so will create a risk of serious bodily injury or death to the elderly person does not, by itself, establish first degree neglect of a vulnerable adult or elderly person. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was *substantial* under the circumstances.

[35] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress," "permanent bodily harm," or death, the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a) ("A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person shall be subject to a fine not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both.

[36] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[37] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute incorporates the standardized definition of "serious mental injury" in RCC § 22E-701. The current neglect of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[38] but the statute does not define the term. There is no DCCA case law interpreting "serious mental distress." RCC § 22E-701 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The revised criminal abuse of a minor and criminal neglect of a minor statutes also use the term "serious mental injury," which is modified from the District's current civil statutes for proceedings on child delinquency, neglect, or need of supervision.[39] This change improves the clarity and consistency of the revised offenses.

Fifth, the revised criminal neglect of a vulnerable adult or elderly person statute limits liability for creating a risk of bodily injury to a risk of bodily injury due to drug or alcohol consumption. The current neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to "provide care and services necessary to maintain the physical and mental health of a vulnerable adult or elderly person."[40] The offense is partially graded on a failure to discharge the required duty.[41] The statute appears to provide liability for a failure to discharge the required duty even if the resulting risk to the physical or mental health of the complainant is comparatively trivial. There is no DCCA case law on this issue. Resolving this ambiguity, the revised criminal neglect of a vulnerable adult or elderly person statute limits liability for creating a risk of comparatively low-level physical harm to a risk of "bodily injury" due to the complainant consuming alcohol or consuming or inhaling, without a valid prescription, a controlled substance or marijuana. "Bodily injury" is the lowest level of physical harm in the RCC and is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or impairment of physical condition." Prohibiting reckless creation of a risk of any "bodily injury" in the revised statute may criminalize the risk of comparatively trivial harms that are part of everyday life. If the actor recklessly creates such a risk with a higher level of "bodily injury," such as "significant bodily injury," there remains liability under first degree or second degree of the RCC criminal neglect of a vulnerable adult or elderly person statute. Conduct that results in a risk of "bodily injury" in contexts other than drug or alcohol consumption may constitute attempted criminal neglect of a vulnerable

[38] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results). In the revised criminal neglect of a vulnerable adult or elderly person statute, risk of mental harm that does not satisfy the definition of "serious mental injury" may be covered by attempted criminal neglect of a vulnerable adult or elderly person, or as third degree criminal abuse of a vulnerable adult or elderly person in RCC § 22E-1503.

[39] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[40] D.C. Code § 22-934.

[41] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

adult or elderly person.[42] This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the revised criminal neglect of a vulnerable adult or elderly person statute codifies an effective consent defense, discussed extensively in the explanatory note to the offense. District statutes do not codify general defenses to criminal conduct. The current neglect of a vulnerable adult or elderly person statute does not address whether consent of the complainant is a defense to liability, although current D.C. Code § 22-935 exempts from liability anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[43] Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching.[44] A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances.[45] It is unclear whether this District case law for assault would apply to neglect of a vulnerable adult or elderly person. Resolving this ambiguity, the revised criminal neglect of a vulnerable adult or elderly person statute effective consent defense clarifies when the actor's reasonable belief that the complainant or a "person with legal authority over the complainant," as that term is defined in RCC § 22E-701, has given "effective consent" is a defense. In particular, the new effective consent defenses in subsection (e) specifically address where the risk, or failure to mitigate remedy the risk, is caused by an omission if the complainant, or a "or person with legal authority over the complainant" gives effective consent to the omission. This replaces in relevant part the exception in the current D.C. Code abuse or neglect of a vulnerable adult or elderly person statutes.[46] An omission includes the actor administering prayer or allowing prayer to be administered instead of medical treatment, but also accounts for other types of omissions that a vulnerable adult or elderly person should be able to give effective consent to, such as a refusal to eat, drink, or take medication, or refusing an offer from the actor to get up from a fall. This change improves the clarity, consistency, and proportionality of the revised statutes.

Seventh, the revised criminal neglect of a vulnerable adult or elderly person statute codifies an exclusion from liability for conduct that is specifically permitted by a District statute or regulation. The District's current neglect of a vulnerable adult or elderly person statutes do not address whether conduct that is specifically permitted under another District law or regulation can result in criminal liability for those offenses. The exclusion resolves any apparent conflict within District laws. For example, Title 22,

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[42] In addition, if an actor recklessly creates, or fails to mitigate or remedy, a risk that a complainant would experience bodily injury from consumption of drugs or alcohol, and "bodily injury" results, there would be liability under the RCC criminal abuse of a vulnerable adult or elderly person statute (RCC § 22E-1503).
[43] D.C. Code § 22-935.
[44] 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932).").
[45] *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).
[46] D.C. Code § 22-935.

Health, of the current D.C. Municipal Regulations, has regulations that specifically refer to immunity from assault liability that clearly will satisfy this exclusion from liability.[47] This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised criminal neglect of a vulnerable adult or elderly person statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial risk is sufficient for liability. The current neglect of a vulnerable adult or elderly person statute criminalizes conduct that "fails to discharge a duty" to provide necessary care and services.[48] The revised statute clarifies that not only creating risks to a vulnerable adult or elderly person, but also failing to mitigate or remedy a substantial risk, is sufficient for liability. Under the general provision in RCC § 22E-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[49] However, although technically superfluous, given that neglect of a vulnerable adult or elderly person offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. The change clarifies the revised statute.

Second, the revised criminal neglect of a vulnerable adult or elderly person statute requires that the defendant have a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person and applies a recklessly culpable mental state to this element. The current neglect of a vulnerable adult or elderly person statute requires that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. The extent of such care and services, however, is unclear under the statute, and "duty to provide care and services" is not statutorily defined. In addition, it is unclear as to whether any of these culpable mental states apply to the fact that the defendant has a duty to provide such care and services. There is no DCCA case law on point, but the DCCA has generally found that "wanton, reckless, or willful indifference" requires a mental state similar to recklessness.[50] To resolve these

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[47] For example, D.C. Mun. Regs. tit. 22-B, § 602.4 states:

> Any minor who is examined, treated, hospitalized, or receives health services under this chapter may give legal consent, and no person who administers the health services shall be liable civilly or criminally for assault, battery, or assault and battery; or any other civil legal charge, except for negligence or intentional harm in the diagnosis and treatment rendered to the minor and for violations of the D.C. Mental Health Information Act of 1978.

[48] D.C. Code § 22-934.

[49] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c), (d) ("(c) 'Omission' means a failure to act when (1) a person is under a legal duty to act and (2) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. (d) For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law.").

[50] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of

ambiguities, the revised statute requires that the defendant is reckless as to the fact he or she has a "responsibility under civil law for the health, welfare, or supervision" of the vulnerable adult or elderly person. While generally corresponding to the language of the current statute, including duties pertaining to "supervision" may slightly expand liability for failure to provide services or care. The RCC also applies a culpable mental state of recklessness to the fact that the complainant has a responsibility under civil law for the health, welfare, or supervision of the complainant because this matches the culpable mental state as to the fact that the complainant is a vulnerable adult or elderly person. Logically, the mental state as to the duty of care should match the mental state as to the attribute that gives rise to the duty. This change improves the clarity and completeness of the revised statute.

Third, the revised criminal neglect of a vulnerable adult or elderly person statute codifies a "reckless" culpable mental state, defined in RCC § 22E-206, with respect to creating or failing to mitigate or remedy a risk, or to provide essential care or items. The current neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to provide necessary care and services "willfully or through wanton, reckless or willful indifference,"[51] but does not define any of these terms. The DCCA in *Tarpeh v. United States* discussed the meaning of "reckless" under the statute and said that it is a "state of mind that falls somewhere between simple negligence . . . and an intentional or willful decision to cause harm to a person."[52] The court stated that to prove "reckless indifference" in the neglect of a vulnerable adult or elderly person statute, "the evidence, as found by the trier of fact, must show not only that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of risks involved in light of known alternative courses of action."[53] In *Tarpeh,* the DCCA explicitly referred to the Model Penal Code definition of "reckless," which requires the defendant to "consciously disregard[] a substantial and *unjustified* risk that the material element exists or will result from his conduct."[54] The revised criminal neglect of a vulnerable adult or elderly person applies a "reckless" culpable mental state as defined in RCC § 22E-206, which is similar to the Model Penal Code.[55] This change improves the clarity of the revised statute.

Fourth, the revised criminal neglect of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state as to the risk of physical or mental injury. The current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. However, the statute is unclear as to whether any of these culpable mental states applies to the fact that, per the penalty gradations, the neglect causes "serious bodily injury or severe mental distress"[56] or "permanent bodily harm or death."[57] DCCA case

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the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[51] D.C. Code § 22-934.

[52] *Tarpeh*, 62 A.2d at 1270.

[53] *Tarpeh*, 62 A.2d at 1270.

[54] *Tarpeh*, 62 A.2d at 1270 (emphasis in original).

[55] See Commentary to RCC § 22E-206.

[56] D.C. Code § 22-936(b).

law has not specifically addressed whether a culpable mental state applies to the penalty gradations, but has found that "reckless indifference" with respect to the failure to provide care and services in the current offense requires something similar to recklessness.[58] The revised statute provides that the standard culpable mental state of "recklessly" applies to the resulting risk of physical or mental harm. This change improves the clarity and proportionality of the revised statute.

[57] D.C. Code § 22-936(c).

[58] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

RCC § 22E-1601. Forced Labor.

Explanatory Note. *This section establishes the forced labor offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing another person to provide services either by means debt bondage or an explicit or implicit coercive threat. This offense replaces the forced labor offense in the current D.C. Code,[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Paragraph (a)(1) specifies that forced labor requires that an actor knowingly causes a person to provide services. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[3] which requires that the accused was practically certain that he or she would cause a person to engage in labor or services. The term "services" is defined under RCC § 22E-701.[4]

Paragraph (a)(2) specifies that forced labor requires that the actor cause another person to engage in labor or services either by means of debt bondage or an explicit or implicit coercive threat. "Debt bondage" is also defined under RCC § 22E-701, and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[5] "Coercive threat" is defined under RCC § 22E-701, and is comprised of seven different forms of threats. The definition of "coercive threat" prohibits "communicat[ing]" specified harms such as accusing someone of a criminal offense, as well as sufficiently serious harms that would cause a reasonable person to comply. The verb "communicates" is intended to be broadly construed, encompassing all speech[6] and other messages,[7] which includes gestures or other conduct,[8] that are received and understood by another person. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies

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[1] D.C. Code § 22-1832.
[2] D.C. Code § 22-1837.
[3] RCC § 22E-206(b).
[4] For further discussion on these terms, see Commentary to RCC § 22E-701.
[5] Debt bondage requires that complainant provides labor, services, or commercial sex acts to satisfy a debt and one of the following conditions apply: 1) the value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; 2) the length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or 3) the amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.
[6] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.
[7] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).
[8] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute communication, if it communicates that harm will continue in the future.

to this element. The accused must be practically certain both that he or she is using debt bondage or coercive threats, and that the debt bondage or coercive threat *causes* the other person to provide services.

Subsection (b) specifies that communicating that any person will engage in legal employment actions is not a basis for liability under the forced labor statute. Such communications, which otherwise might satisfy the requirement of a coercive threat, may be a sufficient basis for other human trafficking offenses.[9] This subsection uses the term "in fact," which indicates that there is no culpable mental state requirement for this exclusion to liability.

Subsection (c) specifies relevant penalties and enhancements for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (c)(1) specifies the penalty for forced labor.

Paragraph (c)(2) provides penalty enhancements applicable to this offense. Subparagraph (c)(2)(A) specifies that if a person commits forced labor and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[10] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct was a gross deviation from the ordinary standard of conduct. Subparagraph (c)(2)(B) specifies that if the actor held the complainant or caused the complainant to provide labor or services for a total of more than 180 days, the offense classification may be increased in severity by one class.[11] Per the rule of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in subparagraph (c)(2)(A) applies to the conduct in subparagraph (c)(2)(B). Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (c)(2) shall be applied in addition to any general penalty enhancements under this title.

Subsection (d) cross references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised forced labor statute changes current District law in four main ways.*

First, by reference to the RCC's "coercive threats" definition, the forced labor statute does not provide liability for causing another to provide labor by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[12] and by extension the current forced labor statute includes using fraud or deception to cause a person to provide services. By contrast, the RCC's "coercive threats" definition does not include fraud or deception,[13] and such conduct is not a sufficient basis for forced

[9] Threats that go beyond ordinary and legal employment actions are subject to liability. For example, the exception under this provision would not apply to a store manager who threatens to fire an employee unless that employee agrees to work for 24 hours without respite.
[10] RCC § 22E-206 (c).
[11] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.
[12] D.C. Code § 22-1831 (3)(D).
[13] RCC § 22E-701.

labor liability. A person who uses deception or fraud to cause another person to provide services has not committed forced labor unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.[14] While using deception to cause another to provide services is wrongful, it does not warrant equal punishment to using coercive threats or debt bondage and could provide major felony liability for common employment disputes.[15] Rather, a person who causes another to provide services through fraud or deception may still be liable under the RCC's revised fraud[16] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offense.

Second, by reference to the RCC's "coercive threats" definition, the revised forced labor offense criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised forced labor offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[17] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[18] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[19] and precludes arguments that an employer's attempts to limit an employee's access to legal and readily available addictive substances like tobacco or alcohol constitute forced labor.[20] However, in some circumstances, such conduct may still fall within another per se form

[14] Forced labor may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who initially lures a laborer with the false promise of high wages, and then coerces the laborer to provide labor or services under threat of bodily injury could be convicted under the RCC's forced labor statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

[15] For instance, under the current statutory definition of "coercion," a person may be liable for forced labor or services, subject to a 20 year maximum imprisonment, for falsely stating the terms of an employee's advancement eligibility or scope of work duties at the time of hiring.

[16] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[17] A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

[18] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[19] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[20] For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance.

of coercive threat or the catch-all form of coercive threat.[21] Eliminating the facilitation of access to any addictive substance as a form of coercive threat prevents the possibility of criminalizing relatively less coercive conduct.[22] This change improves the clarity and proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[23] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days that exceeds 180. This change clarifies and may improve the proportionality of the revised statute.

Fourth, the revised forced labor offense authorizes enhanced penalties if the actor is reckless as to whether the complainant is under 18 years of age. The current forced labor offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor is not currently listed in the definition of a "crime of violence."[24] By contrast, the revised forced labor offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

Beyond these three changes, five other aspects of the revised statute may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threats," forced labor includes causing a person to provide services by threatening that any person will commit an offense against persons or a property offense.[25] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force" and "threats of physical restraint," conduct that appears to constitute the criminal offenses of assault, kidnapping, or criminal restraint. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under

[21] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[22] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[23] D.C. Code § 22-1837.

[24] D.C. Code § 22-1331 (4).

[25] RCC § 22E-701.

all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[26] The revised definition of "coercive threats" and the RCC crime of forced labor together specify that a threat to commit any criminal offense against persons is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised statute specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor statute. The current D.C. Code "coercion" definition includes "serious harm," which is defined as "any harm . . . that is sufficiently serious under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[27] There is no relevant DCCA case law as to whether legal employment actions could be sufficient to compel a reasonable person to perform labor or services. The revised statute prevents liability for forced labor where the coercion consists only of ordinary and legal employer demands. Such conduct does not warrant criminalization as a serious felony. This change improves the clarity and proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[28] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days that exceeds 180. This change clarifies and may improve the proportionality of the revised statute.

Fourth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[29] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code

[26] D.C. Code § 22-1831 (7).
[27] *Id.*
[28] D.C. Code § 22-1837.
[29] *Id.*

provisions concerning repeat offender enhancements,[30] hate crime enhancements,[31] and pretrial release penalty enhancements.[32] To resolve this ambiguity, the revised statute specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Charging and Proof of Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Pretrial Release Penalty Enhancement, or § 22E-608 Hate Crime Penalty Enhancement. This change improves the clarity and may improve the proportionality of the revised statute.

One other change to the forced labor statute is clarificatory, and is not intended to change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[33] "Actor" is a defined term[34], which means "a person accused of any offense." The term "person" is also a defined term[35], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[30] D.C. Code §§ 22-1804; 22-1804a.
[31] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[32] D.C. Code § 23-1328.
[33] D.C. Code § 22-1832.
[34] RCC § 22E-701.
[35] RCC § 22E-701.

RCC § 22E-1602. Forced Commercial Sex.

Explanatory Note. *This section establishes the forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing a person to engage in a commercial sex act by means of physical force, a coercive threat, debt bondage, or by administering a drug or other intoxicant. There is no analogous offense under the current human trafficking chapter, although conduct constituting forced commercial sex may violate the current forced labor statute. This offense also replaces aspects of several offenses in chapter 27 of the current D.C. Code, including: conduct to "compel" or attempt to compel a person into prostitution under the pandering statute;[1] compelling an individual to live life or prostitution against his or her will;[2] and causing a spouse or domestic partner "by force, fraud, coercion, or threats…to lead a life of prostitution."[3] To the extent that certain statutory provisions authorizing extended periods of supervised release[4] apply to the current forced labor statute, these provisions are replaced in relevant part by the revised offensive forced commercial sex offense.*

Paragraph (a)(1) specifies that forced commercial sex requires that an actor knowingly causes the complainant to engage in or submit to a commercial sex act with or for[5] another person.[6] The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would cause

[1] D.C. Code §22-2705. The pandering statute makes it a crime to "cause, compel . . . or attempt to cause or compel . . . any individual . . . to engage in prostitution[.]" The precise effect on D.C. law is unclear, as the D.C. Court of Appeals has not clearly defined what constitutes "compelling" a person to engage in prostitution. It is possible that some coercive means that would constitute "compelling" under the pandering statute do not fall within the revised "coercive threat" definition. In addition, the pandering statute provides for enhanced penalties when the person caused or compelled to engage in prostitution is under the age of 18. D.C. Code § 22-2705 (2). The penalty provision under the RCC's forced commercial sex statute replaces this provision in the current pandering statute.

[2] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

[3] D.C. Code § 22-2708. This statute makes it a crime to "by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]" This conduct will be criminalized under the RCC's forced commercial sex statute. However, the RCC's forced commercial sex statute is narrower than § 22-2708. The forced commercial sex statute does not criminalize causing another person to provide commercial sex acts by means of deception or fraud.

[4] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code § 22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current forced labor or services offense covers sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

[5] The words "or for" clarify that the offense includes a person engaging masturbatory conduct for another person to observe.

[6] An actor who compels a person to engage in a commercial sex act with *the actor* himself or herself may be subject to liability under sex assault offenses defined under Chapter 13.

another person to engage in or submit to a commercial sex act. The term "commercial sex act" is defined under RCC § 22E-701.[7] Paragraph (a)(1) also specifies that the actor must cause the complainant to engage in or submit to commercial sex act with or for another person, which means that the act must be with or for someone other than the actor. This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct for a third party.[8]

Paragraph (a)(2) specifies the prohibited means by which the actor must cause a person to engage in or submit to a commercial sex act. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this paragraph, which requires that the actor is practically certain that the means listed in subparagraphs (a)(2)(A)-(D) *cause* the complainant to engage in or submit to a commercial sex act.

Under subparagraph (a)(2)(A) the actor must use physical force that causes "bodily injury" to, overcomes, or retrains any person. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this subparagraph, which here requires that the actor was practically certain that the actor used force that caused bodily injury to overcome or restrain any person.

Under subparagraph (a)(2)(B), the actor must use an explicit or implicit coercive threat to cause a person to engage in or submit to a commercial sex act. "Coercive threat" is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant's situation to comply.[9] Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this subparagraph, which here requires that the actor was practically certain he was making a coercive threat, explicit or implicit.

Under subparagraph (a)(2)(C), the actor must use debt bondage to cause a person to engage in or submit to a commercial sex act. "Debt bondage" is defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[10] Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The actor must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive threat or debt bondage *causes* the other person to engage in a commercial sex act.

Under subparagraph (a)(2)(D), the actor must administer, or cause to be administered, to the complainant an intoxicant or other substance without the

[7] For further discussion of these terms, see Commentary to RCC § 22E-701.
[8] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."
[9] For further discussion of this term, see Commentary to RCC § 22E-701.
[10] For further discussion of this term, see Commentary to RCC § 22E-701.

complainant's "effective consent." "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express unwillingness to engage in the commercial sex act (sub-subparagraph (a)(2)(D)(i)). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that administering the intoxicant or other substance would impair the complainant's unwillingness to engage in the commercial sex act. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the drug or intoxicant impaired the complainant's ability to express unwillingness to engage in the commercial sex act, only that the actor believed to a practical certainty that it would. However, sub-subparagraph (a)(2)(D)(ii) does require that the intoxicant or other substance have a specified effect on the complainant. The intoxicant or other substance must, "in fact," render the complainant asleep, unconscious, substantially paralyzed, or passing in and out of consciousness (sub-subparagraph (a)(2)(D)(ii)(I)), "substantially incapable of appraising the nature of the commercial sex act" (sub-subparagraph (a)(2)(D)(ii)(II)), or "substantially incapable of communicating unwillingness to engage in the commercial sex act" (sub-subparagraph (a)(2)(D)(ii)(III)). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to a given element, here the required effect of the intoxicant or other substance on the complainant.

Subsection (b)(1) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[11] here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits forced commercial sex, and in fact, the complainant is under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required as to the complainant being under the age of 12. Subparagraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[12] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b)

[11] RCC § 22E-206.

[12] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The RCC's forced commercial sex offense changes current District law in three main ways.*

First, RCC forced commercial sex act creates a standardized penalty and enhancements for coercing or using debt bondage to cause a person to engage in a commercial sexual act. Although the current human trafficking chapter does not have a separate forced commercial sex offense, conduct constituting forced commercial sex could be charged under several current Chapter 27 offenses, with maximum sentences ranging from five years[13] to twenty years.[14] In contrast, the revised forced commercial sex act provides a single penalty, with applicable enhancements. This change improves the consistency and proportionality of the revised statutes.

Second, by reference to the RCC's "coercive threats" definition, the forced commercial sex statute criminalizes restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the forced commercial sex offense only provides liability for threatening to restrict a person's access to controlled substances that the person owns or prescription medication that the person owns.[15] Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[16] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[17] and precludes arguments that an actor's attempts to limit an another person's access to legal and readily available addictive substances like tobacco or alcohol constitute forced commercial sex.[18] However, in some circumstances, such conduct may still fall within another per se form

[13] D.C. Code § 22-2705.
[14] D.C. Code § 22-2706.
[15] A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.
[16] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.
[17] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."
[18] For example, an actor who limits a person's access to tobacco or alcohol may be liable for "controlling" the person's access to the substance.

of coercive threat or the catch-all form of coercive threat.[19] Eliminating the facilitation of access to any addictive substance as a form of coercive threats prevents the possibility of criminalizing relatively less coercive conduct.[20] This change improves the clarity and proportionality of the revised statute.

Third, the revised forced commercial sex offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. It is unclear if the current forced labor and services statute criminalizes forced commercial sex acts, but even if it does, the current forced labor and services statute offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor is not currently a "crime of violence."[21] By contrast, the revised trafficking in forced commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

Eight other changes to the forced commercial sex statute may constitute a substantive change to current District law that improve the clarity, consistency, and proportionality of the revised offense, and eliminate overlap with other offenses.

First, by reference to the RCC's definition of "coercive threats," the forced commercial sex statute does not provide liability for causing another to engage in commercial sex by fraud or deception. The current forced labor offense criminalizes using "coercion to cause person to provide labor or services"[22] and "coercion" is defined to include "fraud or deception."[23] If commercial sex acts fall within the definition of "labor or services," then under current law using fraud or deception to cause a person to engage in commercial sex acts constitutes forced labor. However, the current code does not specify whether "labor or services" includes commercial sex acts, and there is no relevant DCCA case law. The RCC's "coercive threats" definition does not include fraud or deception,[24] and such conduct is not a sufficient basis for forced commercial sex liability. A person who uses deception or fraud to cause another person to engage in commercial sex has not committed forced commercial sex unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in

[19] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.
[20] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.
[21] D.C. Code § 22-1331 (4).
[22] D.C. Code § 22-1832.
[23] D.C. Code § 22-1831.
[24] RCC § 22E-701.

debt bondage.[25] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for what amount to disputes over payments for consensual commercial sex.[26] Rather, a person who causes another to engage in commercial sex through fraud or deception may still be liable under the RCC's revised fraud[27] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statutes.

Second, by reference to the RCC's definition of "coercive threats" the forced commercial sex offense includes causing a person to engage in a commercial sex act by threatening that any person will commit an offense against persons, or property offense.[28] The current "coercion" definition does not explicitly include threats to commit any "an offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[29] By contrast, the revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the current coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, the RCC forced commercial sex act offense specifies what types of conduct constitute a crime when used to compel a person to engage in prostitution. Various offenses under Chapter 27 of the current D.C. Code make it a crime to "compel" a person to "engage in prostitution"[30]; "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[31]; to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact"[32]; or to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[33] The current D.C. Code does not

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[25] Forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, if a person initially lures a sex worker with the false promise of high wages, and then coerces the person to provide labor under threat of bodily injury could be convicted under the RCC's forced commercial sex statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

[26] For instance, under the current statutory definition of "coercion," a person would coerce another if he or she causes that person to engage in a commercial sex act by a lie about how much would be paid.

[27] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[28] RCC § 22E-701.

[29] D.C. Code § 22-1831 (7).

[30] D.C. Code § 22-2705.

[31] D.C. Code § 22-2706.

[32] *Id*.

[33] D.C. Code § 22-2708.

define the terms "threats," "duress," "detain," "force," "fraud," or "intimidation" for the as used in Chapter 27, and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the revised statute refers to the defined terms "coercive threat" and "debt bondage," and specifies that physical force that causes bodily injury, and administering a drug, intoxicant, or other substance are barred means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of the revised statutes.

Fourth, the RCC forced commercial sex offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[34] that are replaced in whole or in part by the RCC's forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[35] This change improves the clarity, consistency, and proportionality of the revised statutes.

Fifth, the RCC forced commercial sex offense requires only a single commercial sexual act for liability. Offenses under Chapter 27 criminalize detaining a person "for the purpose of prostitution,"[36] or compelling a person to "lead a life or prostitution,"[37] and make no reference to the number of occasions in which a person is compelled to engage in prostitution. There is no relevant DCCA case law on the unit of prosecution for these offenses, and it appears that compelling a person to engage in prostitution numerous times may constitute only a single violation of these statutes. In addition, it is possible that coercing a person to engage in a commercial sex act may constitute forced labor under the current statute.[38] However, the current forced labor statute does not specify whether commercial sex acts constitute labor or services, and if they do, whether multiple commercial sex acts may be prosecuted as more than one instance of forced labor. In contrast, the RCC forced commercial sex act offense provides liability for each separate commercial sexual act. This change improves the clarity and proportionality of the revised statutes.[39]

Sixth, the RCC forced commercial sex statute requires that the actor caused the complainant to engage in a commercial sex act with or for a person other than the actor. It is unclear if the current forced labor statute criminalizes coerced commercial sex, and if it does, whether the actor must have caused the complainant engage in a commercial sex act with someone other than the actor. There is no relevant DCCA case law. To resolve

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[34] D.C. Code § 22-2705; D.C. Code § 22-2706; D.C. Code 22-2708.
[35] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[36] D.C. Code § 22-2706.
[37] *Id*.
[38] D.C. Code § 22-1832.
[39] Under the revised offense, a person who uses a coercive threat or debt bondage to compel another person to engage in more than one commercial sex act may be convicted for multiple counts of forced commercial sex. However, whether multiple convictions are permitted in a given case is governed by the merger analysis set for under RCC § 22E-214.

this ambiguity, the revised statute specifies that the offense requires that the actor caused the person to engage in a commercial sex act with another person. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Seventh, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[40] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

Eighth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[41] However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,[42] hate crime enhancements,[43] and pretrial release penalty enhancements.[44] To resolve this ambiguity, the revised statute specifies that the revised statute's penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Charging and Proof of Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Pretrial Release Penalty Enhancement, or § 22E-608 Hate Crime Penalty Enhancement. This change improves the clarity and may improve the proportionality of the revised statute.

Three changes to the forced commercial sex offense statute are clarificatory in nature and not intended to substantively change current District law.

First, the forced commercial sex offense explicitly criminalizes as a human trafficking offense causing a person to engage in commercial sex acts by means of coercive threat or debt bondage. It is unclear whether the current forced labor statute criminalizes the use of coercion or debt bondage to cause a person to engage in commercial sex acts. The current forced labor offense requires that the actor "use coercion to cause a person to provide labor or services" or to "keep any person in debt

[40] D.C. Code § 22-1837.
[41] D.C. Code § 22-1837.
[42] D.C. Code §§ 22-1804; 22-1804a.
[43] D.C. Code §§ 22-3701; 22-3702; 22-3703.
[44] D.C. Code § 23-1328.

bondage."[45] However, the current D.C. Code does not specify whether "labor or "services" include commercial sex acts. "Labor" is currently defined as "work that has economic or financial value," and "services" is currently defined as "legal or illegal duties or work done for another, whether or not compensated." [46] There is no relevant D.C. DCCA case law. The current D.C. Code, however, contains several prostitution-related offenses that do appear to criminalize coercing a person to engage in commercial sex acts.[47] The revised statute, however, specifies that the use of coercive threats to cause a person to engage in commercial sex is not only criminal, but a human trafficking offense. There is no clear justification for distinguishing the harm of using coercive threats to cause a person perform commercial sex when the complainant is a person who other times chooses to engage in commercial sex work from someone who has not engaged in such work. This change improves the clarity, organization, and proportionality of the revised statutes.

Second, the RCC defines a "commercial sex act" as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person."[48] Chapter 27 defines "prostitution" as "a sexual act or contact with another person in return for giving or receiving anything of value."[49] The RCC's definition of "commercial sexual act" definition is essentially equivalent to the current Chapter 27 definition of prostitution. The RCC's definition of "commercial sex act" is not intended to differ in any substantive way from the current code's definition of "prostitution."

Third, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[50] "Actor" is a defined term[51], which means "a person accused of any offense." The term "person" is also a defined term[52], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[45] D.C. Code § 22-1832.
[46] D.C. Code § 22-1831.
[47] D.C. Code §§ 22-2705; 22-2706; 22-2708.
[48] RCC § 22E-701.
[49] D.C. Code § 22-2701.01(3).
[50] D.C. Code § 22-1832.
[51] RCC § 22E-701.
[52] RCC § 22E-701.

RCC § 22E-1603. Trafficking in Labor.

Explanatory Note. *This section establishes the trafficking in labor offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, anyone will cause that person to provide labor or services by means of coercive threat or debt bondage. Trafficking persons for commercial sex acts is criminalized under the separate trafficking in commercial sex offense. The RCC's trafficking in labor offense, along with the RCC's trafficking in forced commercial sex offense[1], replaces the trafficking in labor or commercial sex acts statute,[2] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[3]*

Paragraph (a)(1) specifies that trafficking in labor requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, a person. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain that he or she would entice, house, transport, provide, obtain, and maintain a person.

Paragraph (a)(2) specifies that the person must have acted "with intent that" the trafficked person will be caused, as a result, to provide services by means of debt bondage or an explicit or implicit coercive threat.[4] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the trafficked person will be caused, as a result, to provide labor or services by means of a coercive threat or debt bondage. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs labor or services, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the labor or services that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was

[1] RCC § 22E-1604.
[2] D.C. Code § 22-1833.
[3] D.C. Code § 22-1837.
[4] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

practically certain that the person would be caused to provide services by means of coercive threat or debt bondage.[5]

Paragraph (b)(1) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(1)(A) specifies that if a person commits trafficking in labor and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[6] here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age. Subparagraph (b)(2)(B) specifies that if the complainant was held or provides services for more a total of more than 180 days, the offense classification may be increased in severity by one class.[7] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement, which requires that the actor was aware of a substantial risk that the complainant was held or provided services for more than 180 days. Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The trafficking in labor offense changes current District law in six main ways.*

First, by reference to the RCC's definitions of "labor" and "services", the revised offense excludes liability for trafficking persons who will engage in commercial sex acts. The current trafficking in labor or commercial sex acts offense criminalizes trafficking persons who will engage in labor, services, *or* commercial sex acts.[8] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses. This change improves the organization of the revised offense.

Second, by reference to the RCC's "coercive threat" definition, the trafficking in labor statute does not provide liability for trafficking a person who will be caused to provide labor or services by fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[9] and by extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to provide labor or service. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[10] and trafficking a person who will be tricked into performing

[5] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor.
[6] RCC § 22E-206 (c).
[7] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.
[8] D.C. Code § 22-1833.
[9] D.C. Code § 22-1831 (3)(D).
[10] RCC § 22E-701.

labor or services is not a sufficient basis for liability under the revised trafficking in labor offense. The revised offense only provides liability for trafficking a person who will be caused to provide labor or services under threat of one of the means listed in the RCC's definition of "coercive threats," or by subjecting the person to debt bondage.[11] While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for common employment disputes and those engaged in such schemes.[12] Rather, a person who encourages or assists a person who causes another to provide labor or services through fraud or deception may still be liable as an accomplice[13] under the RCC's revised fraud[14] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in labor offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in labor offense only provides liability for trafficking a person who will caused to provide labor or services under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.[15] Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[16] and precludes arguments that trafficking an employee knowing that an employer seeks to limit the employee's access to legal and readily available addictive

[11] Trafficking in labor may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a laborer knowing that he or she was initially lured with the false promise of high wages, and will be coerced into providing labor under threat of bodily injury could be convicted under the RCC's trafficking in labor statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

[12] For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

[13] RCC § 22E-210.

[14] RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

[15] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[16] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

substances like tobacco or alcohol constitutes trafficking in labor.[17] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[18] Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.[19] This change improves the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in labor offense requires that the actor acted *with intent* that the trafficked person will be caused to provide labor or services by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion will be used to cause the person to provide labor or services. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to perform labor or services by means of a coercive threat or debt bondage.[20] Requiring that the actor was at least practically certain that the person will be caused to provide labor or services by means of coercive threat or debt bondage may avoid disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[21] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in labor offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide labor or services. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[22] The current D.C. Code statute also states that it applies when "coercion

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[17] For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and a person knowingly recruiting an employee into such circumstances may be liable for trafficking.

[18] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[19] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[20] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing labor or services, the driver is not guilty of trafficking in labor if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging labor or services.

[21] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to provide labor or services by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into providing labor or services, with the purpose of avoiding criminal liability.

[22] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor.

will be used or is being used."[23] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing labor or services. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to a future result.[24] This revision excludes persons who may provide assistance to a complainant (e.g., housing, meals) that are unrelated to the coerced acts.[25] This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in labor offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor is currently not a "crime of violence."[26] By contrast, the revised trafficking in labor offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

In addition, the revised trafficking in labor offense makes three other changes that may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threat," trafficking in labor includes causing a person to engage in labor or services by threatening that any person will "commit any criminal offense against persons" or any "property offense."[27] The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[28] The revised definition of "coercive threat" and the RCC crime of trafficking in labor together specify that trafficking a person with intent that any person will use threats to commit any criminal offense against persons or property offense to compel labor or services is categorically a basis for liability, even if it

[23] D.C. Code § 22-1833.
[24] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District work site and believes to a practical certainty that as a result they will perform commercial labor or services by coercive threats, either immediately or weeks later, may be guilty of trafficking in labor.
[25] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform labor or services under coercive threat later that week. Also, there would not be a causal link to a future act of labor or services, or liability for trafficking in labor for a shelter driver who transports persons known to have performed labor or services by coercive threats to a shelter.
[26] D.C. Code § 22-1331 (4).
[27] RCC § 22E-701.
[28] D.C. Code § 22-1831 (7).

would otherwise be unclear whether the threat would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in labor statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport, provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to "houses" may be narrower than "harbor,"[29] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code trafficking in labor or services statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[30] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

One other change to the trafficking in labor statute is clarificatory, and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[31] "Actor" is a defined term[32], which means "a person accused of any offense." The term "person" is also a defined term[33], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[29] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor
[30] D.C. Code §22-1837 (a)(2).
[31] D.C. Code § 22-1832.
[32] RCC § 22E-701.
[33] RCC § 22E-701.

RCC § 22E-1604. Trafficking in Forced Commercial Sex.

Explanatory Note. *This section establishes the trafficking in forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act by means of physical force that causes bodily injury, a coercive threat, debt bondage, or a drug, intoxicant, or other substance. The RCC's trafficking in forced commercial sex offense, along with the RCC's trafficking in labor offense[1], replaces the trafficking in labor or commercial sex acts statute[2] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[3] The revised offense also replaces portions of the pandering statute[4] the compelling an individual to live life or prostitution against his or her will statute,[5] the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute[6] in Chapter 27 of the current D.C. Code.. To the extent that certain statutory provisions authorizing extended periods of supervised release[7] apply to the current trafficking in labor or commercial sex acts statute, these provisions are replaced in relevant part by the revised trafficking in forced commercial sex acts statute.*

Paragraph (a)(1) specifies that trafficking in forced commercial sex requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would entice, house, transport, provide, obtain, or maintain the complainant.

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[1] RCC § 22E-1603.

[2] D.C. Code § 22-1833.

[3] D.C. Code § 22-1837.

[4] D.C. Code § 22-2705. The pandering statute makes it a crime for "any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual's being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact." This conduct will be criminalized under the RCC's trafficking in commercial sex statute.

[5] D.C. Code § 22-2706. This statute makes it a crime to "by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact." This conduct may also be criminalized under the RCC's kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

[6] D.C. Code § 22-2704.

[7] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current trafficking in labor or commercial sex acts offense involves sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

Paragraph (a)(2) specifies that the actor must have acted with intent that the complainant will be caused, as a result, to engage in or submit to a "commercial sex act" by one of the means listed in subparagraphs (a)(2)(A)-(D). The term "commercial sex act" is a defined term.[8] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant will be caused to engage in or submit to a commercial sex act by means specified in subparagraphs (a)(2)(A)-(D). Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually engages in or submits to a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the commercial sex act that the trafficked person will engage in or submit to. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in or submit to a commercial sex act by one of the means listed in subparagraphs (a)(2)(A)-(D).[9]

Paragraph (a)(2) also specifies that the actor must cause the complainant to engage in or submit to a commercial sex act with or for another person, which means that the act must be with or for someone other than the actor.[10] This element may be satisfied if the actor intends that the complainant will engage in or submit to a commercial sex act with a third party, or that the complainant will engage in masturbatory conduct for a third party.[11]

Under subparagraph (a)(2)(A) the actor must intend that the trafficked person will be caused to engage in or submit to a commercial sex act by means of physical force that causes "bodily injury" to, overcomes, or retrains any person. "Bodily injury" is defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition."

Under subparagraph (a)(2)(B), the actor must intend that a coercive threat, explicit or implicit, will be used to cause the complainant to engage in or submit to a commercial sex act. "Coercive threat" is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant's situation to comply.[12]

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[8] RCC § 22E-701.

[9] For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act the person will perform, the taxi driver cannot be held liable for trafficking in forced commercial sex.

[10] An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* by means of a coercive threat or debt bondage may be subject to liability under sex assault offenses defined under Chapter 13.

[11] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[12] For further discussion of this term, see Commentary to RCC § 22E-701.

Under subparagraph (a)(2)(C), the actor must intend that debt bondage will be used to cause a person to engage in or submit to a commercial sex act. "Debt bondage" is defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.[13]

Under subparagraph (a)(2)(D), the actor must intend that the administration of an intoxicant or other substance without the complainant's "effective consent" will be used to cause the complainant to engage in or submit to a commercial sex act. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in or submit to a commercial sex act by administration of a drug, intoxicant or other substance. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that anyone administered a drug, intoxicant, or other substance.

Subsection (b)(1) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits trafficking in forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,[14] here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and disregard of the risk was a gross deviation from the ordinary standard of conduct. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits trafficking in forced commercial sex, the complainant was, in fact, under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required if the complainant was under the age of 12. Paragraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[15] Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

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[13] For further discussion of this term, see Commentary to RCC § 22E-701.

[14] RCC § 22E-206.

[15] This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

Relation to Current District Law. *The trafficking in forced commercial sex statute changes current District law in nine main ways.*

First, the RCC trafficking in forced commercial sex offense is codified in a separate and distinct manner from the offense of trafficking in labor. The D.C. Code currently criminalizes in one statute trafficking persons who will engage in labor, services, *or* commercial sex acts.[16] In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses and clarifies that commercial sex acts are not part of the revised definitions of "labor" and "services." This change improves the organization of the revised offenses.

Second, by reference to the RCC's "coercive threats" definition, the trafficking in forced commercial sex statute does not provide liability for trafficking a person who will be caused to engage in or submit to a commercial sex act by means of fraud or deception. The current statutory definition of "coercion" includes "fraud or deception,"[17] and by extension the current trafficking in in labor or commercial sex acts statute references using fraud or deception to cause a person to engage in a commercial sex act. By contrast, the RCC's "coercive threat" definition does not include fraud or deception,[18] and trafficking a person will be tricked into performing commercial sex is not a sufficient basis for liability under the revised trafficking in forced commercial sex offense. The revised offense only provides liability for trafficking a person who will be caused to engage in a commercial sex act under threat of one of the means listed in the RCC's definition of "coercive threat," or by subjecting the person to debt bondage.[19] While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage.[20] Rather, a person who encourages or assists a person who causes another to provide commercial sex through fraud or deception may still be liable as an accessory[21] under the RCC's revised fraud[22] statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC's "coercive threat" definition, the revised trafficking in forced commercial sex offense criminalizes trafficking when the coercion at issue is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for

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[16] D.C. Code § 22-1833.
[17] D.C. Code § 22-1831 (3)(D).
[18] RCC § 22E-701.
[19] Trafficking in forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a worker knowing that he or she was initially lured with the false promise of high wages, and will also be coerced into engaging in commercial sex acts under threat of bodily injury may be convicted under the RCC's trafficking in forced commercial sex statute. *E.g.*, *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).
[20] For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.
[21] RCC § 22E-210.
[22] RCC § 22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

"facilitating or controlling" a person's access to any addictive substance, and by extension the current trafficking in labor or commercial sex acts statute references facilitating or controlling access to addictive substances to cause a person to engage in a commercial sex act. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in forced commercial sex offense only provides liability for trafficking a person who will caused to provide a commercial sex act under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of coercive threat.[23] Restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of coercive threat. This change eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,[24] and precludes arguments that trafficking a person knowing that someone will seek to limit that person's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in forced commercial sex acts.[25] However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.[26] Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.[27] These changes improve the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in forced commercial sex offense requires that the actor acted *with intent* that the complainant will be caused to engage a commercial sex act by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion or debt bondage will be used to cause the person to engage in a commercial sex act. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to engage in a commercial sex act by means of a coercive threat or debt bondage.[28] Requiring that the

[23] For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

[24] For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

[25] For example, a person who recruits someone to perform commercial sex acts, knowing that another will predicate performance of the commercial sex work on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and may be liable for trafficking.

[26] For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

[27] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to [] years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

[28] For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing a commercial sex act, the driver is not guilty of

actor was at least practically certain that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage avoids disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.[29] This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in forced commercial sex offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide a commercial sex act. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.[30] The current D.C. Code statute also states that it applies when "coercion will be used or is being used."[31] By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing a commercial sex act. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to such a future result.[32] This revision excludes persons who may provide assistance to a complainant (e.g., housing, meals) that are unrelated to the coerced acts.[33] This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in forced commercial sex offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor or commercial sex acts is not currently a "crime of violence."[34] By contrast, the revised trafficking in forced commercial sex offense provides a penalty

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trafficking in forced commercial sex if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging in a commercial sex act.

[29] Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into engaging a commercial sex act, with the purpose of avoiding criminal liability.

[30] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act that the person will perform, the taxi driver cannot be held liable for trafficking in forced commercial sex.

[31] D.C. Code § 22-1833.

[32] The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District house and believes to a practical certainty that as a result they will perform commercial sex acts by coercive threats, either immediately or weeks later, may be guilty of trafficking in forced commercial sex.

[33] For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform a commercial sex act under coercive threat later that week. Also, there would not be a causal link to a future commercial sex act, or liability for trafficking in forced commercial sex for a shelter driver who transports persons known to have performed commercial sex acts by coercive threats to a shelter.

[34] D.C. Code § 22-1331 (4).

enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised RCC trafficking in forced commercial sex offense specifies what types of conduct are sufficient to "compel" a person to engage in prostitution.[35] Under Chapter 27, the current code makes it a crime "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"[36] or to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact,"[37] or to "forcibly abduct a child under 18 from his or her home or usual abode, or from the custody and control of the child's parents or guardian."[38] The current code also makes it a crime to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"[39] The current code does not define the terms "threats," "duress," "detain," "force," "forcibly," "fraud," or "intimidation," and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the revised statute refers to the defined terms "coercive threat" and "debt bondage," and specifies that physical force that causes bodily injury, and administering a drug, intoxicant, or other substance are barred means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of revised statutes.

Eighth, the RCC trafficking in forced commercial sex offense requires a person to act with a "knowing" culpable mental state. Statutes under Chapter 27[40] that are replaced in whole or in part by the RCC's trafficking in forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC trafficking in forced commercial sex act offense specifies one consistent, defined culpable mental state of knowing. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[41] This change improves the clarity and consistency of the criminal code, and improves the proportionality of penalties.

Ninth, the RCC trafficking in forced commercial sex offense creates a standardized penalty and enhancements. The offenses under Chapter 27 that are replaced by the RCC's trafficking in forced commercial sex offense allow for a variety of penalties. Depending on which Chapter 27 offense an actor was prosecuted under, conduct that would constitute trafficking in forced commercial sex could be subject to maximum penalties ranging from 5 years[42] to 20 years.[43] In contrast, the RCC forced

[35] D.C. Code § 22-2706.
[36] *Id*.
[37] *Id*.
[38] D.C. Code §22-2704.
[39] D.C. Code § 22-2708.
[40] D.C. Code § 22-2704; D.C. Code § 22-2705; D.C. Code 22-2706.
[41] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[42] D.C. Code § 22-2705.
[43] D.C. Code § 22-2704.

commercial sex offense applies a consistent penalty and enhancements. This change improves the consistency of the criminal code, and proportionality of the revised statutes.

Beyond these nine changes to current District law, five other aspects of the revised trafficking in forced commercial sex acts may constitute a substantive change to current District law.

First, by reference to the RCC's definition of "coercive threat," trafficking in forced commercial sex includes trafficking a person, with intent that, as a result, the person will be compelled to engage in a commercial sex act under threat that any person will commit an offense against persons or a property offense."[44] The current "coercion" definition does not explicitly include threats to commit any offenses against persons or property offenses but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[45] The revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any criminal offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in forced commercial sex offense includes acting with intent that a person will administer a drug, intoxicant, or other substance to the complainant without the complainant's effective consent. The current trafficking statute does not explicitly include trafficking a person who will be administered a drug, intoxicant, or other substance without that person's effective consent. However, the statute includes the use of "coercion," which is defined to include force, and "facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication[.]"[46] Administering a drug, intoxicant, or other substance without effective consent may constitute force, or facilitation of a person's access to an addictive or controlled substance. There is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, the revised statute clarifies that trafficking a person with intent that the person will engage in or submit to a commercial sex act by means of administration of a drug, intoxicant, or other substance without effective consent constitutes trafficking in forced commercial sex. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised trafficking in forced commercial sex statute replaces the word "harbor" with "houses." The current D.C. Code trafficking statute refers to "harboring" as one of many types of predicate conduct, including "recruit, entice, harbor, transport,

[44] RCC § 22E-701.
[45] D.C. Code § 22-1831 (7).
[46] D.C. Code § 22-1831 (3)(F).

provide, obtain, or maintain." "Harboring" is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word "houses" replaces the word "harbor." The RCC reference to "houses" may be narrower than "harbor,"[47] although the term "houses" is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Fourth, the revised trafficking in forced commercial sex statute requires that the actor had intent that the complainant would be caused to engage in or submit to a commercial sex act with a person other than the actor. The current statute does not specify whether the actor must have intent that the complainant engage in a commercial sex act with someone other than the actor, and there is no relevant DCCA case law. In contrast, the revised statute specifies that the actor must have had intent that the complainant would engage in a commercial sex act with someone other than the actor. This change improves the clarity of the revised criminal code, and reduces unnecessary overlap.

Fifth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code trafficking in labor or commercial sex statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[48] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

In addition, one change to the trafficking in forced commercial sex statute is clarificatory, and not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[49] "Actor" is a defined term[50], which means "a person accused of any offense." The term "person" is also a defined term[51], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[47] The verb form of the word "harbor" is defined by Meriam-Webster's Dictionary as, "to give shelter or refuge to[.]" https://www.merriam-webster.com/dictionary/harbor
[48] D.C. Code §22-1837 (a)(2).
[49] D.C. Code § 22-1832.
[50] RCC § 22E-701.
[51] RCC § 22E-701.

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.

Explanatory Note. *This section establishes the sex trafficking of a minor or adult incapable of consenting offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act, and with recklessness as to that person being under the age of 18, or incapable of appraising the nature of the commercial sex act or communicating unwillingness to engage in the commercial sex act. The revised sex trafficking of a minor or adult incapable of consenting offense replaces the current sex trafficking of children statute,[1] attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code,[2] and part of the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute.[3] To the extent that certain statutory provisions authorizing extended periods of supervised release[4] apply to the current sex trafficking of children statute, these provisions are replaced in relevant part by the revised sex trafficking of a minor or adult incapable of consenting statute.*

Paragraph (a)(1) specifies that sex trafficking of a minor or adult incapable of consenting requires that a person knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, another person. The words "entice, transport, provide, obtain, and maintain by any means" are intended to have the same meaning as under current law. The word "houses" is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would entice, house, transport, provide, obtain, or maintain another person.

Paragraph (a)(2) specifies that sex trafficking of a minor or adult incapable of consenting requires that the actor acted "with intent that" the trafficked person, as a result, would be caused to engage in or submit to a commercial sex act with or for another person. The term "commercial sex act" is a defined term.[5] "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in a commercial sex act with another person. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs a commercial sex act, only that the actor believed to a practical

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[1] D.C. Code § 22-1834.
[2] D.C. Code § 22-1837.
[3] D.C. Code § 22-2704.
[4] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the current sex trafficking of children offense covers sexual acts or contacts with a minor, D.C. Code § 22-403.01 may authorize an extended period of supervised release.
[5] RCC § 22E-701.

certainty that he or she would do so. The words "as a result" require a nexus between the trafficking activity, and the commercial sex act that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in a commercial sex act.[6]

This paragraph also specifies that the actor must cause the complainant to engage in a commercial sex act with or for another person.[7] This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct for a third party.[8]

Paragraph (a)(3) specifies that the actor was reckless as to the trafficked person satisfying one of the elements listed in subparagraphs (a)(3)(A)-(C). Subparagraph (a)(3)(A) requires that the complainant is under the age of 18. Subparagraph (a)(3)(B) requires that the complainant is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Subparagraph (a)(3)(C) requires that the complainant is incapable of communicating[9] unwillingness to engage in the commercial sex act, regardless of the complainant's state of mind. The "reckless" mental state in paragraph (a)(3) applies to subparagraphs (a)(3)(A)-(C), which requires that the actor consciously disregarded a substantial risk that the trafficked person is under the age of 18, incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent, or incapable of communicating unwillingness to engage in the commercial sex act.

Subsection (b)(1) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (b)(2) provides a penalty enhancement applicable to this offense. If the actor recklessly held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.[10] The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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[6] For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into engaging in a commercial sex act, if there is no relationship between that errand and the commercial sex act, the taxi driver cannot be held liable for trafficking in forced commercial sex.

[7] An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* may be subject to liability under sex assault offenses defined under Chapter 13.

[8] Masturbation is not explicitly included in the definition of "commercial sex act." However, the term "commercial sex act" is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[9] If the complainant is unable to communicate verbally or orally, but is able to make gestures, facial expressions, or engage in other conduct, the person may be capable of communicating and this element may not be satisfied.

[10] This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The RCC's sex trafficking of a minor or adult incapable of consenting offense clearly changes current District law in one main way with respect to the current sex trafficking of children offense. To the extent it replaces current D.C. Code § 22-2704, the revised sex trafficking of a minor or adult incapable of consenting offense clearly changes current District law in five main ways. The revised statute also clearly changes current District law by explicitly criminalizing trafficking adults who are unable to consent to commercial sex acts.*

First, the revised sex trafficking of a minor or adult incapable of consenting statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years," but does not define the culpable mental state terms.[11] However, subsection (b) of the current statute further states that "In a prosecution… in which the defendant had a reasonable opportunity to observe the person recruited, enticed… or maintained, the government need not prove that the defendant knew that the person had not attained the age of 18 years."[12] Consequently, the current statute's drafting is ambiguous as to whether "recklessness" always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct,[13] and recklessness as to the complainant's age is insufficient for liability except when the actor has a reasonable opportunity to observe the complainant. Notably, D.C. Code § 22-2704 requires that the trafficked person is under the age of 18, but does not specify a culpable mental state for this element, and there is no relevant DCCA case law. In contrast, the RCC sex trafficking of a minor or adult incapable of consenting statute requires a culpable mental state of recklessness, a defined term, and omits the limitation about a reasonable opportunity to observe the child. It is not clear why reasonable observation, uniquely, is treated as being such strong evidence of age that a lower culpable mental state is required where there is such an opportunity.[14] Requiring recklessness as to a complainant being

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the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

[11] D.C. Code § 22-1834.

[12] D.C. Code § 22-1834 (b).

[13] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010. ("Section 104 Creates the crime of sex trafficking of children. A child is defined as under the age of 18 for commercial sex. The prosecution does not have to prove that coercion was used or that the defendant had actual knowledge of the minor's age. However, if the defendant did not have an opportunity to observe the victim, the government needs to prove the defendant had actual knowledge of the victim's age.").

[14] On the one hand, a reasonable opportunity to observe the complainant does not mean that an actor still could not reasonably mistake the complainant's age as being significantly older than 17 years old. On the other hand, other circumstances may provide an actor equally strong evidence of the complainant's age,

under 18 years of age is consistent with similar age-based circumstances required in other offenses in the RCC and current D.C. Code. This change improves the clarity and consistency of the revised statute.

Second, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that a "knowingly" mental state applies to result elements of the offense. A knowing culpable mental state already is required for the similar sex trafficking of children offense.[15] However, D.C. Code § 22-2704 also makes it a crime to "secrete" or "harbor" a child under the age of 18 "for the purposes of prostitution."[16] The current code does not specify any culpable mental state for these elements of D.C. Code § 22-2704, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor must knowingly recruit, entice, harbor, transport, provide, obtain, or maintain by any means, another person. This change improves the clarity and consistency of the revised statutes.

Third, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor act "with intent" that the trafficked person will be caused to engage in a commercial sex act. A knowing culpable mental state is required for the current sex trafficking of children offense.[17] However, D.C. Code § 22-2704 requires that the actor secrete or harbor another person "for the purposes of prostitution." D.C. Code § 22-2704 does not further specify the meaning of "for the purposes" or specify (other) culpable mental states, and there is no relevant DCCA case law. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor must act "with intent" that the person will be caused to engage in a commercial sex act. This change improves the clarity and consistency of the revised statutes.

Fourth, the revised sex trafficking of a minor or adult incapable of consenting statute includes a penalty enhancement if the trafficked person was held or provides commercial sex acts for more a total of more than 180 days. The current sex trafficking of children offense contains this penalty enhancement.[18] However, D.C. Code § 22-2704 does not provide for heightened penalties. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute allows that the offense classification may be increased by one class if the trafficked person is held or caused to engage in commercial sex act for more than 180 days. This change improves the proportionality and consistency of the revised statutes.

Fifth, the revised statute criminalizes trafficking of an adult incapable of consenting to commercial sex acts. The current sex trafficking of a minor offense only applies to complainants under the age of 18.[19] Trafficking of an adult is criminalized

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even though he or she is never seen—e.g., a report from a trusted source as to the complainant apparently being a minor.

[15] D.C. Code § 22-1834. ("It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.").

[16] D.C. Code § 22-2704 (a)(2).

[17] D.C. Code § 22-1834.

[18] D.C. Code § 22-1834.

[19] D.C. Code § 22-1834.

under the trafficking in labor or commercial sex acts statute.[20] However, that statute requires intent that the complainant will be caused to engage in a commercial sex act by means of "coercion" or debt bondage. The statute does not explicitly cover trafficking of adults who are unable to appraise the nature of the commercial sex act, or who are unable to communicate their consent to engage in or submit to a commercial sex act. By contrast, the revised statute clarifies that trafficking adults who are incapable of appraising the nature of the commercial sex act or of communicating unwillingness to engage in a commercial sex act is criminalized. This change closes a gap in current law, and improves the proportionality of the revise statute.

Beyond these five changes to current District law, two other aspects of the revised sex trafficking of a minor or adult incapable of consenting statute may constitute substantive changes to current District law.

First, the revised sex trafficking of a minor or adult incapable of consenting statute requires that the actor had intent that the complainant would be caused to engage in a commercial sex act *with or for another person.* The current statute does not specify whether the actor must have intent that the complainant engage in a commercial sex act with someone other than the actor, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the actor must have had intent that the complainant will engage in a commercial sex act with someone other than the actor. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Second, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code sex trafficking of children statute is subject to a penalty enhancement if "the victim is held or provides services for more than 180 days[.]"[21] However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

[20] D.C. Code § 22-1833.
[21] D.C. Code §22-1837 (a)(2).

RCC § 22E-1606. Benefiting from Human Trafficking.

Explanatory Note. *This section establishes the benefitting from human trafficking offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly obtaining any benefit or property by participating in an association of two or more persons, with recklessness that the group is engaged in forced commercial sex, trafficking in forced commercial sex, sex trafficking of a minor or adult incapable of consenting, forced labor, or trafficking labor or services. The offense is divided into two penalty grades, depending on whether the benefit arose from a group's commission of forced commercial sex, sex trafficking, or sex trafficking of a minor or adult incapable of consenting; or forced labor or trafficking in labor. The benefitting from human trafficking offense replaces the benefitting financially from human trafficking statute[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Paragraph (a)(1) specifies that first degree benefitting from human trafficking requires that the actor knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[3] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would obtain a financial benefit or property.

Paragraph (a)(2) specifies that the actor must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the actor and one other person.[4] The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The actor must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (a)(3) specifies that for first degree benefitting from human trafficking, the actor must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced commercial sex under RCC § 22E-1602, trafficking in forced commercial sex under RCC 22E-1604, or sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605. The "reckless" culpable mental state requirement here means that the actor consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting forced commercial sex, trafficking in forced commercial sex, or sex trafficking of a minor or adult incapable of consenting. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It

[1] D.C. Code §22-1836.
[2] D.C. Code § 22-1837.
[3] RCC § 22E-701.
[4] This element may be satisfied in a case involving a single business comprised of two people who are engaged in human trafficking.

is not required that all members of the group, including the actor, actually engaged in conduct constituting either of these offenses.[5]

Paragraph (a)(4) specifies that the actor's participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the actor's participation in the group must further, in any manner, the conduct that constitutes forced commercial sex, trafficking in forced commercial sex, or sex trafficking of a minor or adult incapable of consenting.[6]

Paragraph (b)(1) specifies that second degree benefitting from human trafficking requires that the actor knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term "property" is a defined term,[7] which includes anything of value. The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the actor was practically certain that he or she would obtain a financial benefit or property.

Paragraph (b)(2) specifies that the actor must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the actor and one other person. The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of interpretation under RCC § 22E-207, the "knowingly" culpable mental state also applies to this element. The actor must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (b)(3) specifies that for second degree benefitting from human trafficking, the actor must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced labor under RCC 22E-1601 or trafficking in labor under RCC 22E-1603. The "reckless" culpable mental state requirement here means that the actor consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting either forced labor or trafficking in labor. The use of "in fact" indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required

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[5] For example, if a motel owner receives payment from a customer, with recklessness that the other person is using the hotel room to coerce people into engaging in commercial sex acts, the motel owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause any one to engage in commercial sex acts by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally,* John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

[6] For example, if A is on a sports team with B, who engages in sex trafficking, and B uses proceeds of the sex trafficking to pay for uniforms for the team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. *See, United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

[7] RCC § 22E-701.

that all members of the group, including the actor, actually engaged in conduct constituting either of these offenses.[8]

Paragraph (b)(4) specifies that the actor's participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term "in fact" also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the actor's participation in the group must further, in any manner, the conduct that constitutes forced labor or trafficking in labor.[9]

Subsection (c) specifies the penalties applicable to this offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised benefitting from human trafficking offense changes current District law in one main way.*

The revised benefitting from human trafficking offense is divided into two penalty grades depending on whether the group engaged in conduct constituting forced commercial sex, sex trafficking, or sex trafficking of a minor or adult incapable of consenting; or forced labor or trafficking in labor. The current benefitting financially from human trafficking offense only has one penalty grade, regardless of the predicate conduct. By contrast, the revised offense distinguishes benefits obtained from forms of human trafficking that involve commercial sex, and those that involve labor or services. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

Two changes to the benefitting from human trafficking offense statute are clarificatory in nature and is not intended to substantively change current District law.

First, the revised statute no longer refers to participation in a "venture," and instead requires that the actor participated in a group of two or more persons. Omission of the word "venture" is clarificatory in nature and is not intended to change current District law.

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[10] "Actor" is a defined term[11],

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[8] For example, if a building owner receives rent payment from a customer, with recklessness that the other person is using the building to run a sweatshop in which people are coerced into providing labor, the building owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause anyone to provide labor by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was "associated" and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally,* John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

[9] For example, if A is on a sports team with B, who engages in forced labor, and B uses proceeds of the forced labor to pay for uniforms for the team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. *See, United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

[10] D.C. Code § 22-1832.

which means "a person accused of any offense." The term "person" is also a defined term[12], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[11] RCC § 22E-701.
[12] RCC § 22E-701.

RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking.

Explanatory Note. *This section establishes the misuse of documents in furtherance of human trafficking offense ("misuse of documents") for the Revised Criminal Code (RCC). This offense requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, with intent to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person. The misuse of documents in furtherance of human trafficking offense replaces the unlawful conduct with respect to documents in furtherance of human trafficking statute[1] and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.[2]*

Subsection (a) specifies the elements of first degree misuse of documents. Paragraph (a)(1) specifies that first degree misuse of documents requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms "destroys," "conceals," "removes," "confiscates," and "actual or purported government identification document" are intended to have the same meaning as under current law. "Possess" is a defined term per RCC § 22E-701 meaning "holds or carries on one's person; or has the ability and desire to exercise control over." The paragraph specifies that a "knowingly" culpable mental state applies, which requires that the accused was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (a)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain performance of a commercial sex act by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

Subsection (b) specifies the elements of second degree misuse of documents. Subsection (b) specifies the penalty applicable to this offense. Paragraph (b)(1) specifies that first degree misuse of documents requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms "destroys," "conceals," "removes," "confiscates," and "actual or purported government identification document" are intended to have the same meaning as under current law. "Possess" is a defined term per RCC § 22E-701 meaning "holds or carries on one's person; or has the ability and desire to exercise control over." The paragraph specifies that a "knowingly" culpable mental state applies, which requires that

[1] D.C. Code §22-1835.
[2] D.C. Code § 22-1837.

the accused was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (b)(2) specifies that misuse of documents requires that the accused acted "with intent to" restrict the person's liberty to move or travel in order to maintain services by that person. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person's liberty to move or travel. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person's liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

Subsection (c) specifies the penalties applicable to this offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised misuse of documents statute changes current District law in two main ways.*

First, the revised misuse of documents offense is divided into two penalty grades depending on whether the actor misused documents to maintain a person's labor or services, or commercial sex acts. The current misuse of documents offense only has one penalty grade, regardless of whether the misuse of documents is related to forced labor or forced commercial sex. By contrast, the revised offense distinguishes misuse of documents in order to maintain a person's labor or services, or commercial sex acts. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

Second, the revised misuse of documents offense requires that the accused destroys, conceals, removes, confiscates, or possesses any actual or purported *government* identification document, specifically including passports and immigration documents. The current statute refers broadly to "any actual or purported government identification document, including a passport or other immigration document, or any other actual or purported document."[3] There is no relevant DCCA case law construing these terms, although legislative history refers to "official papers."[4] By contrast, the revised offense clarifies that this offense only applies to government-issued identification documents, including immigration documents.[5] Misuse of other documents with intent to restrict someone's freedom of movement may constitute another crime under the RCC.[6] This change improves the clarity of the revised statute.

[3] D.C. Code §22-1835.
[4] Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 "Prohibition Against Human Trafficking Amendment Act of 2010" at 8. March 9, 2010.
[5] For example, destroying a person's employee identification badge issued by a private employer does not constitute misuse of documents.
[6] See, e.g., § 22E-1402. Criminal Restraint (attempted); § 22E-2102 Unauthorized use of property.

Beyond these two changes, three aspects of the revised misuse of documents statute may constitute substantive changes to current District law.

First, the revised misuse of documents offense specifies that the offense requires "knowingly" destroying, concealing, removing, confiscating, or possessing a government identification document. The current statute clearly requires that the destruction, concealing, etc. of a document be done "knowingly," but the statute is ambiguous whether the "knowingly" mental state applies also to the nature of the document as a form of government identification. D.C. Court of Appeals (DCCA) case law does not address the issue.[7] By contrast, the revised offense clarifies the culpable mental state as to the nature of the document. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] This change improves the clarity of the revised statute.

Second, the revised misuse of documents offense specifies that the offense requires that that the accused acted "with intent" to restrict the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. The current statute does not specify any culpable mental state for this element, but merely requires that the accused acted "*to* prevent or restrict, or attempt to prevent or restrict . . . the person's liberty to move or travel[.]"[9] Case law does not address the issue. By contrast, the revised offense clarifies that the actor must act with intent to restrict movement. The phrase with intent to means that the person believes to a practical certainty that the complainant would be restricted in their movement, but actual proof of restriction is not required. "With intent" more clearly communicates the mental state requirement and encompasses the conduct indicated by the "attempt to" prong of the current statute. Anytime a person acts with intent to restrict a person's liberty, that person has also acted with intent to attempt to restrict a person's liberty. This change improves the clarity and consistency of the revised statute.

Third, the revised statute omits the words "without lawful authority." The current statute's covered conduct is, "knowingly to destroy, conceal, … document, of any person to prevent or restrict, or attempt to prevent or restrict, *without lawful authority*, the person's liberty to move or travel…" There is no case law interpreting the phrase "without lawful authority." In the RCC, if a person actually has the lawful authority to engage in conduct covered by the revised statute, general defenses would apply to this conduct the same as any other conduct that otherwise would appear to be a crime. This change improves the clarity of the revised statute.

Two other changes are clarificatory and are not intended to substantively change current District law.

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[7] Although the statute and DCCA case law do not specify a culpable mental state, the Redbook Jury Instruction states that defendant must have "knowingly" destroyed, concealed, removed, or possessed an identification document. D.C. Crim. Jur. Instr. § 4-513.

[8] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[9] D.C. Code § 22-1835.

First, the revised statute requires that the accused act with intent to restrict a person's liberty to move or travel. The current statute criminalizes acting with intent to prevent or "restrict . . . the person's liberty to move or travel[.]" It is unclear what it means to "prevent" a person's liberty to move or travel. The word "restrict" as used in the revised statute is intended to cover all conduct that would constitute "preventing" a person's freedom to move or travel.

Second, the revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[10] "Actor" is a defined term[11], which means "a person accused of any offense." The term "person" is also a defined term[12], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[10] D.C. Code § 22-1832.
[11] RCC § 22E-701.
[12] RCC § 22E-701.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

Explanatory Note. *This section establishes the commercial sex with a trafficked person offense for the Revised Criminal Code (RCC). The commercial sex with a trafficked person offense is divided into two penalty gradations. Both grades require that the actor knowingly engage in a commercial sex act, and the penalty grades are distinguished based on the presence of one or more additional circumstances relating to whether the other party to the commercial sex act had been coerced or trafficked, and whether the other party was under the age of 18, or an adult incapable of consenting. There is no analogous offense under current District law. The current D.C. Code does not distinctly criminalize engaging in commercial sex acts with human trafficking victims.*[1] *To the extent that certain statutory provisions authorizing extended periods of supervised release*[2] *would apply to the commercial sex with a trafficked person, these provisions are replaced in relevant part by the revised commercial sex with a trafficked person statute.*

Subsection (a) establishes the elements for first degree commercial sex with a trafficked person. Paragraph (a)(1) specifies that the actor must engage in a "commercial sex act," a defined term.[3] The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[4] which here requires that the actor was practically certain that he or she is engaged in a commercial sex act.

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[1] It is possible that some conduct that constitutes first and second degree commercial sex with a trafficked person in the RCC could be prosecuted under the current D.C. Code as sexual abuse under an accomplice theory. Under this theory, by making a payment, the patron/accomplice would have encouraged the principal to coerce the commercial sex act, with the purpose to encourage the principal to succeed in coercing the commercial sex act.

It also is possible that some conduct that constitutes second degree commercial sex with a trafficked person in the RCC could also be prosecuted under the current D.C. Code as either first or second degree child sexual abuse, or first or second degree sexual abuse of a minor. A patron who engages in a commercial sex act with a person under 16 years of age would be guilty of either first degree child sexual abuse (if a sexual act) or second degree child sexual abuse (if a sexual contact). A patron who engages in a commercial sex act with a person 16 or 17 years of age would be guilty of sexual abuse of a minor, however, only if he or she is in a "significant relationship" (e.g., a teacher, religious leader, or uncle) to the minor. Conduct constituting second degree commercial sex with a trafficked person may also be prosecuted under a variety of other sex offenses (e.g., misdemeanor sexual abuse of a child or minor; sexual abuse of a secondary education student) in the current D.C. Code in some circumstances.

However, no current D.C. Code offenses distinctly account for the fact that a minor who engaged in commercial sex was trafficked, or that a person of any age engaged in commercial sex was trafficked by means of coercive threat or debt bondage.

[2] D.C. Code § 24-403.01(b)(4) (" In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]" D.C. Code §22-4001(8) defines "registration offense" to include "Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]" To the extent the commercial sex with a trafficked person statute covers sexual acts or contacts without consent, D.C. Code § 22-403.01 would authorize an extended period of supervised release.

[3] RCC § 22E-701

[4] RCC § 22E-206 (b).

Paragraph (a)(2) specifies that first degree commercial sex with a trafficked person requires that a coercive threat,[5] explicit or implicit, or debt bondage, both defined terms,[6] was used to cause the other person to engage in the commercial sex act with the actor. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[7] which here requires that the actor was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act.

Paragraph (a)(3) specifies that first degree commercial sex with a trafficked person requires that the actor was reckless as to whether the other person was under the age of 18, or, in fact, the complainant was under 12 years of age. "Recklessness," a defined term,[8] here requires that the actor consciously disregarded a substantial risk that that disregard of the risk was a gross deviation from the ordinary standard of conduct that the other person was under the age of 18. "In fact" is a defined term that here means no culpable mental state need be proven if the complainant is under 12 years of age.

Subsection (b) establishes the elements for second degree commercial sex with a trafficked person. Paragraph (b)(1) specifies that the actor must engage in a commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[9] which here requires that the actor was practically certain that he or she is engaged in a commercial sex act.

Paragraph (b)(2) specifies that two forms of second degree commercial sex with a trafficked person. Subparagraph (b)(2)(A) requires that an explicit or implicit "coercive threat," or "debt bondage," both defined terms[10], was used to cause the other person to engage in the commercial sex act with the actor. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[11] which here requires that the actor was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act. Subparagraph (b)(2)(B) requires that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. The paragraph specifies that a "knowingly" culpable mental state applies, a defined term[12] which here requires that the actor was practically certain that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. Subparagraph (b)(2)(B) also requires that the actor was reckless that

[5] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.
[6] RCC § 22E-701.
[7] RCC § 22E-206 (b).
[8] RCC § 22E-206 (c).
[9] RCC § 22E-206 (b).
[10] RCC § 22E-701.
[11] RCC § 22E-206 (b).
[12] RCC § 22E-206.

the complainant falls under one of the categories specified in sub-subparagraphs (b)(2)(B)(i)-(iii). Sub-subparagraph (b)(2)(B)(i) requires that the complainant is under the age of 18. Sub-subparagraph (b)(2)(B)(ii) requires that the complainant is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Sub-subparagraph (b)(2)(B)(iii) requires that the complainant was incapable of communicating[13] unwillingness to engage in the commercial sex act. In addition, sub-subparagraph (b)(2)(B)(iv) requires that the complainant was, in fact, under the age of 12. This sub-subparagraph uses the term "in fact," which specifies that no culpable mental state is required as to the complainant being under the age of 12.

Subsection (c) specifies the penalties applicable to this offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The commercial sex with a trafficked person offense changes current District law by criminalizing the knowingly engaging in a commercial sex act with a victim of trafficking in forced commercial sex, forced commercial sex, or sex trafficking of a minor or adult incapable of consenting.*

The RCC statute distinctly criminalizes and punishes as a form of human trafficking knowingly engaging in a commercial sex act with a trafficked person. Under the current D.C. Code, engaging in a commercial sex act with another person, with knowledge that the other person has been coerced into engaging in the commercial sex act, or was trafficked for the purposes of engaging in commercial sex acts, is not distinctly criminalized. In situations where the complainant is under 16 years of age or an adult incapable of consenting, an actor engaging in such conduct may be liable under various sexual abuse charges under Chapter 30 of Title 22.[14] Under current D.C. Code § 22–2701, such conduct may be prosecuted as solicitation of prostitution and subject to a maximum 90 days imprisonment for a first offense. In contrast, the revised statute distinctly treats such conduct as a type of human trafficking offense and provides a correspondingly more serious penalty. This change the proportionality of the revised statutes.

[13] If the complainant is unable to communicate verbally or orally, but is able to make gestures, facial expressions, or engage in other conduct, the person may be capable of communicating and this element may not be satisfied.

[14] If A engages in a commercial sex act with B, knowing that a third party coerced B into engage in the commercial sex act, A is not guilty of a sexual assault offense. However, B may be guilty of a sexual assault offense.

RCC § 22E-1609. Forfeiture.

Explanatory Note. *This section establishes forfeiture rules for property involved in violations of offenses under this chapter. In addition to any penalties authorized by statutes in this chapter, a court may order any actor convicted of an offense under this chapter to forfeit property used or intended to be used to commit or facilitate commission of an offense under this chapter, or any property obtained as a result of commission of an offense under this chapter. The revised statute replaces the current forfeiture statute applicable to human trafficking offenses.*[1]

Relation to Current District Law. *The revised forfeiture statute makes changes current District law in one main way.*

The revised statute provides judicial discretion in determining whether and to what extent to require forfeiture. The current statute states that "the court shall order…" forfeiture. There is no DCCA case law on point, although generally the DCCA has recognized constitutional restrictions on asset s that are excessive.[2] By contrast, the revised statute states that "the court may order…" forfeiture. Providing judicial discretion allows the court to determine a proportionate forfeiture, conscientious of constitutional and sub-constitutional considerations of what would be an excessive loss.

One change is clarificatory and is not intended to substantively change current District law.

The revised statute uses the term "actor" instead of the terms "individual or business," as used in the current forced labor statute.[3] "Actor" is a defined term[4], which means "a person accused of any offense." The term "person" is also a defined term[5], and includes a "partnership, company, corporation, association, organization[.]" The term "actor" includes both individuals and businesses, and the use of this term is not intended to change current District law.

[1] D.C. Code § 22-1838.
[2] Any forfeiture must be proportional under the excessive fines clause of the U.S. Constitution. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-61 (D.C. 1998).
[3] D.C. Code § 22-1832.
[4] RCC § 22E-701.
[5] RCC § 22E-701.

RCC § 22E-1610. Reputation or Opinion Evidence.

Explanatory Note. *This section establishes evidentiary rules that prohibits the use of reputation or opinion evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited by RCC § 22E-1602, trafficking in forced commercial sex, as prohibited by RCC § 22E-1604; sex trafficking of a minor or adult incapable of consenting, as prohibited by § 22E-1605; benefitting from human trafficking, as prohibited by § 22E-1606; and commercial sex with a trafficked person, as prohibited by RCC § 22E-1608. This section is nearly identical to current D.C. Code § 22-1839, but has been amended to apply to prosecutions of forced commercial sex and commercial sex with a trafficked person, which are not currently criminalized under the human trafficking chapter.*

Relation to Current District Law. *The revised reputation or opinion evidence statute changes current District law in one main way.*

The revised reputation or opinion evidence statute bars evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited under RCC § 22E-1602 and commercial sex with a trafficked person, as prohibited under RCC § 22E-1608. Under current law, coercing a person to engage in a commercial sex act and engaging in a commercial sex act with a trafficked person are not separately criminalized. However, the current reputation or opinion evidence statute applies to prosecutions for "trafficking in commercial sex," "sex trafficking of children," and "benefitting financially from human trafficking[.]"[1] By contrast, the revised reputation or opinion evidence statute clarifies that it also applies to prosecutions of the RCC's forced commercial sex and commercial sex with a trafficked person offenses. It would be inconsistent to bar reputation or opinion evidence of an alleged victim's past sexual behavior in prosecutions for other offenses, but allow them in a prosecution for forced commercial sex or commercial sex with a trafficked person. This change improves the consistency and proportionality of the revised statute.

One aspect of the revised reputation or opinion evidence statute may constitute a substantive change to current District law.

The revised statute states that when a "person" is accused of an offense listed in the statute, reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. The RCC defines "person" to include businesses and other legal persons.[2] The current statute only refers to a person being accused of an offense, but that term is not defined.[3] It is unclear whether the current statute applies in cases in which a *business* is accused of an offense listed in the statute, and there is no relevant D.C. Court of Appeals case law on point. By contrast, the revised statute clarifies that the reputation

[1] D.C. Code § 22-1839.
[2] RCC § 22E-701.
[3] Cf. D.C. Code §22-3201 (2A). "'Person' means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.

or opinion evidence rules apply when a business is accused of offenses listed under the statute. This change improves the clarity and consistency of the revised statute.

One change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The current statute cross references statutes in the current D.C. Code. The revised statute changes the cross references other statutory provisions to match the revised human trafficking offenses in the RCC. The RCC evidentiary rule applies to RCC §§ 22E-1602, 22E-1604, 22E-1605, and 22E-1608, instead of current D.C. Code §§ 22-1833, 22-1834, and 22-1836. This is a technical change that does not otherwise change the reputation or opinion evidence statute.

RCC § 22E-1611. Civil Action.

Explanatory Note. *This section authorizes victims of offenses under RCC § 22E-1601, § 22E-1602, § 22E-1603, § 22E-1604, § 22E-1605, § 22E-1606, § 22E-1607, or § 22E-1608 to bring a civil action in D.C. Superior Court for damages and injunctive relief. This section is nearly identical to current D.C. Code § 22-1840, but has been amended to authorize victims of all trafficking offenses included in the RCC to bring a civil action, and to change the statute of limitations.*

This section authorizes a victim of any offense under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, or 22E-1608 to bring a civil action against any person who may be charged as a perpetrator of that offense. It is not required that the defendant in the civil action has actually been charged or convicted of that offense. This language shall not be construed to limit civil liability for other entities that may be held vicariously liable, even if they did not directly engage in conduct constituting an offense under this chapter.[1]

Relation to Current District Law. *The revised civil action statute changes current District law in two main ways.*

First, the revised civil action authorizes victims of commercial sex with a trafficked person as defined under RCC § 22E-1608 to bring a civil action. There is no analogous offense under current law, and accordingly the current civil action statute does not authorize victims of this offense to bring a civil action. By contrast, the revised civil action statute allows victims of commercial sex with a trafficked person to bring civil actions. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of commercial sex with a trafficked person offense. This change improves the consistency of the revised statute.

Second, the revised civil action statute changes the statute of limitations for bringing civil actions under this section. The current statute says that the statute of limitations shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a human trafficking offense, or if the plaintiff is a minor, until the plaintiff reaches the age of majority, whichever is later. By contrast, the revised civil statute extends the time within which a victim can bring a civil action if the offense occurred when the victim was under the age of 35, and generally allows civil suits to be brought within 5 years of when the victim knew, or reasonably should have been aware, of the offense. This revision expands the period in which victims of trafficking offenses may bring civil actions in accordance with changes under the Sexual Abuse Statute of Limitations Elimination Amendment Act of 2017. This change improves the proportionality and consistency of the revised statute.

In addition to these two changes, two other revisions may constitute substantive changes to current District law.

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[1] *See*, *Boykin v. District of Columbia*, 484 A.2d 560, 561–62 (D.C. 1984) ("Under the doctrine of *respondeat superior,* an employer may be held liable for the acts of his employees committed within the scope of their employment.") (citing *Penn Central Transportation Co. v. Reddick,* 398 A.2d 27, 29 (D.C.1979)).

The revised civil action authorizes victims of forced commercial sex as defined under RCC § 22E-1602 to bring a civil action. The current code does not explicitly criminalize forced commercial sex, and it is unclear whether the use of coercion or debt bondage to compel a person to engage in a commercial sex act constitutes forced labor or services under the current statute. Therefore, it is unclear whether the current civil action statute provides a civil cause of action if a person uses coercive threats or debt bondage to compel a person to engage in a commercial sex act. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of the forced commercial sex offense. This change improves the consistency of the revised criminal code.

Secondly, the revised civil action statute specifies that a victim of a trafficking offense may bring a civil action against any person who may be charged as a perpetrator of that offense. The current statute does not specify against whom civil actions may be brought, and there is no relevant DCCA case law. This revision clarifies that victims of an offense under this chapter may bring a civil action against a person who may be charged as a perpetrator of that offense.

In addition, one change to the revised statute is clarificatory in nature and is not intended to substantively change District law.

The revised statute changes cross references to other statutory provisions to match the revised human trafficking offenses in the RCC. The current statute cross references statutes in the current D.C. Code. The revised statute authorizes victims of offenses defined under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, and 22E-1608. This is a technical change that does not otherwise change the civil action statute.

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.

Explanatory Note. *The Limitations on Liability and Sentencing for RCC Chapter 16 Offenses ("limitations on liability statute") provides two limitations on liability to offenses under this chapter. First, the limitations on liability statute bars charging a person as an accomplice to a Chapter 16 offense, if the principal had previously committed a Chapter 16 offense against that person within 3 years of the conduct by the principal constituting the offense. Second, the limitations on liability statute bars charging a person with conspiracy to commit a Chapter 16 offense if another party to the conspiracy had previously committed a Chapter 16 offense against that person within 3 years of the formation of the conspiracy.*

Subsection (a) bars charging a person as an accomplice to a Chapter 16 offense if the principal had previously committed a Chapter 16 offense against that person. This subsection only bars accomplice liability, and victims of trafficking offenses may still be charged and convicted as principals.

Subsection (b) bars charging a person with conspiracy to commit a Chapter 16 offense if any party to the conspiracy had previously committed a Chapter 16 offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense.[1]

Relation to Current District Law. *The limitations on liability statute changes current District law in two main ways.*

First, the RCC's limitation on liability statute changes current law by barring charging a person as an accomplice to a Chapter 16 offense if prior to that offense, the principal committed a Chapter 16 offense against that person within 3 years prior to the conduct by the principal constituting the offense. Under current law, there are no restrictions on accomplice liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently aid or assist principals in committing additional offenses under this chapter. This subsection only bars accomplice liability, and victims of trafficking offenses may

[1] Subsections (b) and (c) recognize that in many instances, victims of human trafficking offenses are highly vulnerable and may be co-opted by perpetrators into assisting in committing further trafficking offenses. Although these victims may not necessarily be able to satisfy a common law duress defense, they often have diminished culpability, and imposing accomplice or conspiracy liability may be disproportionately severe. These subsections seek to balance protections for vulnerable victims of human trafficking offenses who are co-opted by perpetrators, while still permitting criminal liability for persons who commit trafficking offenses as principals. Other jurisdictions have enacted provisions limiting liability for victims of trafficking offenses. E.g., N.M. Stat. Ann. § 30-52-1 ("In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking."). In addition, the Reporter's Notes accompanying the American Law Institute's draft for sexual assault and related offense for the Model Penal Code notes that some human trafficking victim's advocates say that "enforcement practices often traumatize victims and expose them to even greater hardship and danger." Council Draft No. 8 (Dec. 17, 2018). The note cites to 22 U.S.C. § 7101(b)(19) which states that "Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked[.]"

still be charged and convicted as principals. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

Second, the RCC's limitation on liabilities statute changes current law by barring charging a person with conspiracy to commit an offense under Chapter 16 if within 3 years prior to the formation of the conspiracy, a party to the conspiracy had committed a Chapter 16 offense against that person. Under current law, there are no restrictions on conspiracy liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently conspire with parties that previously committed a trafficking offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

RCC § 22E-1613. Civil Forfeiture.

Explanatory Note. *This section establishes civil asset forfeiture rules for conveyances and money that are planned to be used, or are used, to commit RCC human trafficking offenses. The RCC replaces all prostitution offenses that involve non-consensual commercial sex acts with human trafficking offenses. The civil forfeiture statute in part replaces the current forfeiture statute applicable to prostitution and related offenses,[1] and all seizures and forfeitures under this section shall be pursuant to D.C. Law § 20-278. This statute both changes current law by allowing asset forfeiture as to all human trafficking offenses, and preserves current District law by ensuring that offenses involving non-consensual prostitution are still subject to forfeiture.*

Subsection (a) establishes the types of property that are subject to civil forfeiture under the revised statute. Paragraph (a)(1) applies to any property that is, in fact, a conveyance, including aircraft, vehicles, or vessels. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is a conveyance. There are two alternative bases for forfeiture of a conveyance in paragraph (a)(1). The first requires that the conveyance is possessed with intent to facilitate commission of an offense under Chapter 16 of the RCC. "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." "Intent" is a defined term in RCC § 22E-206 that here means a person was practically certain that a conveyance would be used to facilitate commission of an RCC human trafficking offense. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the person's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the conveyance was used to facilitate commission of an RCC human trafficking offense, just that a person believed to a practical certainty [2]OBJ

The alternative basis for forfeiture of a conveyance in paragraph (a)(1) is a conveyance which is, "in fact," used to facilitate the commission of an RCC human trafficking offense. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the conveyance was used to facilitate the commission of an RCC human trafficking offense. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[3]

Paragraph (a)(2) applies to any property that is, "in fact," money, coins, and currency. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is money, coins, or currency. There are two alternative bases for forfeiture of money, coins, and currency in paragraph (a)(2). The first requires that the money, coins, or currency are possessed with intent to facilitate

[1] D.C. Code § 22-2723.
[2] This issue is discussed in detail later in the commentary to this revised statute.
[3] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

commission of an offense under Chapter 16 of the RCC. "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." The culpable mental state requirement of "intent" and the strict liability requirements of "in fact" are the same in paragraph (a)(2) as they are in paragraph (a)(1).

The alternative basis for forfeiture of money, coins, or currency in paragraph (a)(2) is if it is, "in fact," used to facilitate the commission of an RCC human trafficking offense. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the money, coins or currency were used to facilitate the commission of an RCC human trafficking offense. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[4]

Paragraph (b) establishes that the seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised forfeiture statute changes current District law in two main ways.*

First, the revised human trafficking civil forfeiture statute specifies that human trafficking offenses are subject to civil asset forfeiture. The current D.C. Code generally specifies that alleged violations of a "forfeitable offense" can give rise to civil asset forfeiture.[5] Human trafficking offenses are not included in the definition of "forfeitable offense," and alleged violations of human trafficking offenses are not explicitly subject to civil forfeiture. However, the definition of "forfeitable offense" does include prostitution offenses, including prostitution offenses involving non-consensual conduct,[6] that can give rise to forfeiture under D.C. Code § 22-2723. In contrast, the revised forfeiture statute changes law by clarifying that all human trafficking offenses are subject to civil asset forfeiture. This change improves the proportionality and consistency of the revised statutes.

Second, the revised human trafficking forfeiture provision applies to money, coins, and currency which are used, or intended to be used, "to facilitate the commission" of an RCC human trafficking offense. The current D.C. Code prostitution forfeiture statute, which applies in part to prostitution offenses involving non-consensual conduct,[7]

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[4] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[5] D.C. Code § 41-301.

[6] Current Chapter 27 of the D.C. Code, which defines prostitution-related offenses, includes several offenses that criminalize nonconsensual commercial sex acts. For example, D.C. Code § 22-2706 makes it a crime to "[use] threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact[.]" Compelling a person to engage in or submit to nonconsensual commercial sex acts is criminalized as a human trafficking offense under Chapter 16 of the RCC, not as a prostitution-related offense.

[7] Current Chapter 27 of the D.C. Code, which defines prostitution-related offenses, includes several offenses that criminalize nonconsensual commercial sex acts. For example, D.C. Code § 22-2706 makes it a crime to "[use] threats or duress, to detain any individual against such individual's will, for the purpose of

applies to conveyances that are used, or intended to be used, "to facilitate a violation" of the current D.C. Code prostitution statutes[8] and to currency that is used, or intended to be used, "in violation" of the current D.C. Code prostitution statutes.[9] "In violation" appears to be narrower than "to facilitate the commission," but there is no D.C. Court of Appeals (DCCA) case law on this issue. In contrast, the revised forfeiture provision applies to currency that is used, or possessed with intent to be used, "to facilitate the commission" of the RCC human trafficking offenses, which is consistent with the scope of conveyances subject to forfeiture. It is inconsistent to include in forfeiture conveyances that are used, or possessed with intent to be used, "to facilitate the commission" of a trafficking offense, but to limit forfeiture of currency to currency that is used, or possessed with intent to be used "in violation" of a trafficking offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Beyond these two substantive changes to current District law, two other aspects of the revised forfeiture statute may constitute substantive changes to current District law.

First, the RCC definition of "intent to" applies to the revised forfeiture provision. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "intended for use" in a prostitution offense.[10] The meaning of "intended to" is unclear and there is no DCCA case law on this issue.[11] Resolving this ambiguity, the revised human trafficking forfeiture provision applies the RCC definition of "intent" in RCC § 22E-206. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the property would be used in a prostitution offense.[12]

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prostitution or a sexual act or sexual contact[.]" Compelling a person to engage in or submit to nonconsensual commercial sex acts is criminalized as a human trafficking offense under Chapter 16 of the RCC, not as a prostitution-related offense.

[8] D.C. Code Ann. § 22-2723(a)(1) ("(a) The following are subject to forfeiture: (1) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.").

[9] D.C. Code Ann. § 22-2723(a)(2) ("(a) The following are subject to forfeiture: . . . (2) All money, coins, and currency which are used, or intended for use, in violation of a prostitution-related offense.").

[10] D.C. Code § 22-2723(a)(1), (a)(2).

[11] The words "intended to" as used in the current prostitution forfeiture statute may refer to what was commonly known as "specific intent." However, even if this is the case, current District case law is unclear as to whether "specific intent" may be satisfied by mere knowledge, or if conscious desire is required. Compare, *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984) (""[a] specific intent to kill exists when a person acts with the purpose . . . of causing the death of another,") with *Peoples v. United States*, 640 A.2d 1047, 1055-56 (D.C. 1994) (proof that the appellant, who set fire to a building "knew" people inside a would suffer injuries sufficient to infer that the appellant "had the requisite specific intent to support his convictions of malicious disfigurement").

[12] Relying on the RCC definition of "intent" may produce an additional change in current District law. Under the RCC, the "intent" mental state may be satisfied by knowledge of a circumstance or result. The RCC also provides that knowledge of a circumstance may be imputed if a person is reckless as to whether the circumstance exists, and with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied to this forfeiture provision, if an owner does *not* know that property is to be used to violate the trafficking in forced commercial sex offense, but was reckless as to this fact, and avoided investigating whether this circumstance exists in order to avoid criminal liability, the imputation rule may allow a fact finder to impute knowledge to the owner. It is unclear under current District law whether a similar rule of imputation would apply. Current D.C. Code §

Applying the RCC definition of "intent" does not change the mental state requirements for forfeiture in D.C. Law 20-278.[13] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC establishes that strict liability is a distinct basis for the forfeiture of property. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "are used" in a prostitution offense.[14] It is unclear whether "are used" applies strict liability. There is no DCCA case law on this issue. Resolving this ambiguity, the revised human trafficking forfeiture provision, by use of the phrase "in fact," clarifies that strict liability is a distinct basis for the forfeiture of property. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[15] This change improves the clarity, consistency, and proportionality of the revised statutes.

The remaining changes are clarificatory and are not intended to substantively change current District law.

First, the revised forfeiture provision deletes the language "to transport." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense." The term "conveyances" sufficiently communicates an object designed to transport. The verb "to transport" is unnecessary and deleting it improves the clarity of the revised statutes.

Second, the revised forfeiture provision deletes the language "in any manner." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense." "To facilitate" is sufficiently broad to encompass all methods of facilitation, particularly since the revised statute, as is discussed above, no longer specifies "to transport." Deleting "in any manner" improves the clarity of the revised statutes.

Third, the revised forfeiture provision deletes the term "property." The current D.C. Code prostitution forfeiture provision states that "All seizures and forfeitures of property under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278."[16] The term "property" is unnecessary because paragraphs (a)(1) and

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41-306 states that "[n]o property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission." However, this provision applies when an actual *act or omission* is the basis for forfeiture. It is unclear whether an owner's willful blindness as to *intended* uses of property still authorizes civil forfeiture. If this provision does apply even when property has not yet been used, the term "willfully blind" is undefined, and it is unclear how it differs from the deliberate ignorance provision under the RCC.

[13] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[14] D.C. Code § 22-2723(a)(1), (a)(2).

[15] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[16] D.C. Code § 22-2723(b).

(a)(2) of the revised provision and of the current forfeiture provision,[17] limit the provision to types of property—vehicles and money. This change improves the clarity of the revised statutes.

[17] D.C. Code § 22-2723(a)(1), (a)(2).

RCC § 22E-1801. Stalking.

Explanatory Note. *This section establishes the stalking offense for the Revised Criminal Code (RCC). The offense prohibits patterns of behavior that significantly intrude on a person's privacy or autonomy and threaten a long-lasting impact on a person's quality of life. The offense replaces the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.*

Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. "Purposely," a term defined in RCC § 22E-206, here requires a conscious desire to engage in a pattern of misconduct.[1] A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[2] and must consist of one or more of the activities listed in subparagraphs (a)(1)(A) – (D).[3] The behavior must be directed at a specific person, not merely be disturbing to the general public.[4] The pattern may be established by any combination of conduct described in subparagraphs (a)(1)(A) – (D).

Subparagraph (a)(1)(A) provides that one means of committing stalking is physically following or physically monitoring a specific individual. The term "physically following" is defined in RCC § 22E-701 and means maintaining close proximity to a person, near enough to see or hear the person's activities person as they move from one location to another.[5] "Physically monitoring" is also defined in RCC § 22E-701 and means appearing in close proximity to someone's residence, workplace, or school, to detect the person's whereabouts or activities. Such following or monitoring may be accomplished by means of a third party,[6] however, the revised stalking statute does not reach unauthorized electronic surveillance.[7] Per the rules of interpretation in RCC § 22E-

[1] A person does not commit a stalking offense by merely knowing that they are engaging in a pattern of conduct toward the complainant. Consider, for example, a person who communicates to a large audience, such as a television broadcast or an upload to YouTube. That person may be practically certain that the complainant will watch the broadcast, and negligent as to the fact that the complainant will be distressed by the content, but not consciously desire that the complainant watch. Consider also a divorced couple attending a family event, such as a wedding or a funeral. One former spouse may be practically certain that they are maintaining close proximity to the other as they move from the church to the reception hall, and negligent as to the fact that their very presence is distressing, but not consciously desire to physically follow them.

[2] A person does not commit a stalking offense by harming a complainant on two occasions that are unrelated or interrupted by a period of reconciliation. Consider, for example, in February of a given year Sister A and Sister B argue about what to watch on television and A assaults B; from March through September, they get along well; but in October they argue about who has to do the dishes and A assaults B again. Sister A has committed two assaults in violation of RCC § 22E-1202 but has not committed a stalking offense.

[3] The common purpose does not have to be nefarious. For example, a person might persistently follow someone with the goal of winning their affection.

[4] Conduct in a public place that causes a person to reasonably fear a crime is likely to occur may be punishable as disorderly conduct. RCC § 22E-4201.

[5] The phrase "close proximity" does not require that the defendant be near enough to reach the complainant. Distances may vary widely, depending on facts including crowd density, noise, and height. Examples may include walking a couple of stores down the street from the complainant or driving near the complainant in a vehicle.

[6] *See* RCC § 22E-211 (Liability for causing crime by an innocent or irresponsible person).

[7] Unauthorized electronic surveillance is addressed in RCC § 22E-1802, Electronic Stalking.

207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to physically follow or monitor the complainant.[8]

Subparagraph (a)(1)(B) provides that another means of committing stalking is falsely personating a complainant. For example, an actor may commit a stalking offense by falsely posing as the complainant in an online forum and making statements that intentionally or negligently inflict fear or emotional stress on that complainant. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to falsely personate the complainant.

Subparagraph (a)(1)(C) provides that a third means of committing stalking is to persistently contact someone without their effective consent. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state requires that the accused consciously desire to contact the specific individual.[9] The method of communication is irrelevant, whether it be in person speech, electronic correspondence, or messages sent through a third party.[10] Subparagraph (a)(1)(C) does not reach communications *about* the specific individual to other (third) persons.[11] This restriction on communication is content-neutral, and prohibits all contact beyond the complainant's effective consent, irrespective of tenor and tone.

Subparagraph (a)(1)(D) provides that a fourth means of committing stalking is to commit, solicit, or attempt Criminal Threats,[12] Theft,[13] Identity Theft,[14] Arson,[15] Criminal Damage to Property,[16] Criminal Graffiti,[17] Trespass,[18] Breach of Home Privacy,[19] or Indecent Exposure.[20] "In fact," a defined term,[21] is used to indicate that

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[8] For example, the accused must act with the purpose of appearing at the target's home, office, or school and with the purpose of watching them. A person who does not know the location is one that the target frequents, or who knowingly but not purposely frequents, a location where the target is does not commit a stalking offense.

[9] Consider, for example, Person A calls a phone number intending to reach Person B and Person C unexpectedly answers the phone. Person A did not purposely engage in a pattern of stalking conduct.

[10] Consider, for example, Person A contacts Person B's family, friends, coworkers, and neighbors to complain about unpaid alimony. If Person A simply voices a negative opinion *about* Person B, that speech will not amount to stalking. However, if Person A repeatedly instructs Person B's friends to relay a message *to* Person B, with the intent or effect of frightening Person B, Person A has committed the offense of stalking.

[11] For example, a person who posts disparaging remarks about a former spouse on her own Facebook page, without tagging the subject of the post, does not commit stalking. *But see Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts). Note, however, that communications about the specific individual that amount to a criminal threat may constitute a separate basis for finding stalking conduct per subparagraph (a)(1)(C).

[12] RCC § 22E-1204.

[13] RCC § 22E-2101.

[14] RCC § 22E-2205.

[15] RCC § 22E-2501.

[16] RCC § 22E-2503.

[17] RCC § 22E-2504.

[18] RCC § 22E-2601.

[19] RCC § 22E-4205.

[20] RCC § 22E-4206.

[21] RCC § 22E-207.

there is no separate or additional culpable mental state required as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Paragraph (a)(2) specifies that the person must be negligent as to the fact that the course of conduct is without effective consent. The term "negligent" is defined in RCC § 22E-206 and here requires that the actor should be aware of a substantial risk that the contact[22] is without the complainant's effective consent[23] and that the actor's failure to perceive the risk was a gross deviation from the ordinary standard of care.[24] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701.

Paragraph (a)(3) requires that the conduct described in paragraph (a)(1) have either the intent or the effect of causing the victim to experience fear or distress. Under (a)(3)(A), a person commits stalking when they act "with intent to" cause someone fear or significant distress. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would cause someone fear or significant distress. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such fear or significant distress occurred, just that the defendant believed to a practical certainty that such fear or significant distress would result.[25] Under (a)(3)(B), a person commits stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[26] "Negligently" is a defined term in RCC § 22E-206 and, applied here, means the actor should be aware of a substantial risk that the pattern of

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[22] It is the contact and not the content that must be without effective consent. Compare, for example, a complainant who notifies the defendant to cease all communication (e.g., "Do not call me again.") with a complainant who asks the defendant to cease certain *offensive* communication (e.g., "Do not call me 'a jerk' again.").

[23] Consider, for example, a person who is told by a love interest's parent, "Never contact my daughter again." If the person reasonable believes that this is the command only of the parent and not the love interest, disobeying the command will not amount to stalking.

[24] For example, a complainant may convey their desire to not be contacted either directly, by telling the person to stop, or indirectly through an attorney, government entity, or a third party. In some instances, blocking electronic communications may also suffice to notify to the accused that further communication is unwelcome. On some communication platforms, electronic blocking is obvious to the person who has been blocked. On other platforms, the user's profile may appear to vanish. On others, the blocking (or muting) is not made apparent to the person who was blocked at all.

[25] Consider, for example, Person A sends multiple messages to Person B threatening to "beat him up." Person B is unafraid because he has been specially trained as a fighter. Person A has, nevertheless, may have committed a stalking offense against Person B.

[26] Consider, for example, Person A secretly follows Person B from place to place, hoping Person B will not notice, but Person B does notice and becomes afraid. Person A has committed stalking, if Person B's fear was objectively reasonable. Consider also, a person incessantly contacts an ex-lover after being asked to stop, with the intention of reconciling. Although the person did not intend to cause any undue fear or distress, the unwanted communication nevertheless amounts to stalking, if it negligently does cause such a harm.

conduct will frighten or significantly distress that particular individual[27] and the actor's failure to perceive the risk was a gross deviation from the ordinary standard of care. Sub-subparagraphs (a)(3)(A)(i) and (a)(3)(B)(i) specify fear of physical harm or confinement to any person[28] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is defined in the statute to mean ongoing security from significant intrusions on one's bodily integrity or bodily movement. Sub-subparagraphs (a)(3)(A)(ii) and (a)(3)(B)(ii) also provide that "significant emotional distress" is a second type of emotional injury that may establish stalking liability. "Significant emotional distress" is a defined term that means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. The distress must rise significantly above the level of uneasiness, nervousness, unhappiness, or similar feelings commonly experienced in day to day living.[29]

Paragraph (b)(1) specifically excludes from stalking liability certain speech about social issues that is usually constitutionally protected speech.[30] Paragraph (b)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the requirements in paragraph (b)(1). The term "public matter" has the meaning indicated in Supreme Court case law. Stalking statutes are often vulnerable to constitutional challenges, as written and as applied.[31] The paragraph makes clear that the stalking statute does not punish activities such as participating in a labor strike, advocating a boycott, publishing harsh reviews of a restaurant, acting as a whistleblower, or criticizing a city official's fitness for office. Although such applications of the stalking statute likely would be constitutionally invalid without this statutory language, codifying the exception provides better notice to the public and criminal justice system actors. Pursuant to (b)(1), a person who is a law enforcement officer,[32] District official, [33] candidate for elected office, or employee of a business that is open to the public is expected to tolerate the opinions of the community

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[27] For example, if the actor reasonably but mistakenly believes that the victim of the stalking conduct will be unbothered by the pattern of conduct, the actor has not acted negligently. RCC § 22E-206. The fact that another reasonable person might find the same consequence alarming is inconsequential.

[28] This includes fear that the stalker will physically harm the victim, a member of the victim's family, or a stranger.

[29] RCC § 22E-701.

[30] Speech on public issues should be "uninhibited, robust, and wide-open…[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Connick v. Myers*, 461 U.S. 138 (1983) (internal quotation marks omitted)).

[31] There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek, but the "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring); *see also State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977). The revised statute's prior notification requirement is not itself enough to render the statute constitutional as applied. *See, e.g., State v. Pierce*, 152 N.H. 790 (2005).

[32] Defined in RCC § 22E-701.

[33] Defined in RCC § 22E-701.

they serve, at least while they are on duty.[34] However, depending on the facts in a particular case, the First Amendment may offer broader or narrower protection than the speech highlighted in this special exception. Free speech on matters of public concern is not limited to speech directed at political figures and businesses nor is it limited to communications that occur while those persons are engaged in their official duties.[35]

Paragraph (b)(2) specifically excludes from stalking liability persons who are engaged in activities that are vital to a free press and to the fair administration of justice. Paragraph (b)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the requirements in paragraph (b)(2) and subparagraphs (b)(2)(A) and (b)(2)(B). A journalist, law enforcement officer, professional investigator (licensed or unlicensed), attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of his or her professional duties or court obligations does not commit a stalking offense.[36]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion.[37]

Subsection (d) provides the penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (d)(2) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven beyond a reasonable doubt,[38] the penalty classification is increased by one class. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether the enhancement applies.

Subparagraph (d)(2)(A) authorizes an enhancement if the defendant violated a court order or condition of release prohibiting or restricting contact with the complainant by committing the stalking offense. The accused is strictly liable with respect to whether a court order or condition of release prohibited or restricted contact with the complaining witness.[39] The term "court order" includes any judicial directive, oral or written, that

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[34] *See White v. Muller*, 2017 D.C. Super. LEXIS 14 (concluding that 47 text messages that a journalist sent to a Councilmember were not protected because they "do not reference any particular policy or subject matter" and are instead "personal in nature, belittling, and appear to be [an] attempt to intimidate…").

[35] *See Gray v. Sobin*, 2014 D.C. Super. LEXIS 1, *12.

> The Supreme Court has defined speech on a matter of public concern as speech that either can be fairly considered as relating to any matter of political, social, or other concern to the community or is on a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

(Internal quotation marks omitted.) (quoting *Snyder v. Phelps*, 562 U.S. 443 (2011); *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Rankin v. McPherson*, 483 U.S. 378 (2004)).

[36] The revised statute anticipates that some legal pleadings, correspondence and negotiations will be distressing. Whether conduct exceeds the scope of a person's duties as an attorney or unrepresented litigant is fact-sensitive.

[37] *See also Whylie v. United States*, 98 A.3d 156, 158 (D.C. 2014) (finding that all conduct (1400 phone calls) that occurred before entry of a restraining order constituted one course of conduct, while all conduct that occurred after the entry of the restraining order (800 phone calls) constituted another).

[38] RCC § 22E-605 requires that an enhancement be charged and proven beyond a reasonable doubt.

[39] A good faith belief that the order was expired or vacated is not a defense.

restricts contact with the stalking victim.[40] A condition of release may be imposed by a court or by the United States Parole Commission.[41]

Subparagraph (d)(2)(B) authorizes an enhancement for any person who has a prior stalking or electronic stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of stalking or electronic stalking under RCC § 22E-1801 and 1802.[42]

Subparagraph (d)(2)(C) authorizes an enhancement for stalking conduct that causes the affected persons to incur expenses that amount to more than $5,000. "Financial injury" is a defined term that includes all reasonable monetary costs, debts, or obligations that were sustained as a result of the stalking.[43] This provision does not affect the sentencing court's discretion with respect to ordering restitution. The government's decision to not seek a penalty enhancement does not preclude the government from seeking reimbursement under the restitution statute.[44]

Subparagraph (d)(2)(D) authorizes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor is strictly liable as to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years. Second, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and that the person's disregard of the risk is a gross deviation from the ordinary standard of conduct.[45]

Paragraph (d)(3) disallows stacking a repeat offender penalty enhancement[46] on top of a penalty enhancement for a prior stalking conviction.

Paragraph (e)(1) cross-references applicable definitions in the RCC.

Paragraph (e)(2) defines "safety" means ongoing security from significant intrusions on one's bodily integrity or bodily movement.[47]

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[40] Examples include stay away orders, civil protection orders, family court orders, civil injunctions, and consent decrees. The order must clearly address prohibitions on contact with the specified person. An order to stay away from a particular location, without reference to the specific individual will not suffice.

[41] Regarding the legal authority to impose such conditions, see *Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014).

[42] The term "comparable offense" is defined in RCC § 22E-701.

[43] RCC § 22E-701.

[44] *See* D.C. Code § 16-711.

[45] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[46] RCC § 22E-606.

[47] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019) (explaining, "'Fear for safety' means fear of significant injury or a comparable harm...seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community.").

Relation to Current District Law. *The revised stalking statute clearly changes current District law in five main ways.*

First, the revised statute limits stalking liability for non-threatening communications to those communications that occur without the complainant's effective consent. Given that current D.C. Code § 22-3133(a)(3) provides for stalking liability when the defendant does not have any subjective awareness of the impact of his or her non-threatening speech, the defendant may be guilty of stalking while never having been aware that their non-threatening speech was unwanted.[48] In contrast, the revised statute requires that, although the complaining witness does not have to affirmatively notify the actor to cease following, monitoring, falsely personating, or criminal behavior,[49] non-criminal speech does not become a predicate for stalking unless the defendant is at least negligent as to the fact that it is unwelcome. This requirement effectively transforms future communications into a verbal act of ignoring the victim's directive to be left alone and invading the victim's privacy. The revised statute thereby criminalizes behavior that is calculated to torment without reaching other legitimate speech.[50] This change improves the clarity, proportionality, and, perhaps, the constitutionality of the revised statutes.[51]

Second, the revised stalking statute provides as a possible basis of liability that a person negligently causes the targeted person to fear for his or her safety or that of another person, or to suffer significant emotional distress. Current D.C. Code § 22-3133(a) provides as one possible basis of liability that there be a course of conduct that "the person should have known *would cause* a reasonable person in the individual's circumstances" to experience fear for safety or emotional distress.[52] The DCCA has held

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[48] In Montana, Roman McCarthy received a five-year sentence after mailing two letters to his ex-wife, neither of which she opened but which nonetheless caused her emotional distress. Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 Mich. L. Rev. 607, 608 (2015) (citing *State v. McCarthy*, 980 P.2d 629 (Mont. 1999)).

[49] In these instances, "[r]ecommending that a victim confront or try to reason with the individual who is stalking him or her can be dangerous and may unnecessarily increase the victim's risk of harm." *See Revised Model Code* at page 52.

[50] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977). Bill collectors, global warming activists, well-intentioned family members, personal coaches, and religious leaders are among the many persons who may purposely make repeated communications to a specific individual, with messages that they know or should know will cause the hearer significant emotional distress.

[51] The revised statute's prior notification requirement is not itself enough to render the statute constitutional as applied. *See, e.g., State v. Pierce*, 152 N.H. 790 (2005).

[52] In *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017), the Supreme Court of Illinois held that identical language violates due process. The court explained:

> [T]he proscription against "communicat[ions] to or about" a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient…Therefore, it is clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited

that this element is satisfied where the defendant's conduct is "objectively frightening and alarming." [53] In contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) he or she should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the complainant* and the actor's failure to perceive the risk is a gross deviation from the ordinary standard of care, and (2) the complainant did experience significant emotional distress.[54] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[55] even though it is highly unusual to provide criminal liability for merely negligent conduct.[56] The lack of any subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[57] Requiring actual harm may also better reflect the Council's prior stated intent that stalking liability be focused on harms to targeted individuals rather than communications

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communications. *See Reed*, 576 U.S. at ——, 135 S.Ct. at 2227; *see also Matal v. Tam*, 582 U.S. ——, ——, 137 S.Ct. 1744, 1764–65, 198 L.Ed.2d 366 (2017) (plurality opinion) (holding that the 'disparagement clause,' which prohibits federal registration of a trademark based on its offensive content, violates the first amendment).

See also State v. Shackelford, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[53] *Atkinson v. United States*, 121 A.3d 780, 786-87 (D.C. 2015); *see also Beachum v. United States*, 189 A.3d 715 (D.C. 2018) (affirming a conviction for negligently causing emotional distress where the defendant's conduct scared the complainant).

[54] In *State v. Ryan*, 969 So. 2d 1268, 1271 (La. Ct. App. 2007), a Louisiana court reversed a stalking conviction that was based on the defendant driving back and forth in front of the Wrights' house several times over the course of a day to collect firewood from a tree trimming crew, causing Mrs. Wright emotional distress. The trial court had found, "There's no prior contact whatsoever between these people; nobody knew one another here," but concluded, "[A]s I've stated before, the suspicious conduct in a neighborhood causes a certain amount of—degree of emotional distress especially with the womenfolk."

[55] RCC § 22E-206.

[56] *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples,* 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich,* 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries,* 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States,* 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[57] *See Republic of Sudan, Ministry of External Affairs, et al. v. James Owens, et al.*, No. 17-SP-837, 2018 D.C. App. (Sep. 20, 2018) (noting civil liability for negligent infliction of emotional distress requires some limiting principles to avoid "virtually infinite liability"); *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990) (en banc).

and behaviors that are inappropriate but do not actually cause distress.[58] This change improves the clarity, consistency, and proportionality of District statutes and may ensure constitutionality.

Third, the revised statute limits liability for "monitoring" to in-person monitoring at a person's residence, workplace, or school. Current law defines a course of stalking conduct to include acts to "monitor" and "place under surveillance."[59] These terms are not defined and the DCCA has not interpreted their meaning.[60] In contrast, the revised stalking statute defines "physically monitoring" to mean being in the immediate vicinity of the person's residence, workplace, or school, with intent to detect the person's whereabouts or activities.[61] Limiting monitoring to locations where the specific individual is obliged to be and there is a heightened expectation of privacy avoids prosecutions for "mutual stalking"[62] and may help ensure first amendment protections for conduct in public spaces is not burdened.[63] The revised code punishes indirectly observing or recording someone's location or activities as a separate offense focused on nonconsensual electronic monitoring.[64] This change eliminates unnecessary gaps and overlap between criminal offenses.

Fourth, the revised statute does not specifically authorize multiple convictions for stalking and identity theft based on the same facts. Current D.C. Code § 22-3134(d) provides that, "A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct." Although there is no case law on

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[58] D.C. Code § 22-3131 explains that the current stalking statute aims to protect victims of stalking from grief and violence, as opposed to protecting the public from conduct that is generally alarming or distressing.

> (a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm…(b)…The Council recognizes that stalking includes a pattern of following or monitoring *the victim*, or committing violent or intimidating acts *against the victim*, regardless of the means.

(Emphasis added.) Notably, behavior that alarms the general public may be separately punished as disorderly conduct in D.C. Code § 22-1321 and corresponding RCC § 22E-4201.

[59] D.C. Code § 22-3132(8)(a).

[60] At least one other state has interpreted monitoring to include a wide variety of relatively conduct, including "keeping track of" an individual's online activity. *See People v. Gauger*, 2-15-0488, 2018 WL 3135087, at *3 (Ill. App. Ct. June 27, 2018) (affirming a stalking conviction where a defendant impersonated the victim's friends on Facebook and downloaded photographs of her family).

[61] RCC § 22E-1801(d).

[62] Consider, for example, a recently divorced couple that continues to attend the same church services, each experiencing significant emotional distress upon seeing the other. If the revised statute included churches, both people may be said to have committed stalking.

[63] Reasonable time, place, and manner restrictions may be imposed upon constitutionally protected speech in some circumstances, and several District statutes reflect these considerations. *See, e.g.,* D.C. Code § 22-1314.02 (regarding obstruction of access to or disruption of medical facilities).

[64] RCC § 22E-1802. *See also* D.C. Code § 22-3531, Voyeurism, which makes it unlawful to secretly monitor a person who is (A) Using a bathroom or rest room; (B) Totally or partially undressed or changing clothes; or (C) Engaging in sexual activity.

point, this language appears to categorically authorize multiple convictions for identity theft and stalking based on the same act or course of conduct. In contrast, the revised stalking statute does not contain such a concurrent sentencing provision and treats identity theft the same as other criminal conduct that may subject a person to stalking liability. There is no apparent reason for specially treating identity theft in this manner, and there may be situations where convictions for identity theft and stalking based on the same acts or course of conduct should merge. The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft (and other predicate crimes) and stalking arising from the same act or course of conduct.[65] This change improves the proportionality of penalties and the consistency of the code.

Fifth, the revised statute provides a distinct penalty enhancement for having one prior stalking or electronic stalking conviction that increases the penalty by one class. The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[66] and a third offense.[67] The revised statute retains the second-strike enhancement but eliminates the third-strike enhancement. Instead, the RCC's general repeat offender penalty enhancement may apply when a defendant has two or more prior convictions for a comparable offense.[68] This change improves the consistency and proportionality of District statutes.

Beyond these five changes to current District law, eight other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies that stalking may be committed by falsely personating the complainant or committing Criminal Threats,[69] Theft,[70] Identity Theft,[71] Arson,[72] Criminal Damage to Property,[73] Criminal Graffiti,[74] Trespass,[75] Breach of Home Privacy,[76] or Indecent Exposure.[77] Current D.C. Code § 22-3132(8) defines a "course of conduct" for the stalking statute and provides an extensive list of activities that already appear to be criminal, such as efforts to "threaten,"[78] "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so,"[79] and "[u]se another individual's personal identifying information."[80] The DCCA

[65] *See* RCC § 22E-212. A stalking offense may reasonably account for the predicate offenses in some cases and not in others.
[66] D.C. Code § 22-3134(b)(2).
[67] One or more of the convictions must have been jury-demandable. D.C. Code § 22-3134(c).
[68] RCC §§ 22E-606(a) and (b).
[69] RCC § 22E-1204.
[70] RCC § 22E-2101.
[71] RCC § 22E-2205.
[72] RCC § 22E-2501.
[73] RCC § 22E-2503.
[74] RCC § 22E-2504.
[75] RCC § 22E-2601.
[76] RCC § 22E-4205.
[77] RCC § 22E-4206.
[78] D.C. Code § 22-3132(8)(A).
[79] D.C. Code § 22-3132(8)(B).
[80] D.C. Code § 22-3132(8)(C).

has not addressed whether the conduct listed in the current stalking statute's definition of a "course of conduct" requires proof equal to corresponding criminal offenses or how such conduct differs from corresponding criminal offenses. The revised statute specifies that only conduct constituting a criminal threat or a specified property offense in the RCC is predicate conduct for stalking, replacing the corresponding general references to threats, property damage, and misuse of personal information in the current statute.[81] This change improves the clarity and consistency of District statutes.

Second, the revised statute provides stalking liability for communications "about" a person only when such communications are otherwise criminal.[82] Current law defines a course of stalking conduct to include both communications to a person and communications about a person without distinction.[83] The current language appears to capture all speech that a person should know would cause an individual to feel alarmed, disturbed, or distressed.[84] However, the current stalking statute also states that it "does not apply to constitutionally protected activity."[85] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute more narrowly proscribes speech that is not merely insensitive to the subject of the commentary but also has the intent or effect of tormenting the listener[86] or threatening bodily harm. This approach

[81] For example, "threaten" in the current stalking statute generally corresponds to the criminal threat offense codified at RCC § 22E-1204. "Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," generally corresponds to the offenses of theft (RCC § 22E-2101), unauthorized use of property (RCC § 22E-2102; arson (RCC § 22E-2501), damage to property (RCC § 22E-2503), graffiti (RCC § 22E-2504), trespass (RCC § 22E-2601), and trespass of motor vehicle (RCC § 22E-2602). "Use another individual's personal identifying information" generally corresponds with references to the offenses of forgery (RCC § 22E-2204) and identity theft (RCC § 22E-2205).

[82] Providing stalking liability for other communications "about" a person may criminalize publicizing matters of public concern, or "public shaming." For example, a victim who posts six signs to raise public awareness about the identity of her rapist may be liable for stalking under existing law if that victim knew that it would reasonably cause the perpetrator to suffer emotional distress. *See* Amy Brittain and Maura Judikis, *'The man who attacked me works in your kitchen': Victim of serial groper took justice into her own hands*, Washington Post, January 31, 2019.

[83] D.C. Code § 22-3132(8)(C).

[84] D.C. Code § 22-3133(a)(3)(B). Consider, for example, a person who exposes another person's extramarital affair to several other people. Although the revelation may be disturbing or distressing, it is not the kind of behavior that is typically considered stalking behavior and it is likely protected as free speech. *United States v. Stevens*, 559 U.S. 460, 479 (2010) ("*Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation." (emphasis in original)). Civil tort remedies, including monetary damages and injunctive relief, exist for defamation, invasion of privacy – false light, tortious interference, intentional infliction of emotional distress, and negligent infliction of emotional distress.

[85] D.C. Code § 22-3133(b).

[86] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (upholding a conviction where the defendant published tweets tagging a specific individual; concluding the tweets are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *and People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague); *see also State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

may be more consistent with the Council's prior stated intent, as there are many distressing communications "about" an individual that do not amount to the "severe intrusions on the victim's personal privacy and autonomy" that the current statute aims to curtail.[87] This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Third, the revised statute excludes stalking liability for communications concerning political and public matters to on-duty law enforcement officers, District officials, candidates for elected office, or employees of businesses that serve the public.[88] The current stalking statute provides no specific exceptions for particular types of communications or recipients, but states that the statute "does not apply to constitutionally protected activity."[89] While the DCCA has not directly addressed First Amendment challenges to the stalking statute, the issue has been litigated in D.C. Superior Court in the context of communications to a member of the D.C. Council.[90] To resolve ambiguities as to the constitutional scope of the offense, the revised stalking statute explicitly recognizes an exercise of free speech that is especially common in Washington, D.C.: contacting elected representatives to urge or criticize political action.[91] The revised code provides that expressions of opinion about public issues are not a basis for stalking liability,[92] while cautioning the reader that harassing and insulting

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[87] D.C. Code § 22-3131(a); *see also Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (holding that nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment); *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (invalidating language in the state's stalking statute identical to the District's current law as overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[88] RCC § 22E-1801(e)(2).

[89] D.C. Code § 22-3133(b).

[90] *See White v. Muller*, 2017 D.C. Super. LEXIS 1, *10 (concluding that 47 text messages that a journalist sent to a Councilmember were not protected because they "do not reference any particular policy or subject matter" and are instead "personal in nature, belittling, and appear to be [an] attempt to intimidate…").

[91] For example, Senator Kamala Harris recently urged her 1.73 million Twitter followers, "Save this number to your favorites: (202) 224-3121. Call your Senators in the morning and tell them to oppose Kavanaugh. Call them in the afternoon. Leave a message at night. Keep making your voice heard." Kamala Harris (@kamalaharris), Twitter (September 7, 2018, 11:02 AM), *https://twitter.com/KamalaHarris/status/1038125246778368001*.

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> '[A]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.' *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988). Speech on 'public issues should be uninhibited, robust, and wide-open…[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.' *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1215, 179 L. Ed. 2d 172 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)) (internal quotation marks omitted).

Gray v. Sobin, 2014 D.C. Super. LEXIS 1, *11.

one-to-one communications[93] sent after hours may not enjoy the same protection.[94] The exception also applies to employees of businesses that serve the public, who may be the subject of distressing criticism of their goods or services. This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Fourth, the revised statute more precisely specifies the nature of the social harm in stalking to be a course of conduct that causes "ongoing" safety concerns or emotional distress. The current stalking statute requires proof that the defendant engaged in a "course of conduct," a defined term that refers to conduct "on 2 or more occasions" but is silent as to whether or how the conduct on these occasions is related.[95] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[96] is silent on whether such distress is of an ongoing nature. The DCCA has explained only that each term requires a severe degree of intrusion.[97] To resolve these ambiguities, the revised code defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[98] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[99] the revised statute's definitions refer to both the degree and the duration of the harm. This change improves the clarity of the revised statute.

Fifth, the revised definition of "financial injury" more precisely defines the types of expenses that will trigger a penalty enhancement. Current D.C. Code § 22-3132(5) includes expenses incurred by the complainant, member of the complainant's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the complainant. In contrast, the revised definition includes expenses incurred by any natural person,[100] but requires that the expenses be reasonably incurred by the criminal conduct. Additionally, the revised definition includes more examples in the non-exhaustive list of costs, such as the cost of clearing a debt and "lost compensation," which includes employment benefits and other earnings. These changes clarify and improve the consistency of District statutes.

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[93] In contrast, blocking speech on a public forum constitutes viewpoint discrimination that violates the First Amendment. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) (disallowing President Trump to block users from his @realdonaldtrump Twitter page).

[94] *See White v. Muller*, 2017 D.C. Super. LEXIS 1, *14 (distinguishing insulting text messages sent to an elected official's phone and critical posts about the official on a public social media page or at a community meeting.); *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act…raise[s] no question under that instrument."); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[95] D.C. Code § 22-3132(8).

[96] D.C. Code § 22-3132(4).

[97] *See Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).

[98] RCC §§ 22E-1801(d)(8) and (9).

[99] Merriam-Webster.com, *"stalking"*, 2018, *available at* https://www.merriam-webster.com/dictionary/stalking (defining stalking as 1 : to pursue by stalking; 2 : to go through (an area) in search of prey or quarry stalk the woods for deer; 3 : to pursue obsessively and to the point of harassment).

[100] Expenses incurred by the court system or another entity are excluded from the calculation of financial injury.

Sixth, the revised stalking statute excludes liability for conduct that is authorized by a court order or District statute, regulation, rule, or license;[101] or that is reasonably within the scope of a person's specific, lawful commercial purpose or employment duty. Current D.C. Code § 22-3133(b) contains a general statement that the offense "does not apply to constitutionally protected activity," but otherwise is silent as to whether other activities are excluded. The DCCA has not addressed whether a person's bona fide action pursuant to their occupational duties is excepted from stalking liability.[102] However, to resolve these ambiguities as to the constitutional scope of the offense, the revised statute specifically excludes from stalking liability activities that, despite being distressing, are generally recognized as legitimate occupational activities. Even if the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[103] Without a clear exclusion, such legitimate activities may constitute stalking.[104] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offense.

Seventh, the revised statute extends jurisdiction for stalking only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3135(b) states that jurisdiction extends to communications if "the specific individual lives in the District of Columbia" and "it *can be* electronically accessed in the District of Columbia" (emphasis added). The DCCA has not interpreted the meaning of this phrase. The revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the complainant is a District resident.[105] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[106] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[107] and such an extension, if intended, may be

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[101] For example, a *pro se* litigant may need to send distressing communications in connection with a pending case. *See, e.g.,* Eugene Volokh, *How I Was a Criminal Defendant in a N.J. Harassment Case*, REASON (August 22, 2019).

[102] Notably, in *White v. Muller*, 2017 D.C. Super. LEXIS 1, the court's analysis did not focus on the fact that Muller had duties as a member of the press so much as the status of White as a Councilmember.

[103] Many of the professional activities excepted in the RCC stalking statute, e.g., a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

[104] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone's home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee's compliance with worker safety laws may cause the person some degree of emotional unrest.

[105] For example, Person A resides in Toronto and sends Person B a threatening text message each time she visits the Canada from her home in Washington, DC. Current law may be understood to mean that A has committed a stalking offense in the District, simply because the messages *can be* accessed here.

[106] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

[107] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

unconstitutional.[108] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Eighth, the revised statute requires the actor engage in a course of conduct negligent as to the fact that it is without the complainant's effective consent. The current D.C. Code does not codify any general defenses and the DCCA has not decided whether an effective consent defense applies to the District's stalking statutes. In contrast, the RCC specifies that a person does not commit a stalking offense when non-criminal conduct was invited, welcomed, or consensual. This change clarifies and may improve the proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute separately criminalizes only conduct that intends or causes another to experience fear for safety or emotional distress. Current D.C. Code § 22-3133(a) specifically refers to conduct that would cause another person to "feel seriously alarmed, disturbed, or frightened" without defining these terms. Current D.C. Code §22-3133(a) also refers to fear for "safety," undefined, and "emotional distress" which is defined.[109] The DCCA has explained that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one's safety or significant emotional distress.[110] Accordingly, the revised stalking statute eliminates a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or frightened" because such results are adequately captured in the statute by other terminology.[111] This change improves the clarity of District statutes.

Second, the revised statute does not specially codify a statement of legislative intent for the stalking offense. Current D.C. Code § 22-3131 codifies a lengthy statement of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences." [112] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent.[113] Instead, the DCCA routinely uses the Council's legislative documents (e.g., Committee reports) to determine legislative intent. The revised stalking statute relies upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

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[108] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

[109] Under D.C. Code § 22-3132(4), "emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

[110] *Coleman v. United States*, 202 A.3d 1127, 1139 (D.C. 2019),.

[111] *See* Merriam-Webster.com, *"alarmed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/alarmed (defining alarmed as feeling a sense of danger : urgently worried, concerned, or frightened); Merriam-Webster.com, *"disturbed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/disturbed (defining disturbed as showing symptoms of emotional illness); Merriam-Webster.com, *"frightened"*, 2018, *available at* https://www.merriam-webster.com/dictionary/frightened (defining frightened as feeling fear : made to feel afraid).

[112] The statement of legislative intent appears to be based on model language recommended by the National Center for Victims of Crime. *See Revised Model Code*, at page 24.

[113] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

Third, the revised statute applies standardized definitions for the "purposefully" and "with intent" culpable mental states required for stalking liability. The current stalking statute requires that the accused "purposefully engages in a course of conduct," and provides alternative culpable mental state requirements of acting "with the intent" or "[t]hat the person knows" would cause an individual a specified harm. However, the terms "purposely," "with the intent," and "knows," are not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "purposefully" and "with intent"[114] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[115] These changes clarify and improve the consistency of District statutes.

Fourth, the definition of "safety" in the revised offense clarifies, but does not change, District law. The current statute uses the phrase "fear for safety" but does not define it. In *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019), the District of Columbia Court of Appeals explained, "'Fear for safety' means fear of significant injury or a comparable harm...seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community." This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

[114] RCC § 22E-206. Note that the RCC definition of "with intent" requires that a person "believes that conduct is practically certain to cause the result," which is the same standard as for "knowing." Also, proof that a person acts purposely, consciously desiring to cause the result, will meet the culpable mental state requirement that a person act "with intent" per RCC § 22E-206(e)(3). Consequently, the revised stalking statute's use of "with intent" appears to match the requirements of both "with the intent" and "knows" in current D.C. Code § 22-3133(a)(1) and (a)(2).

[115] RCC § 22E-207(a).

RCC § 22E-1802. Electronic Stalking.

Explanatory Note. *This section establishes the electronic stalking offense and penalty for the Revised Criminal Code (RCC). The offense prohibits patterns of behavior that significantly intrude on a person's privacy or autonomy and threaten a long-lasting impact on a person's quality of life. Together with the revised stalking offense,[1] the offense replaces the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.*

Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. As applied here, "purposely," a term defined in RCC § 22E-206, requires a conscious desire to engage in a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[2] and must consist of one or both of the activities listed in subparagraphs (a)(1)(A) and (a)(1)(B). The behavior must be directed at a specific person, not merely surveilling the general public.

Subparagraph (a)(1)(A) provides that one means of committing electronic stalking is creating an original image or audio recording of a specific individual.[3] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The image may be created remotely.[4] Unlike the defined term "sound recording,"[5] the phrase "audio recording" does not require fixation onto a material object, and may include an electronic file. Per the rules of interpretation in RCC § 22E-207, the "purposely" culpable mental state also applies to this element of the offense. That is, the accused must consciously desire to create an image or audio recording.

Subparagraph (a)(1)(B) provides that another means of committing electronic stalking is to access equipment or software that is designed to trace a complainant's movements from one location to another.[6] The term "monitoring equipment or software" is defined in RCC § 22E-701 and means equipment or software with location tracking capability, including global positioning system and radio frequency identification technology. The equipment or software must be installed on property that is "property of another," which is a defined term in RCC § 22E-701.[7] Per the rules of interpretation in

[1] RCC § 22E-1801. [Previously numbered RCC § 22E-1206.]

[2] It is the purpose, not the conduct, that must be uninterrupted. The common purpose does not have to be nefarious. For example, a person might persistently monitor someone with the goal of ensuring the they are not engaging in risking or dangerous behavior.

[3] The offense excludes creating a derivative image (e.g., taking a photograph of a photograph, capturing a screenshot) or hacking into a trove of pre-existing images. A person who takes a derivative image without permission may commit unauthorized use of property, in violation of RCC § 22E-2102. A person who commits a computer hacking crime may be subject to punishment under 18 U.S.C. § 1030. The word "derivative" has its common meaning: "having parts that originate from another source." Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[4] For example, by using of a fixed camera, aerial drone, or a third person.

[5] RCC § 22E-701.

[6] A parent who overtly or covertly traces their child's movements may be able to avail herself of the parental defense in RCC § 22E-408(a)(1).

[7] Property of another may include a motor vehicle, bicycle, clothing, or accessory.

RCC § 22E-207, the "purposely" culpable mental state also applies to this element. That is, the accused must consciously desire to electronically track the complainant's location.

Paragraph (a)(2) specifies that the person must be negligent as to the fact that the course of conduct is without effective consent. The term "negligent" is defined in RCC § 22E-206 and here requires that the actor should be aware of a substantial risk that the contact[8] is without the complainant's effective consent[9] and that the actor's failure to perceive the risk is a gross deviation from the ordinary standard of care.[10] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701.

Paragraph (a)(3) requires that the conduct described in paragraph (a)(1) be committed with either the intent or the effect of causing the victim to experience fear or distress. Under (a)(3)(A), a person commits electronic stalking when they act "with intent to" cause someone fear or significant emotional distress. "Intent" is a defined term in RCC § 22E-206 that, applied here, means the actor was practically certain that his or her conduct would cause someone fear or significant emotional distress. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such fear or significant distress occurred, just that the defendant believed to a practical certainty that such fear or significant emotional distress would result.[11] Under (a)(3)(B), a person commits electronic stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[12] "Negligently" is a defined term in RCC § 22E-206 that, applied here, means the actor should be aware of a substantial risk that the pattern of conduct will frighten or significantly distress that particular individual[13] and the actor's

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[8] It is the contact and not the content that must be without effective consent. Compare, for example, a complainant who notifies the defendant to cease all communication (e.g., "Do not call me again.") with a complainant who asks the defendant to cease certain *offensive* communication (e.g., "Do not call me 'a jerk' again.").

[9] Consider, for example, a person who is told by a love interest's parent, "Never contact my daughter again." If the person reasonable believes that this is the command only of the parent and not the love interest, disobeying the command will not amount to stalking.

[10] For example, a complainant may convey their desire to not be contacted either directly, by telling the person to stop, or indirectly through an attorney, government entity, or a third party. In some instances, blocking electronic communications may also suffice to notify to the accused that further communication is unwelcome. On some communication platforms, electronic blocking is obvious to the person who has been blocked. On other platforms, the user's profile may appear to vanish. On others, the blocking (or muting) is not made apparent to the person who was blocked at all.

[11] Consider, for example, Person A livestreams video footage of Person B singing in her car, in the hopes of causing profound humiliation and emotional distress. Person B is surprised but overall enjoys the attention and praise she receives from the online audience. Person A, nevertheless, may have committed an electronic stalking offense against Person B.

[12] Consider, for example, Person A surreptitiously places a tracking device in Person B's shoe, hoping Person B will not notice, but Person B does notice and becomes afraid. Person A has attempted electronic stalking, if Person B's fear was objectively reasonable.

[13] For example, if the actor reasonably but mistakenly believes that the victim of the electronic stalking conduct will be unbothered by the pattern of conduct, the actor has not acted negligently. RCC § 22E-206. The fact that another reasonable person might find the same consequence alarming is inconsequential.

failure to perceive the risk is a gross deviation from the ordinary standard of care. Sub-subparagraphs (a)(3)(A)(i) and (a)(3)(B)(i) specify fear of physical harm or confinement to any person[14] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is defined in subsection (f) and refers to ongoing security from significant intrusions on one's bodily integrity or bodily movement. Sub-subparagraphs (a)(3)(A)(ii) and (a)(3)(B)(ii) also provide that "significant emotional distress" is a second type of emotional injury that may establish electronic stalking liability. "Significant emotional distress" is a defined term that means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. The suffering must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living.[15]

Subsection (b) clarifies that not all patterns of behavior that have the intent or effect of causing significant emotional distress are subject to prosecution.

Paragraph (b)(1) specifies that a person does not commit an electronic stalking offense if they are acting with the permission of one of the people depicted in an audio recording.[16] Paragraph (b)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element, here the elements in subparagraphs (b)(1)(A) and (b)(1)(B).

Paragraph (b)(2) specifically excludes from electronic stalking liability persons who are engaged in activities that are vital to a free press and to the fair administration of justice. Paragraph (b)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the requirements in paragraph (b)(2) and subparagraphs (b)(2)(A) and (b)(2)(B). A journalist, law enforcement officer, professional investigator (licensed or unlicensed), attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of their professional duties or court obligations does not commit an electronic stalking offense.[17]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion.[18]

Subsection (d) provides the penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

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[14] This includes fear that the stalker will physically harm the victim, a member of the victim's family, or a stranger.

[15] RCC § 22E-701; *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019).

[16] For example, a person does not commit the offense by recording his or her own phone call. A conference calling company does not commit the offense by recording a call at the direction of the moderator. And, a security company does not commit the offense by hosting surveillance footage on its website at the request of the property owner.

[17] The revised statute anticipates that some legal pleadings, correspondence and negotiations will cause significant emotional distress. Determining whether conduct exceeds the scope of a person's duties as an attorney or unrepresented litigant is a fact-sensitive inquiry.

[18] *See also Whylie v. United States*, 98 A.3d 156, 158 (D.C. 2014) (finding that all 1400 phone calls that occurred before entry of a restraining order constituted one course of conduct, while all 800 phone calls that occurred after the entry of the restraining order constituted another).

Paragraph (d)(2) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven beyond a reasonable doubt,[19] the penalty classification is increased by one class. Per the rules of interpretation in RCC § 22E-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether the enhancement applies.

Subparagraph (d)(2)(A) authorizes an enhancement if the defendant violated a court order or condition of release prohibiting or restricting contact with the complainant by committing the electronic stalking offense. The accused is strictly liable with respect to whether a court order or condition of release prohibited or restricted contact with the complainant. A good faith belief that the order was expired or vacated is not a defense. The term "court order" includes any judicial directive, oral or written, that restricts contact with the stalking victim.[20] A condition of release may be imposed by a court or by the United States Parole Commission.[21]

Subparagraph (e)(2)(B) authorizes an enhancement for any person who has a prior stalking or electronic stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of stalking or electronic stalking under RCC § 22E-1801 and 1802.[22]

Subparagraph (d)(2)(C) authorizes an enhancement for electronic stalking conduct that results in expenses amounting to more than $5,000. "Financial injury" is a defined term that includes all reasonable monetary costs, debts, or obligations that were sustained as a result of the electronic stalking.[23] This provision does not affect the sentencing court's discretion with respect to ordering restitution. The government's decision to not seek a penalty enhancement does not preclude the government from seeking reimbursement under the restitution statute.[24]

Subparagraph (d)(2)(D) authorizes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor is strictly liable as to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years. Second, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18

[19] RCC § 22E-605 requires that an enhancement be charged and proven beyond a reasonable doubt.
[20] Examples include stay away orders, civil protection orders, family court orders, civil injunctions, and consent decrees. The order must clearly address prohibitions on contact with the specified person. An order to stay away from a particular location, without reference to the specific individual will not suffice.
[21] Regarding the legal authority to impose such conditions, see *Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014).
[22] The term "comparable offense" is defined in RCC § 22E-701.
[23] RCC § 22E-701.
[24] *See* D.C. Code § 16-711.

years of age and the person's disregard of the risk is a gross deviation from the ordinary standard of conduct.[25]

Paragraph (d)(3) disallows stacking a repeat offender penalty enhancement[26] on top of a penalty enhancement for a prior stalking conviction.

Paragraph (e)(1) cross-references applicable definitions in the RCC.

Paragraph (e)(2) defines "safety" to mean ongoing security from significant intrusions on one's bodily integrity or bodily movement.[27]

Relation to Current District Law. *The revised electronic stalking statute clearly changes current District law in five main ways.*

First, the revised code separately punishes electronic stalking as a stand-alone offense. Current D.C. Code § 22-3132 defines a course of stalking conduct to include acts that "monitor" and "place under surveillance."[28] However, these terms are not defined and the DCCA has not interpreted their meaning.[29] In contrast, the revised code distinguishes between "physically monitoring"[30] in violation of the revised stalking statute[31] and electronically stalking in violation of RCC § 22E-1802. Different exclusions from liability and penalties apply to each offense.[32] This change improves the clarity and proportionality of the revised offenses and eliminates unnecessary gaps and overlap in District law.

Second, the revised stalking and electronic stalking statutes provide as a possible basis of liability that a person negligently causes the targeted person to fear for his or her safety or that of another person, or to suffer significant emotional distress. Current D.C. Code § 22-3133(a) provides as one possible basis of liability that there be a course of conduct that "the person should have known *would cause* a reasonable person in the individual's circumstances" to experience fear for safety or emotional distress (emphasis added).[33] The DCCA has held that this element of stalking is satisfied where the

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[25] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary.

[26] RCC § 22E-606.

[27] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019) (explaining, "'Fear for safety' means fear of significant injury or a comparable harm…seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community.").

[28] D.C. Code § 22-3132(8)(a).

[29] At least one other state has interpreted monitoring to include a wide variety of relatively nonintrusive conduct, including "keeping track of" an individual's online activity. *See People v. Gauger*, 2-15-0488, 2018 WL 3135087, at *3 (Ill. App. Ct. June 27, 2018) (affirming a stalking conviction where a defendant impersonated the victim's friends on Facebook and downloaded photographs of her family).

[30] RCC § 22E-701 defines "physically monitoring" to mean being in the immediate vicinity of the person's residence, workplace, or school, with intent to detect the person's whereabouts or activities.

[31] RCC § 22E-1801. [Previously numbered RCC § 22E-1206.]

[32] *Compare* RCC §§ 22E-1801(b)(2) *with* 1802(b)(2). *Compare* RCC §§ 22E-1801(e)(1) *with* 1802(e)(1).

[33] In *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017), the Supreme Court of Illinois held that identical language violates due process. The court explained:

> [T]he proscription against "communicat[ions] to or about" a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient…Therefore, it is

defendant's conduct is "objectively frightening and alarming."[34] In contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) they should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the complainant* and the actor's failure to perceive the risk is a gross deviation from the ordinary standard of care, and (2) the complainant did experience significant emotional distress.[35] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[36] even though it is highly unusual to provide criminal liability for merely negligent conduct.[37] The broad scope of the offense due to the lack of any requirement of subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[38] Requiring actual harm may also better reflect the Council's prior stated intent that stalking liability be focused on harms to targeted individuals rather than

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> clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications. *See Reed*, 576 U.S. at ——, 135 S.Ct. at 2227; *see also Matal v. Tam*, 582 U.S. ——, ——, 137 S.Ct. 1744, 1764–65, 198 L.Ed.2d 366 (2017) (plurality opinion) (holding that the 'disparagement clause,' which prohibits federal registration of a trademark based on its offensive content, violates the first amendment).

See also People v. Morocho, 1-15-3232, 2019 WL 2438619 (Ill. App. Ct. June 10, 2019); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[34] *Atkinson v. United States*, 121 A.3d 780, 786-87 (D.C. 2015); *see also Beachum v. United States*, 189 A.3d 715 (D.C. 2018) (affirming a conviction for negligently causing emotional distress where the defendant's conduct scared the complainant).

[35] In *State v. Ryan*, 969 So. 2d 1268, 1271 (La. Ct. App. 2007), a Louisiana court reversed a stalking conviction that was based on the defendant driving back and forth in front of the Wrights' house several times over the course of a day to collect firewood from a tree trimming crew, causing Mrs. Wright emotional distress. The trial court had found, "There's no prior contact whatsoever between these people; nobody knew one another here," but concluded, "[A]s I've stated before, the suspicious conduct in a neighborhood causes a certain amount of—degree of emotional distress especially with the womenfolk."

[36] RCC § 22E-206.

[37] *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples,* 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich,* 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries,* 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States,* 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[38] *See Republic of Sudan, Ministry of External Affairs, et al. v. James Owens, et al.*, No. 17-SP-837, 2018 D.C. App. (Sep. 20, 2018) (noting civil liability for negligent infliction of emotional distress requires some limiting principles to avoid "virtually infinite liability"); *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990) (en banc).

communications and behaviors that are inappropriate but do not actually cause distress.[39] This change improves the clarity, consistency, and proportionality of District statutes and may ensure constitutionality.

Third, the revised statutes do not specifically authorize multiple convictions for stalking and identity theft based on the same facts. Current D.C. Code § 22-3134(d) provides that, "A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct." Although there is no case law on point, this language appears to categorically authorize multiple convictions for identity theft and stalking (or conduct constituting electronic stalking) based on the same act or course of conduct. In contrast, the revised stalking and electronic stalking statutes do not contain such a concurrent sentencing provision. There is no apparent reason for specially treating identity theft in this manner, and there may be situations where convictions for identity theft, stalking, and electronic stalking based on the same acts or course of conduct should merge.[40] The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft and stalking arising from the same act or course of conduct.[41] This change improves the proportionality of penalties and the consistency of the code.

Fourth, the revised statute provides a distinct penalty enhancement for having one prior stalking or electronic stalking conviction that increases the penalty by one class. The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[42] and a third offense.[43] The revised statute retains a repeat offender enhancement in the statute for when a person has one prior but eliminates the additional third-strike enhancement. Instead, the RCC's general repeat offender penalty enhancement may apply when a defendant has two or more prior convictions for a

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[39] D.C. Code § 22-3131 explains that the current stalking statute aims to protect victims of stalking from grief and violence, as opposed to protecting the public from conduct that is generally alarming or distressing.

> (a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm…(b)…The Council recognizes that stalking includes a pattern of following or monitoring *the victim*, or committing violent or intimidating acts *against the victim*, regardless of the means.

(Emphasis added.) Notably, behavior that alarms the general public may be separately punished as disorderly conduct in D.C. Code § 22-1321 and corresponding RCC § 22E-4201.

[40] RCC § 22E-2205 (Identity Theft) prohibits possessing personal identifying information without effective consent. Personal identifying information, such as a credit card number, may be obtained by physically or electronically monitoring someone.

[41] *See* RCC § 22E-212. A stalking offense may reasonably account for the predicate offenses in some cases and not in others.

[42] D.C. Code § 22-3134(b)(2) increases the maximum penalty 5 times, from 12 months to 5 years when a person has one prior conviction within the last 10 years.

[43] D.C. Code § 22-3134(c) increases the maximum penalty 10 times, from 12 months to 10 years when a person has two prior convictions within the last 10 years, one or more of the convictions must have been jury-demandable.

comparable offense.[44] This change improves the consistency and proportionality of District statutes.

Fifth, the revised offense includes a one-party consent exclusion that is largely consistent with the District's wiretapping law. The current stalking statutes in D.C. Code §§ 22-3131 – 3135 do not carve out an exclusion from liability for a person who records their own communications with others. Although the District is a one-party consent jurisdiction,[45] self-recording may be punished as stalking if the actor knows it would reasonably cause the other party to suffer emotional distress.[46] In contrast, the revised electronic monitoring statute excepts conduct where there was one-party consent. This change corrects a misalignment of the stalking and wiretapping laws, a misalignment that is often overlooked or misunderstood by the general public.[47] The revised statute improves the clarity, consistency, and proportionality of the revised code.

Beyond these five changes to current District law, six other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute more precisely specifies the nature of the social harm in electronic stalking to be a course of conduct that causes "ongoing" safety concerns or emotional distress. The current stalking statute requires proof that the defendant engaged in a "course of conduct," a defined term that refers to conduct "on 2 or more occasions" but is silent as to whether or how the conduct on these occasions is related.[48] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[49] is silent on whether such distress is of an ongoing nature. The DCCA has explained only that each term requires a severe degree of intrusion.[50] To resolve these ambiguities, the revised statute defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[51] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[52] the revised statutes' definition refers to both the degree and the duration of the harm. This change improves the clarity of the revised statutes.

Second, the revised definition of "financial injury" more consistently and precisely defines the types of expenses that will trigger a penalty enhancement. Current D.C. Code § 22-3132(5) includes all expenses incurred by the complainant, member of the complainant's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the complainant. It is unclear, however,

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[44] RCC § 22E-606.

[45] *See* D.C. Code § 23-542(b)(2); *see also, e.g.,* Jena McGregor, *Can you record your boss at work without him or her knowing?*, WASHINGTON POST (August 14, 2018) (concerning Omarosa Manigualt Newman's recordings of President Trump in the White House).

[46] *See* D.C. Code § 3133(a)(2)(C).

[47] *See, e.g.,* Benjamin Freed, *Under DC Law, Ryan Lizza Didn't Need to Ask Scaramucci's Permission to Record Phone Call*, THE WASHINGTONIAN (August 10, 2017).

[48] D.C. Code § 22-3132(8).

[49] D.C. Code § 22-3132(4).

[50] *See Coleman v. United States*, 202 A.3d 1127, 1139 (D.C. 2019).

[51] RCC §§ 22E-1801(d)(8) and (9).

[52] Merriam-Webster.com, *"stalking"*, 2018, *available at* https://www.merriam-webster.com/dictionary/stalking (defining stalking as 1 : to pursue by stalking; 2 : to go through (an area) in search of prey or quarry stalk the woods for deer; 3 : to pursue obsessively and to the point of harassment).

whether there are any reasonableness limitations under the current statute to what may be considered financial injury.[53] To resolve this ambiguity, the revised definition includes expenses incurred by any natural person,[54] but requires that the expenses be reasonably incurred by the criminal conduct. Additionally, the revised definition includes more examples in the non-exhaustive list of costs, such as the cost of clearing a debt and "lost compensation," which includes employment benefits and other earnings. These changes clarify and improve the consistency of District statutes.

Third, the revised penalty enhancement requires $5,000 in financial injury. Current D.C. Code § 22-3134(b)(4) specifies that the maximum term of imprisonment for a stalking offense may be increased from one year to five years, if the person "caused more than $2,500 in financial injury." The revised code resets the dollar value thresholds for property offenses to include $500, $5,000, $50,000, and $500,000.[55] To improve the consistency of the revised stalking and electronic stalking offenses, the threshold for financial injury has been doubled from $2,500 to $5,000.

Fourth, the revised stalking and electronic stalking statutes exclude liability for conduct that is reasonably within the scope of a person's journalistic, law enforcement, legal, or other specified duties. Current D.C. Code § 22-3133(b) contains a general statement that the offense "does not apply to constitutionally protected activity," but otherwise is silent as to whether other activities are excluded. The DCCA has not addressed whether a person's bona fide action pursuant to their occupational duties is excepted from stalking liability.[56] To resolve these ambiguities as to the constitutional scope of the offense, the revised statutes specifically exclude from stalking and electronic stalking liability activities that, despite being distressing, are generally recognized as legitimate occupational activities. Even if the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[57] Without a clear exclusion, such legitimate activities may constitute stalking or electronic stalking.[58] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offenses.

Fifth, the revised statute limits jurisdiction for stalking and electronic stalking only to instances where some aspect of the crime occurs in the District. Current D.C.

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[53] E.g., it is unclear whether the purchase of a new house or hiring a bodyguard would be included under the current statute, insofar as it may be "incurred as a result of the stalking" but not be objectively reasonable.

[54] Expenses incurred by the court system or another entity are excluded from the calculation of financial injury.

[55] *See, e.g.,* RCC §§ 22E-2101 (Theft), 22E-2301 (Extortion), 22E-2401 (Possession of Stolen Property).

[56] Notably, in *White v. Muller*, 2017 D.C. Super. LEXIS 1, the court's analysis did not focus on the fact that Muller had duties as a member of the press so much as the status of White as a Councilmember.

[57] Many of the professional activities excepted in the RCC stalking statute, e.g., a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

[58] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a photojournalist may approach and photograph a defendant or victim leaving a courthouse, knowingly exacerbating their distress. Similarly, a business owner monitoring an employee's compliance with worker safety laws may knowingly cause the person some degree of emotional unrest.

Code § 22-3135(b) states that jurisdiction extends to communications if "the specific individual lives in the District of Columbia" and "it *can be* electronically accessed in the District of Columbia" (emphasis added). The DCCA has not interpreted the meaning of this phrase. The revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the complainant is a District resident.[59] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited by courts to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[60] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[61] and such an extension, if intended, may be unconstitutional.[62] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Sixth, the revised statute requires the actor engage in a course of conduct negligent as to the fact that it is without the complainant's effective consent. The current D.C. Code does not codify any general defenses and the DCCA has not decided whether an effective consent defense applies to the District's stalking statutes. In contrast, the RCC specifies that a person does not commit a stalking offense when non-criminal conduct was invited, welcome, or consensual. This change clarifies and may improve the proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute separately criminalizes only conduct that intends or causes another to experience fear or emotional distress. Current D.C. Code § 22-3133(a) specifically refers to conduct that would cause another person to "feel seriously alarmed, disturbed, or frightened" without defining these terms. Current D.C. Code §22-3133(a) also refers to fear for "safety," undefined, and "emotional distress," which is defined.[63] The DCCA has explained that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one's safety or significant emotional distress.[64] Accordingly, the revised stalking and electronic stalking statutes eliminate a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or frightened" because such results are adequately captured in the statute by other terminology.[65] This change improves the clarity of District statutes.

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[59] For example, Person A resides in Toronto and sends Person B a threatening text message each time she visits the Canada from her home in Washington, DC. Current law may be understood to mean that A has committed a stalking offense in the District, simply because the messages *can be* accessed here.

[60] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

[61] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[62] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

[63] Under D.C. Code § 22-3132(4), "emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

[64] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).

[65] *See* Merriam-Webster.com, *"alarmed,"* 2018, *available at* https://www.merriam-webster.com/dictionary/alarmed (defining alarmed as feeling a sense of danger : urgently worried, concerned, or frightened); Merriam-Webster.com, *"disturbed,"* 2018, *available at* https://www.merriam-webster.com/dictionary/disturbed (defining disturbed as showing symptoms of emotional illness);

Second, the revised statutes do not specially codify a statement of legislative intent for the stalking and electronic stalking offenses. Current D.C. Code § 22-3131 codifies a lengthy statement of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences."[66] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent.[67] Instead, the DCCA routinely uses the Council's legislative documents (e.g., Committee reports) to determine legislative intent. The revised stalking and electronic stalking statutes rely upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

Third, the revised statutes apply standardized definitions for the "purposely" and "with intent" culpable mental states required for stalking and electronic stalking liability. The current stalking statute requires that the accused "purposely engages in a course of conduct," and provides alternative culpable mental state requirements of acting "with the intent" or "[t]hat the person knows" would cause an individual a specified harm. However, the terms "purposely," "with the intent," and "knows," are not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "purposefully" and "with intent"[68] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[69] These changes clarify and improve the consistency of District statutes.

Fourth, the definition of "safety" in the revised offense clarifies, but does not change, District law. The current statute uses the phrase "fear for safety" but does not define it. In *Coleman v. United States*,[70] the District of Columbia Court of Appeals explained, "'Fear for safety' means fear of significant injury or a comparable harm...seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community." This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

Merriam-Webster.com, *"frightened,"* 2018, *available at* https://www.merriam-webster.com/dictionary/frightened (defining frightened as feeling fear : made to feel afraid).

[66] The statement of legislative intent appears to be based on model language recommended by the National Center for Victims of Crime. *See Revised Model Code*, at page 24.

[67] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

[68] RCC § 22E-206. Note that the RCC definition of "with intent" requires that a person "believes that conduct is practically certain to cause the result," which is the same standard as for "knowing." Also, proof that a person acts purposely, consciously desiring to cause the result, will meet the culpable mental state requirement that a person act "with intent" per RCC § 22E-206(e)(3). Consequently, the revised stalking statute's use of "with intent" appears to match the requirements of both "with the intent" and "knows" in current D.C. Code § 22-3133(a)(1) and (a)(2).

[69] RCC § 22E-207(a).

[70] 202 A.3d 1127 (D.C. 2019).

RCC § 22E-1803. Voyeurism.

Explanatory Note. *This section establishes the voyeurism offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits observing or recording a person who is privately undressing or engaging in sexual conduct without permission.*[1] *The offense replaces the current misdemeanor voyeurism offense in D.C. Code § 22-3531.*[2]

Subsection (a) specifies the requirements of first degree voyeurism, which requires creating a recording of private behavior without permission.

Paragraph (a)(1) specifies that the person must act at least knowingly.[3] Subparagraphs (a)(1)(A) and (a)(1)(C) prohibit capturing visual images, whereas subparagraph (a)(1)(B) prohibits capturing visual images or audio recording. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The image may be created remotely.[4] Unlike the defined term "sound recording,"[5] the phrase "audio recording" does not require fixation onto a material object and may include an electronic file. The image or audio recording must be creating an original depiction of a specific individual.[6]

Subparagraph (a)(1)(A) prohibits capturing images of a someone's exposed private areas[7] or a person in their underwear.[8] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image of one the itemized areas.

Subparagraph (a)(1)(B) prohibits capturing images or audio recordings of a person while they are engaging in a sexual act or masturbation. The term "sexual act" is defined in RCC § 22E-701. Unlike the electronic stalking offense,[9] it is not a defense that one party consented to the recording. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image or audio recording of one the itemized activities.

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[1] *See Valenzuela-Castillo v. United States*, 180 A.3d 74, 76-77 (D.C. 2018) (explaining that the voyeurism statute's legislative aim is to "prohibit persons from spying on their neighbors, guests, tenants, or others in places and under circumstances where there is an expectation of privacy, that is, in a home, bedroom, bathroom, changing room, and similar locations and under one's clothing.")

[2] The felony voyeurism offense in D.C. Code § 22-3531(f)(2) is replaced by RCC § 22E-1804, Unauthorized Disclosure of a Sexual Recording.

[3] "Knowingly" is defined in RCC § 22E-206.

[4] For example, by using of a fixed camera, aerial drone, or a third person.

[5] RCC § 22E-701.

[6] The offense excludes creating a derivative image (e.g., taking a photograph of a photograph, capturing a screenshot) or hacking into a trove of pre-existing images. A person who takes a derivative image without permission may commit unauthorized use of property, in violation of RCC § 22E-2102. A person who commits a computer hacking crime may be subject to punishment under 18 U.S.C. § 1030. The word "derivative" has its common meaning: "having parts that originate from another source." Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[7] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[8] The words "nude" and "undergarment-clad" modify each word in the list that follows. Consider, for example, a person who angles a camera to photograph underneath a woman's dress or skirt.

[9] RCC § 22E-1802.

Subparagraph (a)(1)(C) prohibits capturing images of someone while they are urinating or defecating. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image of urination or defecation.

Paragraph (a)(2) requires that the person act without the complainant's effective consent to being recorded. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to being recorded.[10]

Paragraph (a)(3) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the complainant's circumstances would reasonably expect that such a recording would not occur. A person does not commit an offense where it is objectively unreasonable to expect privacy under the circumstances.[11] Whether a person's expectation of privacy is reasonable depends on all of the surrounding circumstances,[12] including the time, place,[13] the complainant's manner of dress,[14] the complainant's body position,[15] and efforts to communicate that privacy is expected.[16] A person may know that they will be observed and nevertheless reasonably expect to not be recorded.[17]

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[10] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit second degree voyeurism by photographing the exhibition unless it is proven that the person is practically certain that the couple does not want to be recorded.

[11] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit second degree voyeurism by photographing the exhibition unless it is proven that the couple has a reasonable expectation of privacy.

[12] This language is meaningfully distinct from the phrasing "while the person is *in a place* where he or she would have a reasonable expectation of privacy," that appears in other state statutes. *See State v. Glas* (2002) 147 Wash.2d 410, 54 P.3d 147 (holding that the voyeurism statute, as written, does not cover intrusions of privacy in public places and, thus, does not prohibit "upskirt" photography).

[13] *See, e.g., State v. Frost*, 634 N.E.2d 272 (Ohio Ct. App. 1994) (holding a defendant was not guilty of voyeurism by acts of observing bikini-clad women on public beach with binoculars from his vehicle, while engaging in masturbation).

[14] For example, a person who exposes their undergarment-clad buttocks by sagging their pants in a public place does not have a reasonable expectation that their buttocks will not be photographed.

[15] The more public the place and the more likely it is that people will take photographs there, the more conscientious and personally responsible one must be about what they do and do not expose. For example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial knowing many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be photographed. *Compare,* Justin Jouvenal and Miles Parks, *Voyeur charges dropped against photographer at Lincoln Memorial*, WASHINGTON POST (October 9, 2014) *with* Perry Stein, *Man charged with voyeurism after allegedly filming under a girl's dress at Whole Foods*, WASHINGTON POST (October 1, 2019).

[16] For example, a person may post a "Do Not Disturb" sign on a hotel room door or call out "Occupied!" when a bathroom door will not lock, or put a sock on their doorknob to tell their roommate to come back later.

[17] For example, a person may not expect that a sexual partner will observe their body but not record it. *See also* Derek Hawkins, *Former Playmate sentenced for Snapchat body-shaming of naked woman at gym*, WASHINGTON POST (May 25, 2017).

Subsection (b) specifies the requirements of second degree voyeurism, which requires directly observing[18] private behavior without permission. The word "directly" includes observations made with the aid of a device such as binoculars, a telescope, or any nonrecording electronic device to enhance their ability to see. It does not include viewing an image that another person recorded.

Paragraph (b)(1) specifies that the person must act at least knowingly. "Knowingly" is a defined term[19] and applied here means that the person must be practically certain that they are looking at the complainant engaging in the specified private behavior. Paragraph (b)(1) prohibits observing a person's exposed private areas[20] or a person in their underwear.[21] It also prohibits observing a person while they are engaging in a sexual act or masturbation or while they are urinating or defecating. The term "sexual act" is defined in RCC § 22E-701.

Paragraph (b)(2) requires that the person act without the complainant's effective consent to being observed. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to being viewed.

Paragraph (b)(3) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the complainant's circumstances would reasonably expect that such an observation would not occur. A person does not commit an offense where it is objectively reasonable to expect privacy under the circumstances.[22] Whether a person's expectation of privacy is reasonable depends on all of the surrounding circumstances, including the time, place, the complainant's manner of dress,[23] the complainant's body position,[24] and efforts to communicate that privacy is expected.[25]

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[18] The word "observe" includes direct and indirect observations. For example, watching a livestream of a video feed, without recording it, is sufficient.

[19] "Knowingly" is defined in RCC § 22E-206.

[20] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[21] The words "nude" and "undergarment-clad" modify each word in the list that follows. Consider, for example, a person who angles a camera to photograph underneath a woman's dress or skirt.

[22] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit third degree voyeurism by watching the exhibition unless it is proven that the couple has a reasonable expectation of privacy.

[23] For example, a person who exposes their undergarment-clad buttocks by sagging their pants in a public place does not have a reasonable expectation that their buttocks will not be viewed.

[24] For example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial at a time when many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be seen. *Compare,* Justin Jouvenal and Miles Parks, *Voyeur charges dropped against photographer at Lincoln Memorial*, WASHINGTON POST (October 9, 2014) *with* Perry Stein, *Man charged with voyeurism after allegedly filming under a girl's dress at Whole Foods*, WASHINGTON POST (October 1, 2019).

[25] For example, a person may post a "Do Not Disturb" sign on a hotel room door or call out "Occupied!" when a bathroom door will not lock, or put a sock on their doorknob to tell their roommate to come back later.

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (c)(3) specifies that the penalty classification may be increased by one penalty class if it is proven beyond a reasonable doubt[26] that the defendant was reckless as to the fact that the complainant was a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and the person's disregard of the risk is a gross deviation from the ordinary standard of conduct.[27]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised voyeurism offense clearly changes current District law in eight main ways.*

First, the revised voyeurism offense punishes observing a person's nude or undergarment-clad private area without their permission. Current D.C. Code § 22-3531(d) makes it unlawful to electronically record a person's private area without express and informed consent, under circumstances in which that person has a reasonable expectation of privacy. However, the statute does not provide any liability for merely observing a private area, without recording, unless the victim is also using the bathroom, undressing, or engaging in sexual activity. Accordingly, a person who strategically positions himself or angles a mirror to look up the skirts of passersby does not commit an offense. In contrast, the revised statute criminalizes all upskirting behavior that violates a reasonable expectation of privacy, even if the accused does not produce a recorded image. This change may eliminate an unnecessary gap in law.[28]

Second, the revised statute does not require that an observation be covert. Current D.C. Code § 22-3531(b) requires that the accused act with "the purpose of secretly or surreptitiously observing" the complainant. This requirement may exclude liability for a person who overtly views a complainant by intruding into a bedroom, peering over a bathroom stall,[29] or lifting a dress.[30] In contrast, the revised offense punishes any hostile observation that occurs without the complainant's effective consent, if the victim has a

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[26] RCC § 22E-605.

[27] *See* RCC § 22E-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[28] *But see Valenzuela-Castillo v. United States*, 180 A.3d 74, 85 (D.C. 2018) (J. Easterly, *dissenting*) (reasoning that the legislative history of the voyeurism statute indicates that it was not meant to encompass simple viewing).

[29] The DCCA has held that a person "occupies a hidden observation post" in violation of the statute when he furtively sneaks into a bathroom and looks underneath a stall, even if the victim is then able to see him. *See Valenzuela-Castillo v. United States*, 180 A.3d 74, 75 (D.C. 2018); *but see* Judge Easterly's dissent (reasoning that one does not "occupy" a "hidden" "post" by merely changing their body position in a public space). However, the court has not addressed whether a person who more overtly bursts into a bathroom or bedroom commits the offense.

[30] *See, e.g.,* Dana Hedgpeth, *Fairfax police seek man they say chased woman, tried to take photos by lifting her skirt*, WASHINGTON POST (September 12, 2019). Chasing a woman and lifting her skirt would also be punished as offensive physical contact under RCC § 22E-1205.

reasonable expectation of privacy under the circumstances. This change eliminates an unnecessary gap in law and clarifies the revised offense.

Third, the revised voyeurism and unauthorized disclosure of a sexual recording[31] offenses establish four distinct penalties for attempting, observing, recording, and distributing. Current D.C. Code § 22-3531 includes only two sentencing gradations. Under current law, a person is subject to up to one year in jail if they "occupy a hidden observation post or to install or maintain a peephole, mirror, or any electronic device for the purpose of secretly or surreptitiously observing" the complainant using the bathroom, undressing, or engaging in sexual activity.[32] A person is subject to the same one-year penalty if they electronically record those observations[33] or create a recording of the complainant's private area.[34] And, a person is subject to a maximum penalty of five years in prison if they disseminate or attempt to disseminate any such recording "directly or indirectly, by any means."[35] In contrast, the revised statute punishes creating a recording more severely than observations alone and relies on the general part's common definition of attempt[36] and penalty for an attempt[37] to define and penalize attempts the same as for other revised offenses.[38] Distribution of a recording is punished as unauthorized disclosure of a sexual recording, under RCC § 22E-1804. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised offense includes an enhancement for recklessly committing voyeurism against a child. When the current voyeurism statute was enacted, the Council considered including a penalty enhancement for offenses against any person who is under 18 years of age.[39] At least one advocacy group recommended deferring the decision about enhancements to the Criminal Code Reform Commission.[40] The revised statute includes an enhancement but requires proof that the defendant was reckless as to the fact that the victim was underage.[41] A person who is practically certain that they are

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[31] RCC § 22E-1804.
[32] D.C. Code §§ 22-3531(b) and (f)(1).
[33] D.C. Code §§ 22-3531(c) and (f)(1).
[34] D.C. Code §§ 22-3531(d) and (f)(1).
[35] D.C. Code § 22-3531(f)(2).
[36] RCC § 22E-301(a).
[37] RCC § 22E-301(c)(1).
[38] Under the revised statute, using an observation post, peephole, or mirror is punished only if it amounts to attempted third degree voyeurism and attempting to disseminate a recording is punished as attempted first degree voyeurism. *See, e.g., State v. Million*, 63 Ohio App. 3d 349 (1989) (explaining, although evidence that defendant used hand-held mirror to look underneath stall did not support voyeurism conviction if adjacent stall was unoccupied, it might have supported attempted voyeurism conviction if the following stall was occupied).
[39] *Freundel v. United States*, 146 A.3d 375, 382 (D.C. 2016) (explaining, "[T]wo versions of the statute that were then under consideration…one version provided for different penalties depending on whether the victim was a minor or an adult.").
[40] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 175, testimony of Richard Gilbert on behalf of the District of Columbia Association of Criminal Defense Attorneys ("We believe the decision to punish such a crime more severely if the victim is a minor should be deferred as a subject to be considered by the proposed Reform Commission.").
[41] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 175, testimony of Richard Gilbert on

observing or recording a child inflicts a more egregious social harm than a person who invades the privacy of an adult.[42] Similar enhancements appear in other RCC offenses against persons, such as sexual assault and related provisions in Chapter 13. This change improves the consistency and proportionality of the revised offenses.

Fifth, the revised statute applies the culpable mental state definitions in the RCC's general part. None of the mental states in the current statute are defined in the D.C. Code.[43] In contrast, the revised statute specifies a defined mental state for every conduct, result, and circumstance element of the offense. First, the revised statute requires that the person know—that is, be practically certain—that they are observing, recording, or distributing an image or audio recording of the complainant without the complainant's effective consent. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[44] Second, the revised statute requires that a person who distributes an image or audio recording be at least reckless as to the fact that the image or audio recording was created unlawfully. Courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[45] Third, the revised statute holds an observer or recorder strictly liable with respect to whether the complainant has a reasonable expectation of privacy under the circumstances and holds a distributer strictly liable with respect to whether the conduct that created the image or recording amounts to second degree voyeurism. Although applying strict liability to statutory elements that

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behalf of the District of Columbia Association of Criminal Defense Attorneys ("It is not at all clear to us that such penalty enhancements based upon the age or other characteristic of the victim are [sic.] must necessarily be enshrined in statutes as opposed to factors to be considered at sentencing. However, we join PDS in believing that any such enhancements should be limited to situations in which that characteristic is foreseeable and/or contributes to the commission of the crime.").

[42] Some instances of voyeurism against children—i.e. possession and distribution of images that are sexual in nature—will overlap and merge with the offenses of possession of an obscene image of a minor and trafficking an obscene image of a minor. *See* RCC §§ 22E-214, 22E-1805, and 22E-1806.

[43] Current D.C. Code § 22-3531(b) specifies that a person who occupies a hidden observation post or who installs or maintains a mirror, peephole, or electronic device, must act with the purpose of secretly or surreptitiously observing another person. Current D.C. Code § 22-3531(c) does not specify a culpable mental state for a person who records another person engaging in private behavior. Current D.C. Code § 22-3531(d) specifies that a person who records another person's private area must capture the image intentionally, however, it is unclear whether the person must also intend to violate the subject's reasonable expectation of privacy or express and informed consent. Finally, current D.C. Code § 22-3531(f)(2) specifies that a person is guilty of a felony if they distribute or attempt to distribute a recording that they know or should know was taken in violation subsection (b), (c), or (d).

[44] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[45] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

distinguish innocent from criminal behavior is strongly disfavored by courts[46] and legal experts[47] for any non-regulatory crimes, it may be difficult or impossible in many cases to prove that a distributer knew the elements of second degree voyeurism or that an observer or recorder was practically certain that the victim reasonably expected privacy. This change improves the clarity and consistency of the revised offense.

Sixth, the revised offense narrows the exclusions from liability in four ways. First, D.C. Code § 22-3531(e)(1) excludes liability for "[a]ny lawful law enforcement, correctional, or intelligence observation or surveillance." The revised offense does not include an exclusion for law enforcement officers or investigators and instead relies on the general defense for execution of a public duty.[48] This change improves the consistency and proportionality of the revised offense. Second, D.C. Code § 22-3531(e)(2) excludes liability for "[s]ecurity monitoring in one's own home." This phrasing broadly exempts any person who places covert security cameras in a bathroom or guestroom and records guests engaging in private, sexual activity. In contrast, under the revised statute, offense liability attaches in any location in which the victim's expectation of privacy is reasonable under the circumstances.[49] Third, D.C. Code § 22-3531(e)(3) excludes liability for "[s]ecurity monitoring in any building where there are signs prominently displayed informing persons that the entire premises or designated portions of the premises are under surveillance." In contrast, under the revised statute, signage is one of many factors that the factfinder may consider when determining whether the complainant's expectation of privacy is reasonable under the circumstances. Fourth, D.C. Code § 22-3531(e)(4) excludes liability for "[a]ny electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent." This phrasing broadly exempts any person who records a patient, even if it is done without the doctor's permission and even if the patient expressly objects to the recording before being rendered unable to do so.[50] In contrast, the revised code includes an emergency health professional defense[51] which is available only to doctors and their

[46] *Elonis v. United States*," 135 S. Ct. 2001, 2010 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X-Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[47] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[48] RCC § 22E-402.

[49] For example, using a "nanny cam" to observe a house sitter in one's own kitchen may not amount to voyeurism whereas using that same camera to observe that same house sitter in one's own shower may constitute an offense.

[50] For example, a rogue hospital employee could install a hidden camera in an operating room.

[51] RC § 22E-408(a)(3).

designees during an in which it would be too difficult to obtain consent. These changes eliminate unnecessary gaps in law.

Seventh, the revised code defines the term "effective consent."[52] Current D.C. Code §§ 22-3531(c)(1) and (d) require that the person act without the victim's "express and informed consent." This phrase is not defined by statute and District case law has not interpreted its meaning in the context of the voyeurism statute. The RCC definition of "effective consent" does not require that consent be express or informed, only that it not be induced by physical force, an explicit or implicit coercive threat, or deception.[53] This change improves the proportionality of the revised offense.

Eighth, the revised statute partially clarifies the appropriate unit of prosecution for the voyeurism offense. Although is not obvious from the organization of the D.C. Code whether the voyeurism offense is intended to protect individual victims or to ensure public order,[54] the DCCA has explained that its purpose is to protect the victim of the observation or recording.[55] The RCC classifies voyeurism as an offense against persons, clarifying that the statute permits separate punishments for separate victims[56] and does not permit separate punishments for each copy of an image or for each recipient. Other unit of prosecution issues[57] are not addressed in the statutory language or accompanying commentary but may be addressed in the RCC's general part.[58] This change clarifies and improves the proportionality the revised offense.

Beyond these eight changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, unlike current D.C. Code §§ 22-3531(b)(2) and (c)(1)(B), the revised offense does not separately criminalize observations of a person who is "[t]otally or partially undressed or changing clothes." The word "undressed" and the phrase

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[52] RCC § 22E-701.

[53] "Consent" is also a defined term in RCC § 22E-701.

[54] Current D.C. Code § 22-3531 appears in Subtitle I of Title 22 of the D.C. Code, which is titled simply, "Criminal Offenses." The offense is sandwiched between property offenses such as trespass, repealed public order offenses such as vagrancy, and general provisions such as use of "District of Columbia" by certain persons and the fines for criminal offenses.

[55] *See Freundel v. United States*, 146 A.3d 375, 379 (D.C. 2016) (stating, "The provision by its terms is directed at protecting individual privacy.")

[56] *See Freundel v. United States*, 146 A.3d 375, 384 (D.C. 2016); *see also State v. Mason*, 410 P.3d 1173 (Wash. Ct. App. 2018).

[57] For example, creating a single recording of multiple people together in the nude may constitute a single offense or multiple offenses. *See Freundel v. United States*, 146 A.3d 375, 382-83 (D.C. 2016) ("Because each victim was recorded undressing separately, we need not decide whether multiple punishments would be permissible based on a single recording depicting more than one victim at the same time."). Watching two people engage in a single sex act together may constitute a single offense or multiple offenses. *See, e.g., State v. Diaz-Flores*, 148 Wash. App. 911 (2009). Taking multiple photos of the same person in succession or taking multiple videos of the same conduct from different angles may constitute a single offense or multiple offenses. *See, e.g., State v. Boyd*, 137 Wash. App. 910 (2007) (finding two photographs of the same victim did not establish multiple acts of voyeurism but rather a continuing course of conduct). Recording one person over multiple days may constitute a single offense or multiple offenses. *See, e.g.,* RCC §§ 22E-1801(c) and 1802(c) which provide, "Where conduct is of a continuing nature, each 24-hour period constitutes one occasion."

[58] [Further Commission recommendations are forthcoming.]

"changing clothes" are not defined in the current statute and District case law has not addressed their meaning. Broadly construed, "undressed" may include a person who has removed their clothing but concealed their body using a blanket, robe, or towel. Broadly construed, "changing clothes" may include changing outerwear. The revised statute clarifies that photographing a person who is sleeping under the covers or changing their jacket does not amount to voyeurism.[59] This change improves the clarity of the revised offense.

Second, unlike current D.C. Code §§ 22-3531(b)(2) and (c)(1)(B), the revised offense does not separately criminalize observations of a person who is "using a bathroom or restroom." The phrase—which is commonly used as a euphemism for urinating or defecating—is not defined in the statute and District case law has not addressed its meaning. Broadly construed, the phrase may capture conduct that is not voyeuristic in nature.[60] The revised statute prohibits recording a person who is using the bathroom only if that person's nude or undergarment-clad private areas are exposed or if the person is urinating or defecating. Other private bathroom behaviors that involve sexual conduct, nudity, or the removal of clothing are separately protected under the other subsections of the revised code.

Third, the revised statute defines the term "image" and specifies that the creation of a derivative image does not amount to voyeurism. D.C. Code § 22-3531(d)(1) makes it unlawful to "capture an image" of a person's private area without permission. The term "image" is not defined in the statute and District case law has not addressed its meaning. It is unclear whether "capture an image" has the same meaning as "electronically record" in § 22-3531(c)(1). It is also unclear whether "image" includes both refers to both "visual" and "aural images."[61] It is also unclear whether the term "image" includes a "series of images"[62] or a derivative image (e.g., a photograph of a photograph, a screenshot). To resolve this ambiguity, the revised code defines the term "image" to mean a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. This definition broadens the offense by including images that are captured without an electronic device (such as those captured using a mechanical camera) but narrows the offense by excluding images that are hand-drawn or illustrated on an electronic device (such as a tablet). The definition also clarifies that a film or video constitutes a single image, not a series of images. And, the statutory language specifies that derivative images are not included. This change clarifies the revised offense and improves the consistency of the revised offenses.

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[59] A person who places a recording device in a changing room but only captures people changing clothes without exposing their private areas or underwear may nevertheless commit attempted voyeurism. *See generally* RCC § 22E-301.

[60] E.g., posting a bathroom selfie that shows a stranger in the background applying makeup, filming a hallway that shows people entering and exiting a bathroom, creating an audio recording of a person singing in the shower or talking to herself. *See, e.g.,* Charles V. Bagli and Vivian Yee, *Robert Durst of HBO's 'The Jinx' Says He 'Killed Them All,'* NEW YORK TIMES (March 15, 2015) (discussing documentary filmmakers recording a suspected murderer muttering inculpatory statements to himself in the bathroom).

[61] *See* § 22-3531(a)(1). The revised offense does not criminalize creating an "aural image" of a person's private areas or of a person undressing.

[62] *See* D.C. Code § 22-3531(f)(2).

Fourth, the revised statute defines the type of sexual activity that may not be viewed or recorded without permission. D.C. Code §§ 22-3531(b)(3) and (c)(1)(C) use the term "sexual activity," without defining it. District case law has not addressed its meaning. Broadly construed, the term may include conduct short of penetration, such as kissing or caressing. The revised code defines the term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.[63] And, the revised voyeurism offense prohibits observing or recording a person who is engaging in a sexual act or masturbation. This change improves the clarity and consistency of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised offense is prosecuted by the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code § 22-3531(g) grants prosecutorial authority to the Attorney General for the District of Columbia. However, the DCCA has held that the offense must be prosecuted by USAO under the Home Rule Act.[64]

[63] RCC § 22E-701.

[64] *See In re Perrow*, 172 A.3d 894 (D.C. 2017) (explaining that voyeurism is distinguishable from "Peeping Tom" conduct punished as disorderly conduct, because it requires intent to observe, record, or photograph).

RCC § 22E-1804. Unauthorized Disclosure of a Sexual Recording.

Explanatory Note. *This section establishes the unauthorized disclosure of a sexual recording offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits distributing sexually explicit images of a person without permission. The offense replaces the non-consensual pornography chapter in D.C. Code §§ 22-3051 – 3057 and the felony voyeurism offense in D.C. Code § 22-3531(f)(2).*[1]

Paragraph (a)(1) specifies that a person must act at least knowingly with respect to a distribution or display. "Knowingly" is a defined term[2] and, applied here, means that the person must be practically certain that they are distributing, displaying, or making available online an image or audio recording to a third person who is not the complainant.[3] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[4] The phrase "make accessible on an electronic platform" does not require proof that the material was actually accessed or viewed.[5] The word "user" excludes technical administrators that have access to all files hosted on the website.[6]

Subparagraph (a)(1)(A) prohibits dissemination of images. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format. Per the rules of interpretation in RCC § 22E-207, the actor must know—that is, be practically certain—that what they are distributing or displaying is an image of the complainant's nude genitals or anus; or nude or undergarment-clad[7] pubic area, buttocks, or female breast[8] below the top of the areola.

Subparagraph (a)(1)(B) prohibits dissemination of images or audio recordings. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. Unlike the defined term "sound recording,"[9] the phrase "audio recording" does not require fixation onto a material object and may include an electronic file. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that what they are distributing or displaying is an image or audio recording of the complainant engaging in or submitting to

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[1] The misdemeanor voyeurism offense is replaced by RCC § 22E-1803, Voyeurism.

[2] RCC § 22E-206.

[3] *See Roberts v. United States*, 17-CF-431, 2019 WL 4678119, at *6 (D.C. Sept. 26, 2019) (holding a defendant must have disclosed a sexual image to a third party).

[4] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

[5] For example, a person may commit an offense by publishing the image on their own public website, on a peer-to-peer social networking platform, or on the dark web, even if no one else ever views the page.

[6] For example, a person who uploads an image of the complainant to their own cloud account, without granting access to any other user, does not commit an offense, even though a cloud service administrator or information technology specialist may have access to it.

[7] Although some swimwear, formal wear, or other garments may be more revealing than some underwear, the word "undergarment" does not include such garments.

[8] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[9] RCC § 22E-701.

a sexual act, masturbation, or sadomasochistic abuse.[10] The terms "sexual act" and "sadomasochistic abuse" defined in RCC § 22E-701.

Paragraph (a)(2) requires that the actor engage in conduct without the complainant's effective consent. A person does not commit an offense by distributing an image of herself or by distributing an image with permission from the person who is depicted. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant does not give effective consent to disseminating the image or recording.

Paragraph (a)(3) specifies two alternative requirements for liability.

Subparagraph (a)(3)(A) imposes liability where an actor and the complainant reached an explicit or implicit agreement that the image or audio recording would not be shared.[11] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that such an agreement applied at the time of the distribution or display. Subparagraph (a)(3)(A) requires an intent to alarm[12] or to sexually abuse, humiliate, harass, or degrade the complainant,[13] or an intent to receive financial gain as a result of the distribution or display. "Intent" is a defined term in RCC § 22E-206 that, applied here, means the actor was practically certain that his or her conduct would cause one of the specified harms to the complainant or result in a financial benefit. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such harm or financial benefit occurred, just that the defendant believed to a practical certainty that it would result.

Subparagraph (a)(3)(B) imposes liability where a person obtains the image or recording by any of four unlawful means as defined in the RCC: voyeurism, theft, unauthorized use of property, or extortion. For example, a person who obtains a photograph by stealing a DVD, hacking a cloud server, texting an image from someone else's phone, or secretly recording a consensual encounter, commits a new offense by sharing the image or audio recording with others. Subparagraph (a)(3)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the defendant's conduct constitutes a predicate offense. Subparagraph (a)(3)(B) does not require intent to harm or gain financially.

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[10] Consider, for example, a woman who, upon noticing her boyfriend has a DVD with another woman's name on it, steals the DVD and asks her best friend to watch it for her. Because the woman was merely suspicious, and not practically certain, about the contents, she has not committed unauthorized disclosure of a sexual recording. *But see* RCC § 22E-2101, Theft.

[11] *See* Report on Bill 20-903, the "Criminalization of Non-Consensual Pornography Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (November 12, 2014) at Page 5 ("Explicit warning not to share a sexual image is not necessary to create an understanding…within the context of a romantic or similarly close relationship where it is the norm to send these images between the parties... [However,] such an understanding does not exist where a sexual image is sent unsolicited without any prior agreement or understanding in place.").

[12] Per its ordinary meaning, "alarm" includes efforts to "disturb," "excite," or "strike with fear." Merriam-Webster.com, *"alarm"*, 2020, *available at* https://www.merriam-webster.com/dictionary/alarm.

[13] For example, a person may commit an offense by posting a homemade sex tape out of revenge after a bad breakup, with intent to harass or humiliate their ex-partner.

Subsection (b) establishes two exclusions from liability for the unauthorized disclosure of a sexual recording offense. Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified licensee. Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (b)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified interactive computer service.

Subsection (c) establishes an affirmative defense for the innocent display or distribution of a prohibited image.[17] The actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[18] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. The recipient of the display or distribution must be someone that the actor reasonably believes[19] to be a "law enforcement officer, prosecutor, attorney, school administrator;" or someone with a responsibility for the health, welfare, or supervision of one of the people depicted or involved in the creation of the image or recording. "Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others."[20]

Subsection (d) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (d)(2) establishes a penalty enhancement of two classes for mass dissemination or publication online.

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[14] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[15] *See* D.C. Code § 22-2201(d).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] Per RCC § 22E-201, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

[18] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

[19] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[20] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

Subsection (e) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised unauthorized disclosure of a sexual recording statute clearly changes current District law in eleven main ways.*

First, the revised statute criminalizes disseminating images that were obtained unlawfully by the actor. The current non-consensual pornography offenses require that "[t]here was an agreement or understanding between the person depicted and the person disclosing that the sexual image would not be disclosed." [21] This requirement does not provide liability for distribution of an image that was taken without the victim's knowledge or permission.[22] In contrast, the revised statute provides liability for dissemination of images or audio recordings that were illegally obtained by specified means. Exposing intimate images or audio recordings against a person's will fundamentally deprives that person of her right to privacy.[23] A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator's objective.[24] The revised statute punishes exploiting a stranger as severely as exploiting a former partner.[25] This change eliminates an unnecessary gap in law.

Second, the revised statute specifies more precisely which types of audio and visual recordings are protected. First, the current non-consensual pornography offense prohibits distribution of "one or more sexual images,"[26] whereas the current felony voyeurism offense prohibits the distribution of any "image or series of images or sounds or series of sounds" of a "private area."[27] In contrast to the current non-consensual pornography statute, the revised statute recognizes a right to privacy in sexual audio recordings,[28] that is more consistent with the scope of the revised voyeurism statute.[29]

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[21] D.C. Code §§ 22-3052(a)(2) and 22-3053(a)(2).

[22] For example, a person could snoop through a lover's smartphone, discover nude photographs from another suitor, steal a screenshot, and post it online without incurring any criminal liability. *See, e.g., State v. VanBuren*, 214 A.3d 791 (Vt. 2019). Or, a person could hack into a celebrity's cloud server and publish their nude photographs online, subject only to federal computer crime laws. *See* 18 U.S.C. § 1030; *see also* Laura M. Holson, *Hacker of Nude Photos of Jennifer Lawrence Gets 8 Months in Prison*, NEW YORK TIMES (August 30, 2018). This conduct does not amount to stalking (RCC § 22E-1801) or electronic stalking (RCC § 22E-1802), unless it occurs on multiple occasions with the intent or effect of causing significant emotional distress. This conduct does not amount to voyeurism (RCC § 22E-1803), unless it surreptitiously recorded by the same person who is distributing it. This conduct does not amount to extortion (RCC § 22E-2301), unless there is some demand for action in exchange for the recordings.

[23] *People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019).

[24] *Id*. at *19.

[25] *See People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019) ("[C]riminal liability here does not depend on "whether the image was initially obtained with the subject's consent; rather, it is the absence of consent to the image's distribution that renders the perpetrator in violation of the law.").

[26] D.C. Code §§ 22-3052(a), 22-3053(a), and 22-3054(a).

[27] D.C. Code § 22-3531.

[28] For example, such recordings may be of sexual encounters and masturbation (e.g., phone sex), consistent with the current voyeurism offense.

[29] The revised offense does not refer to "one *or more* images" or to a "*series of* images" or "*series of* sounds," to avoid confusion with respect to the appropriate unit of prosecution. A series of images taken in rapid succession may constitute a single course of conduct whereas a compilation of images taken weeks or

Second, the current non-consensual pornography offense defines the term "sexual image" to mean "a photograph, video, or other visual recording,"[30] whereas the current felony voyeurism statute does not define the term "image" but does require that the image be electronic.[31] It is unclear whether the current non-consensual pornography offense requires the image to be an electronic recording. To resolve this ambiguity, the revised statute applies the RCC's definition of "image,"[32] which excludes drawings and illustrations, consistent with the current non-consensual pornography offense. These changes improve the clarity and consistency of the revised offense and reduce unnecessary gaps in liability.

Third, the revised statute applies a more consistent definition of the type of sexual content that is protected. First, the current non-consensual pornography offense defines the term "sexual image" to include a depiction of "an *unclothed* private area"[33] and defines "private area" to mean "the genitals, anus, or pubic area of a person, or the *nipple* of a developed female breast, *including the breast of a transgender female*."[34] The current voyeurism statute defines "private area" differently as "the naked *or undergarment-clad* genitals, pubic area, anus, or *buttocks*, or female *breast below the top of the areola*."[35] In contrast to the current non-consensual pornography statute, the revised statute recognizes a privacy right warranting criminal sanction in the more expansive list of depictions of the human body described in the voyeurism statute. Second, the current non-consensual pornography statute protects depictions of "sexual conduct," including masturbation and "[s]adomasochistic sexual activity for the purpose of sexual stimulation,"[36] whereas the current felony voyeurism statute protects depictions of "sexual activity"[37] or "using a bathroom or restroom,"[38] without defining those terms. The meaning of the term "sexual activity" is unclear and may include conduct short of penetration, such as kissing or sadomasochistic contact. Similarly, the term "using a bathroom" is unclear and could include activities such as grooming, blowing one's nose, or applying makeup. Resolving these ambiguities, the revised statute includes depictions of a "sexual act," as defined in RCC § 22E-701,[39] masturbation, and sadomasochistic activity, that is more consistent with the detailed list in the current non-consensual pornography statute. The revised statute does not include depictions of urination or defecation unless they depict the complainant's nude or undergarment-clad private areas.

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months apart may be appropriately charged as separate counts. *See, e.g., State v. Boyd*, 137 Wash. App. 910 (2007) (finding two photographs of the same victim on the same day did not establish multiple acts of voyeurism but rather a continuing course of conduct).

[30] D.C. Code § 22-3051(7). (Emphasis added.)

[31] D.C. Code §§ 22-3531(c)(1) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record…").

[32] RCC § 22E-701.

[33] D.C. Code § 22-3051(7). (Emphasis added.)

[34] D.C. Code § 22-3051(4). (Emphasis added.)

[35] D.C. Code § 3531(a)(2). (Emphasis added.)

[36] D.C. Code §§ 22-3051(6); 22-3101(5).

[37] D.C. Code §§ 22-3531(b)(3) and (c)(1)(C).

[38] D.C. Code §§ 22-3531(b)(1) and (c)(1)(A).

[39] The revised code defines the term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.

These changes improve the clarity and consistency of the revised offense and reduce unnecessary gaps in liability.

Fourth, the revised statute clarifies the type of intended harm required for disclosure of an image that was lawfully obtained. The current nonconsensual pornography statutes in D.C. Code §§ 22-3052(a)(3) and 22-3053(a)(3) require a showing that the accused distributed the sexual image "with the intent to harm the person depicted" or for financial gain. The term "harm" is defined in the statute to mean "any injury, whether physical or nonphysical, including psychological, financial, or reputational injury."[40] To resolve these ambiguities, the revised statute more precisely requires intent to "alarm or sexually abuse, humiliate, harass, or degrade the complainant." These injuries are required in other RCC offenses.[41] This change improves the consistency of the revised statutes.

Fifth, the revised offense does not include a categorical exclusion from liability for commercial images. D.C. Code § 22-3055(a)(2) provides that the non-consensual pornography chapter shall not apply to "[a] person disclosing or publishing a sexual image that resulted from the voluntary exposure of the person depicted in a public or commercial setting." This blanket exception appears to eliminate any protection for people who agree to participate in a commercial recording, even if the recording was for a limited audience.[42] In contrast, the revised statute provides liability for commercial images if the other elements of the offense, including a reasonable expectation of privacy, are met. The revised offense recognizes that effective consent as to distribution may be limited and puts the privacy rights of models and sex workers on par with other citizens. This change eliminates an unnecessary gap in law.

Sixth, the revised offense does not punish attempts to commit unauthorized distribution as severely as a completed offense. The current felony voyeurism statute applies the same five-year penalty to a person who "distributes or disseminates, or attempts to distribute or disseminate."[43] Although the current non-consensual pornography offense requires this element, the statute nonetheless punishes "making a sexual image available for viewing even if the image is not actually viewed by anyone other than the defendant and the person depicted in the image."[44] In contrast, the revised statute requires that the person "distribute or display" the image to another person who actually views it. Attempts to distribute an image would remain criminal, but subject to a lower penalty. The revised statute relies on the general part's common definition of attempt[45] and penalty for an attempt[46] to define and penalize attempts the same as for

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[40] D.C. Code § 22-3051(2).
[41] See RCC § 22E-701 (defining "sexual act" and "sexual contact").
[42] *See, e.g.,* Katie Van Syckle, *22 Women Say They Were Exploited by Porn Producers: Their lawsuit, a rare look into an opaque industry, seeks $22 million in damages,* NEW YORK TIMES (Aug. 29, 2019); Adeel Hassan and Katie Van Syckle, *Porn Producers Accused of Fooling Women Get Sex Trafficking Charges: Young women say that they responded to ads seeking models and were tricked into performing*, NEW YORK TIMES (Oct. 13, 2019).
[43] D.C. Code § 3531(f)(2).
[44] *See* D.C. Code §§ 22-3051 – 3054; *Roberts v. United States*, 17-CF-431, 2019 WL 4678119, at *6 (D.C. Sept. 26, 2019) (requiring that the defendant "exhibit" the image to a third party but not requiring that the third party see it).
[45] RCC § 22E-301(a).
[46] RCC § 22E-301(c)(1).

other revised offenses. This change improves the consistency[47] and proportionality of the revised offense.

Seventh, under the revised statute, a person is not liable for redistributing an image that was disclosed by someone else. The current felony voyeurism statute makes it unlawful to distribute images "that the person knows or has reason to know were taken in violation of" the voyeurism statute.[48] The current non-consensual pornography chapter makes it unlawful to distribute an image "obtained from a third party or other source…with conscious disregard that the sexual image was obtained as a result of" a violation of the non-consensual pornography statute.[49] In contrast, the revised statute punishes redistribution only if the person acted as a co-conspirator or as an accomplice.[50] The revised statute's language avoids punishing a person who shares an image as severely as the person who is responsible for the original privacy intrusion.[51] This change improves the consistency and proportionality of the revised statutes.

Eighth, the revised offense expands liability for publication online. First, the current felony voyeurism punishes an actor who "distributes or disseminates, or attempts to distribute or disseminate" an image that was obtained through voyeurism.[52] The terms "distribute" and "disseminate" are not defined in the statute and District case law has not addressed their meaning. Second, the current non-consensual pornography statutes specify that it is unlawful to make pornographic material "available for viewing by uploading to the Internet"[53] and define "Internet" to mean "an electronically available platform by which sexual images can be disseminated to a wide audience."[54] The term "wide audience" is not defined in the statute and District case law has not addressed its meaning. In contrast, the revised statute clarifies that uploading material to any online forum that is accessible by a user other than the complainant or defendant is sufficient, even if no other person actually accesses or views it and the electronic platform is not accessible by a "wide audience." This change simplifies the revised offense and avoids litigation over whether an online forum is available to a "wide audience." It also improves the logical organization of the revised statute by making unauthorized disclosure of a sexual recording a lesser-included version of the enhanced offense.

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[47] Similarly, in the revised criminal threats offense, the verb "communicates" is intended to be broadly construed, encompassing all speech and other messages that are received and understood by another person. RCC § 22E-1204. In *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), the DCCA recognized that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

[48] D.C. Code § 22-3531(f)(2).

[49] D.C. Code § 22-3054(a).

[50] *See* RCC §§ 22E-210 and 22-302.

[51] Consider, for example, Classmate A posts a partially-nude locker room photograph of a student on Twitter, commenting, "How ugly! She should be ashamed!" Classmate B retweets it, commenting, "Wow, what an invasion of privacy! YOU should be ashamed!" Under current law, Classmates A and B face the same punishment.

[52] D.C. Code § 22-3531(f)(2).

[53] D.C. Code § 22-3051(5).

[54] D.C. Code § 22-3051(3). The definition includes "social media" and "smartphone applications" but excludes "text messages." In some cases, this may be a distinction without a difference. Many social media platforms and smartphone applications have a direct messaging feature that is virtually identical to Short Message Service.

Ninth, the revised statute establishes a penalty enhancement for large-scale unauthorized distribution of images. Under the current felony voyeurism statute, distribution of sexual images obtained through voyeurism is punishable by up to five years of in prison, irrespective of audience size.[55] Under the current non-consensual pornography statutes, distribution of sexual images obtained by consent is punishable by either 180 days in jail[56] or three years in prison,[57] depending on how widespread the disclosure is. Publication to six or more people or to the internet is punishable by three years. In contrast, the revised statute includes two penalty levels through the enhancement in subsection (d)(2), consistent with the current non-consensual pornography chapter's penalty distinction between distribution to a few people versus distribution to a large audience or online forum. This change improves the consistency and proportionality of the revised statutes.

Tenth, the revised statute excludes liability for a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act. The current nonconsensual pornography statute, D.C. Code § 22-3055(b), provides that: "Nothing in this chapter shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person." However, the current non-consensual pornography offenses do not include an exception for other telecommunications services provider such as radio stations, television broadcasters, and phone service providers, and the current felony voyeurism offense does not include an exception for any service provider. In contrast to these statutes' limited or absent exclusions for commercial service providers, the revised statute makes clear that there is no criminal liability for a company or employee who merely facilitates the transmission of an image or sound at a user's request. This change improves the consistency and proportionality of the revised offense.

Eleventh, the revised code defines and uses the term "effective consent" instead of using other, undefined references to "consent." The current nonconsensual pornography offenses, through D.C. Code §§ 22-3052(a)(1), 22-3053(a)(1), and 22-3054(a)(1) require that "the person depicted did not *consent* to the disclosure of the sexual image." (Emphasis added.) The current voyeurism offense, in D.C. Code §§ 22-3531(c)(1) and (d), requires that the person act without the victim's "express and informed consent." The terms "consent" "express consent" and "informed consent" are not defined in the D.C. Code and District case law has not interpreted their meaning in the context of the non-consensual pornography and voyeurism statutes. In contrast, the revised statute uses the defined term "effective consent."[58] The RCC definition of "effective consent" does not require that consent be express or informed—however those terms are defined—only that the consent not be induced by physical force, an explicit or

[55] D.C. Code § 22-3531(f)(2).
[56] D.C. Code § 22-3052(b).
[57] D.C. Code § 22-3053(b).
[58] RCC § 22E-701.

implicit coercive threat, or deception.[59] This change improves the consistency and proportionality of the revised offense.

Beyond these eleven changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions as to the culpable mental states required for unauthorized disclosure liability. Current nonconsensual pornography statutes in D.C. Code §§ 22-3052 – 3054 specify that a person must "knowingly disclose" or "knowingly publish" a sexual image and require that the actor proceed "with the intent to harm the person depicted or to receive financial gain." However, the terms "knowingly" and "with intent" are not defined for the statute, and it is unclear whether the "knowingly" mental state applies to the elements that follow concerning agreement and consent. The current voyeurism statute, in D.C. Code § 22-3531(f)(2), does not specify any culpable mental state as to distribution, but it does require that "the person knows or has reason to know" the images were obtained unlawfully. To resolve these ambiguities, the revised statute uses the RCC's general provisions that define "knowingly" and "with intent"[60] and specify that there is no additional culpable mental state required with respect to an actor's underlying criminal conduct. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[61] These changes clarify and improve the consistency of District statutes.

Second, the revised statute extends jurisdiction for unauthorized disclosure liability only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3057 states: "A violation of § 22-3052, § 22-3053, or § 22-3054 shall be deemed to be committed in the District of Columbia if any part of the violation takes place in the District of Columbia, including when either the person depicted or the person who disclosed or published the sexual image *was a resident of*, or located in, the District of Columbia at the time that the sexual image was made, disclosed, or published." (emphasis added.) However, authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[62] There is no clear precedent for states to extend jurisdiction based solely on the residency

[59] For more information on the meaning of "effective consent" in the RCC, see entries for "consent" and "effective consent" in RCC § 22E-701.
[60] RCC § 22E-206.
[61] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).
[62] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

of the alleged victim,[63] and the DCCA has not addressed the issue. To resolve this ambiguity, the revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the complainant is a District resident. Some authorities have questioned whether a purported extension of jurisdiction as in the current statute is unconstitutional.[64] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Third, the revised statute clarifies the scope of the affirmative defense. The current non-consensual pornography chapter establishes an affirmative defense that applies "if the disclosure or publication of a sexual image is made in the public interest, including the reporting of unlawful conduct, the lawful and common practices of law enforcement, or legal proceedings."[65] The current felony voyeurism statute does not include a comparable affirmative defense provision.[66] The phrase "in the public interest" is not defined in the statute and District case law has not yet addressed its meaning. To resolve this ambiguity, the revised affirmative defense requires that a defendant demonstrate they distributed the image or audio recording to someone they reasonably believed to be a law enforcement officer, prosecutor, attorney, school administrator, or person with a responsibility for the health, welfare, or supervision of someone depicted in the image or involved in the creation of the image. It also requires that the person intended only "to report possible illegal conduct or seek legal counsel from an attorney." This revised language recognizes that a person in public life enjoys a right to sexual privacy and protection.[67] This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute does not specify that the victim must be an "identified or identifiable person." The current nonconsensual pornography statutes in D.C. Code §§ 22-3052(a), 22-3053(a), and 22-3054(a) state: "It shall be unlawful in the District of Columbia for a person to knowingly [disclose or publish] one or more sexual images of another identified or identifiable person." However, this language does not appear in the current felony voyeurism statute, in D.C. Code § 22-3531(f)(2). Legislative history suggests that this phrase was included to make clear that a person is liable for non-consensual pornography whether the victim is named ("identified") or the victim's face is depicted ("identifiable").[68] However, District case law has held that a person is

[63] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[64] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[65] D.C. Code § 22-3056.
[66] D.C. Code § 22-3531(f)2).
[67] For example, a defendant might argue under the current statute that the public has an interest in viewing a sexual recording of a politician or a movie star that undermine that celebrity's public denials of infidelity. However, such conduct would not be covered by the revised statute's affirmative defense.
[68] *See* Report on Bill 20-903, the "Criminalization of Non-Consensual Pornography Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (November 12, 2014) at Page 5 (providing a hypothetical and explaining, "The photo is a sexual image because it shows the nipple of [the victim's] developed female breast, who is identifiable by her face in the photo. If her face was cropped out of the photo, however, she would still be identified by the use of her first name in the email subject line and the reference to her employment at the school.").

"identified or identifiable" even if they are not named and even if they are not recognizable by others.[69] Because the revised statute already makes clear that it applies only to images of a specific complainant—and not anonymous images—the phrase "identified or identifiable" is stricken as superfluous. This change clarifies the revised offense.

Second, the revised statute does not specify that a person is liable for distributing images "directly or indirectly, by any means."[70] This language is surplusage.

[69] In *Roberts v. United States*, 216 A.3d 870, 880 (D.C. 2019), the DCCA explained, "it suffices that the person depicted in a sexual image can identify himself or herself in the image."
[70] D.C. Code § 22-3531(f)(2).

RCC § 22E-1805. Distribution of an Obscene Image.

Explanatory Note. *This section establishes the distribution of an obscene image offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces subsection (a) of the obscenity statute, D.C. Code § 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception).*

Paragraph (a)(1) specifies that a person must at least knowingly engage in distribution or display of an image. "Knowingly" is a defined term[1] and, applied here, means that the person must be practically certain that they are distributing or displaying an image to another person. The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[2] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The person must also be practically certain that the picture or video depicts an actual or simulated[3] sexual act; sadomasochistic abuse; masturbation; sexual or sexualized[4] display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexualized[5] display of the breast[6] below the top of the areola, or buttocks, when there is less than a full opaque covering. The terms "sexual act," "sexual contact," and "sadomasochistic abuse" are defined in RCC § 22E-701.

Paragraph (a)(2) requires that the person act without the recipient's effective consent.[7] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception. The term "consent" is also defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to receiving the offensive image.[8]

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[1] RCC § 22E-206.

[2] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

[3] The term "simulated" is defined in RCC § 22E-701 and means feigned or pretended in a way that realistically duplicates the appearance of actual conduct.

[4] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[5] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[6] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[7] *See Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1144 (D.C. 2016) (explaining, "[A]lthough courts have been willing to protect the rights of consenting adults to transmit and receive indecent materials, they have also permitted states to regulate the dissemination of some indecent materials to minors and nonconsenting adults.") (citing *Ginsberg v. New York*, 390 U.S. 629, 636, (1968)).

[8] A person does not commit distribution of an obscene image if they subjectively believe—reasonably or unreasonably—that the recipient consents to viewing the material. For example, a man does not commit an offense for sending a photograph of his erect penis by text message to a woman he is dating and, based on a prior conversation, believes the woman has agreed to such conduct. On the other hand, a man who, for example, sends a similar penis picture with intent to annoy, harass, or alarm someone, or with intent to seduce a stranger he knows nothing about (and, therefore, has not given any indication of agreement to such behavior) does commit the offense.

Paragraph (a)(3) specifies that a person must also be reckless as to the image being obscene.[9] The term "obscene" is defined in RCC § 22E-701 and requires proof that the image: appeals to a prurient interest in sex, under contemporary community standards[10] and considered as a whole; is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[11] "Reckless" is defined in the revised code,[12] and, applied here, means that the person must be aware of a substantial risk that the image is obscene, and the person's disregard of the risk is a gross deviation from the ordinary standard of conduct.

Subsection (b) establishes four exclusions from liability for the distribution of an obscene image offense.[13] Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified licensee. Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (b)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified interactive computer service.

Paragraph (b)(3) excludes liability for publishing an image in or on a public forum, unless the image is also knowingly distributed or displayed directly to a specific viewer[17] or with the purpose of reaching a specific viewer,[18] without that viewer's

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[9] The government is not required to prove that the person viewed the image. The person may be practically certain that a film contains pornography based on the title, description, or other indicators. *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[10] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards").

[11] *See Miller v. California*, 413 U.S. 15 (1973).

[12] RCC § 22E-206.

[13] *See* RCC §§ 22E-201(b); 22E-605.

[14] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[15] *See* D.C. Code § 22-2201(d).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] E.g., sending an image to another social media user via direct message.

[18] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

effective consent. Paragraph (b)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows until the culpable mental states in subparagraphs (b)(3)(A) and (b)(3)(B) are specified. Paragraph (b)(4) excludes liability when the person reasonably believes[19] they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[20] "Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others."[21]

Paragraph (c)(1) establishes an affirmative defense for an employee of a school, museum, library, movie theater, or other venue, who is acting within the scope of their role. The term "movie theater" is defined in RCC § 22E-701.

Paragraph (c)(2) establishes an affirmative defense for the innocent display or distribution of a prohibited image.[22] The actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[23] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. The recipient of the display or distribution must be someone that the actor reasonably believes[24] to be a "law enforcement officer, prosecutor, attorney, school administrator;" or someone with a responsibility for the health, welfare, or supervision of one of the people depicted or involved in the creation of the image or recording. "Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others."[25]

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[19] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[20] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.

[21] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[22] Per RCC § 22E-201, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

[23] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

[24] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[25] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under

Subsection (d) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised distribution of an obscene image offense clearly changes current District law in eight main ways.*

First, the revised statute applies the RCC standardized definitions of "knowingly" and "recklessly." The current obscenity statute in D.C. Code § 22-2201(a)(1) states at the beginning of the offense that, "It shall be unlawful in the District of Columbia for any person knowingly:" then, after the colon, describes all the prohibited conduct. The plain language of the statute thus appears to require a mental state of "knowingly" apply to all elements of the offense. Current D.C. Code § 22-2201(a)(2)(B) broadly defines "knowingly" to mean "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of" the obscene materials.[26] In contrast, the revised offense defines "knowingly" to require practical certainty and defines "recklessness" to require conscious disregard of a substantial risk.[27] The revised statute requires knowledge of the sexual nature of the image but only recklessness as to the image being of the sort that is criminally obscene. Application of the standardized RCC definitions here appears to be largely consistent with District case law interpreting the obscenity statute.[28] Moreover, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence[29]and courts have also recognized that recklessness regarding a risk of

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traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[26] *See also Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) (citing *Morris v. United States*, 259 A.2d 337 (D.C. 1969)).

[27] RCC § 22E-206.

[28] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[29] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

serious harm is wrongful conduct.[30] This change improves the clarity and consistency of the revised statute.

Second, the revised statute requires a distribution or display of an image. The current obscenity statute in D.C. Code § 22-2201(a)(1) makes it unlawful to participate in,[31] purchase,[32] possess,[33] materials that are obscene, indecent, filthy, or immoral.[34] The current statute also makes it unlawful to promote[35] or possess with intent to disseminate[36] obscene materials. D.C. Code § 22-2201(a)(2)(A) also contains a permissive inference that states, "[T]he creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies or the possession of more than 3 copies, of obscene, indecent, or filthy material shall be prima facie evidence of an intent to disseminate such material in violation of this subsection."

In contrast, the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted, and in other situations where effective consent has not been given. Merely creating, possessing, or promoting depictions of sexual activity between consenting adults is not prohibited.[37] Due process confers a right to privately create and enjoy erotica, even if it is objectively offensive.[38] The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct.[39] It is not clear that the aspects of the current law that relate to the creation and possession of obscene pornography create a risk of harm to

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[30] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[31] *See* D.C. Code §§ 22-2201(a)(1)(B) ("present, direct, act in, or otherwise participate in the preparation or presentation of…"); 22-2201(a)(1)(C) ("pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale…"); 22-2201(a)(1)(E) ("create").

[32] D.C. Code § 22-2201(a)(1)(E) ("buy, procure").

[33] D.C. Code § 22-2201(a)(1)(E).

[34] Under § 22-2201(a)(1)(C), it is unlawful to "pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale" specified obscene materials. Under § 22-2201(a)(1)(B), it is unlawful to "present, direct, act in, or otherwise participate in the preparation or presentation of" specified obscene materials. Under § 22-2201(a)(1)(E), it is unlawful to "create, buy, procure, or possess…with intent to disseminate" specified obscene materials. Under D.C. Code §§ 22-2201(a)(1)(A) and (D), it is unlawful to "offer or agree to sell" specified obscene materials. Under §§ 22-2201(a)(1)(F) and (G), it is unlawful to "advertise or otherwise promote the sale of" obscene material (or materials represented to be obscene).

[35] D.C. Code §§ 22-2201(a)(1)(A) and (D) ("offer or agree to sell, deliver, distribute, or provide"); 2202291(a)(1)(F) and (G) ("advertise or otherwise promote the sale of").

[36] D.C. Code § 22-2201(a)(1)(E).

[37] Producing adult pornographic films may constitute prostitution in violation of D.C. Code § 22-2701 et seq. "Prostitution" is broadly defined to include "a sexual act or contact with another person in return for giving or receiving anything of value." D.C. Code § 22-2701.01(3).

[38] *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744, 747 (5th Cir. 2008) (holding Texas criminal statute prohibiting sale of sexual devices violated consumers' rights to engage in private intimate conduct of their choosing); *see also* D.C. Code § 22-2201(a)(1)(D), which makes it unlawful to "sell…any…device which is intended for…immoral use."

[39] *Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

any of the participants or the general public. In addition, elimination of the permissive inference also may reduce the possibility of a constitutional challenge.[40] Moreover, the rationale for criminalizing conduct short of an attempt[41] is less compelling with respect to obscenity than it is for other contraband offenses such as weapons or controlled substances. The offensive material itself—which oftentimes exists in digital format only—does not create a health hazard, pose a risk of physical danger, or invite violence from rival distributors. This change improves the proportionality of the revised offense and may ensure its constitutionality.

Third, the revised statute criminalizes depictions only of specified parts of the body or types of conduct. Subsection (a) of D.C. Code § 22-2201 applies broadly to materials that are obscene, indecent, filthy, or immoral. The terms "obscene," "indecent," "filthy," and "immoral" are not defined in in the statute. However, District case law[42] has interpreted the terms to refer to the three criteria enumerated by the Supreme Court in *Miller v. California*.[43] Namely, to determine whether material is obscene, one must consider: (a) whether 'the average person,[44] applying contemporary community standards'[45] would find that the work, taken as a whole, appeals to the

[40] *See Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, 36 (1969)) ("Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.").

[41] *See* RCC § 22E-301.

[42] D.C. Code § 22-2201 is largely absent from modern District case law, with only one published opinion mentioning it in the past twenty-five years. *See Blackledge v. United States*, 871 A.2d 1193, 1196 (D.C. 2005) (wherein the defendant was found not guilty on the obscenity charge at trial and the issue was not examined on appeal). Otherwise, the statute only appears in the occasional footnote. *See, e.g.*, *Hawkins v. United States*, 119 A.3d 687, 691 n. 7 (D.C. 2015). Indeed, case law involving the statute has not been especially active since the late 1970s, following *Miller v. California*, 413 U.S. 15 (1973), in which the Court established the constitutional baseline, per the First Amendment, for criminal laws prohibiting obscenity.

[43] 413 U.S. 15 (1973); *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction); *see also Hudson v. United States*, 234 A.2d 903, 905 (D.C. 1967) (explaining that the word "obscene" is intended to have a meaning that varies from time to time as general notions of decency in attire and public entertainment tend to change).

[44] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[45] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

prurient interest,[46] (b) whether the work depicts or describes, in a patently offensive way,[47] sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Although local and national community standards may be difficult to discern,[48] a person may be held criminally liable if they comprehend the material's content[49] or character,[50] even if they do not know it to be patently offensive. In contrast, the revised statute is more narrowly limited to depictions that are likely to or designed to appeal to the prurient interest, such as nudity and sexual activity. The revised statute only reaches body parts and conduct that are the subject of other sexual and privacy offenses: an actual or simulated sexual act; sadomasochistic abuse; masturbation; sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[46] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

[47] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[48] *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart concurring) (stating, "I know it when I see it.").

[49] *See* D.C. Code § 22-2201(a)(2)(B); *Lakin v. U. S.*, 363 A.2d 990, 998 (D.C. 1976); *Morris v. U. S.*, 259 A.2d 337, 340 (D.C. 1969); *Huffman v. United States*, 259 A.2d 342, 345 (D.C. 1969); *Smith v. People of the State of California*, 361 U.S. 147, 154-55 (1959).

[50] *Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

Fourth, the revised statute criminalizes distribution or display of images only. Subsection (a) of current D.C. Code § 22-2201 criminalizes obscene[51] writings, pictures, sound recordings, plays, dances, motion pictures, performances, exhibitions, representations, devices, articles, and things. In contrast, the revised obscenity offense is limited to the defined term "image," which means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format.[52] Other mediums are less vivid, poignant, or memorable than visual representations, and it appears highly unlikely that they may be said to be "patently offensive" under modern community standards per *Miller v. California*.[53] A blanket prohibition of devices, articles, or things that are "intended for…immoral use"[54] also may be especially vulnerable to a substantive due process challenge.[55] This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fifth, the revised statute excludes liability for any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Current D.C. Code § 22-2201(d) provides, "Nothing in this section shall apply to a licensee[56] under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." In contrast, the revised offense excludes liability for a wider array of commercial information technology providers. Unlike radio stations, television broadcasters, and phone service providers, internet service providers are not licensed under the federal communications act. The revised statute better aligns itself with the practicalities of the information age by excepting these service providers as well as other remote communications providers.[57] This change improves the proportionality of the revised offense.

Sixth, the revised statute limits liability for online posts of obscene images. Current D.C. Code § 22-2201 does not directly address publishing sexual material to an online public forum. The current statute was enacted in 1967, decades before the invention of smartphones equipped with cameras and internet access. In contrast, the

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[51] D.C. Code § 22-2201(a)(1)(G) also makes it unlawful to "advertise or otherwise promote the sale of material represented or *held out by such person* to be obscene." (Emphasis added.)

[52] RCC § 22E-701.

[53] 413 U.S. 15 (1973). In particular, many writings and sound recordings, excluded under the revised statute, are of "serious literary, artistic, political, or scientific value."

[54] D.C. Code § 22-2201(a)(1)(D).

[55] *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744-747 (5th Cir. 2008) (holding Texas criminal statute prohibiting sale of sexual devices violated consumers' rights to engage in private intimate conduct of their choosing).

[56] The term "licensee" is undefined and District case law has not addressed its meaning. 47 U.S.C. § 153(30) defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter." 47 U.S.C. § 153(49) defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."

[57] *See, e.g.*, D.C. Code § 22-3055(b).

revised statute limits liability for obscene online publication to conduct that targets an online user. Paragraph (b)(4) of the revised statute requires that either the obscene post be sent directly to another user without their effective consent (e.g., via direct message to that user) or purposely sent to the complainant without their effective consent (e.g., posting the image as a comment on that user's page,[58] tagging that user in the image or image caption[59]). A mere knowledge standard for online publication is insufficient because, in most instances a person who publishes pornography online can be said to be practically certain that they are displaying that pornography to every person who reaches that particular web address, whether the person consented to viewing sexual images or not. This change improves the proportionality of the revised offense.

Seventh, the revised statute revises the affirmative defense in current law for "individuals having scientific, educational, or other special justification for possession of such material." Current D.C. Code § 22-2201(c) states that it is an affirmative defense that "the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material." The term "special justification" is not defined and District case law has not addressed its meaning. In contrast, the revised offense establishes an affirmative defense for employees of schools, museums, libraries, movie theaters, and other venues who are acting within the reasonable scope of their professional duties.[60] Other general defenses in the RCC's general part may also apply to persons with special justification.[61] This change improves the clarity and consistency of the revised offense.

Eighth, the revised offense does not codify a special confiscation and disposal provision. Current D.C. Code § 22-2201(a)(3) provides: "When any person is convicted of a violation of this subsection, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of any materials described in paragraph (1) of this subsection, which were named in the charge against such person and which were found in the possession or under the control of such person at the time of such person's arrest." In contrast, the revised offense does not require confiscation of obscene materials. Unlike dangerous articles such as firearms and explosives,[62] obscene images do not present a physical danger to public health or safety. Moreover, under the revised statute, a person is permitted to possess and enjoy obscene material without

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[58] For example, if a person posts a comment below a Washington Post article that includes a .gif of an obscene display of bestiality, that person may have committed distribution of an obscene image to the author of the article but has not committed an offense against every viewer of the article.

[59] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

[60] The exclusions do not apply to a rogue employee who is acting *ultra vires*. For example, a projectionist in a movie theater who displays an obscene, X-rated film in lieu of a G-rated cartoon, commits an offense.

[61] RCC § 22E-408 includes defenses for parents, wards, and emergency health professionals. Consider, for example, a parent who gives a teenager a child birth video to warn them of the consequences of unprotected sexual intercourse. Such a parent may be able to avail themselves of the defense in RCC § 22E-408(a)(1).

[62] *See* D.C. Code § 22-4517 (providing for the taking and destruction of weapons).

distributing it inside the District. Accordingly, the revised statute does not authorize a sentencing court to order an offender to relinquish or destroy it. This change improves the consistency and proportionality of the revised offense.

Beyond these eight changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute excludes liability for a person who reasonably believes they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[63] Current D.C. Code § 22-2201 does not include an exception for this conduct and it is unclear whether common law defenses would apply under these circumstances. The revised statute expressly excludes liability when the image is being distributed to someone who is already familiar with it or is responsible for someone who made it or is depicted in it. This change clarifies and improves the completeness of the revised statute.

Second, the revised statute includes an affirmative defense for a person who demonstrates they distributed the image or audio recording to someone they reasonably believed to be a law enforcement officer, prosecutor, attorney, school administrator, or person with a responsibility for the health, welfare, or supervision of someone depicted in the image or involved in the creation of the image. Current D.C. Code § 22-2201 does not include an exception for this conduct and it is unclear whether common law defenses would apply under these circumstances. The revised statute expressly includes a defense when the person intended only "to report possible illegal conduct or seek legal counsel from an attorney." This change clarifies and improves the completeness of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised offense clarifies the term "licensee" has the meaning specified in 47 U.S.C. § 153(30). Current D.C. Code § 22-2201(d) provides: "Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act. The term "licensee" is undefined and District case law has not addressed its meaning. However, Title 47 of the United States Code defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter"[64] and defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."[65] The revised statute adopts this definition to clarify the meaning of the revised offense.

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[63] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.
[64] 47 U.S.C. § 153(30).
[65] 47 U.S.C. § 153(49).

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

Explanatory Note. *This section establishes the distribution of an obscene image to a minor offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces subsection (b) of the obscenity statute, D.C. Code § 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception).*

Paragraph (a)(1) specifies that a person must at least knowingly engage in distribution or display of an image. "Knowingly" is a defined term[1] and, applied here, means that the person must be practically certain that they are distributing or displaying an image to another person.[2] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[3] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format. The person must also be practically certain that the image depicts: a sexual act; sadomasochistic abuse; masturbation; a sexual or sexualized[4] display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or a sexual or sexualized[5] display of the breast[6] below the top of the areola or buttocks, when there is less than a full opaque covering. The terms "sexual act," "sexual contact," and "sadomasochistic abuse" are defined in RCC § 22E-701.

Subparagraph (a)(2)(A) specifies that a person must also be reckless as to image being obscene.[7] The term "obscene" is defined in RCC § 22E-701 and requires proof that the image: appeals to a prurient interest in sex, under contemporary community standards[8] and considered as a whole is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[9] "Reckless" is defined in the

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[1] RCC § 22E-206.

[2] The government is not required to prove that the recipient viewed the picture or video, only that it was received.

[3] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

[4] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[5] The word "sexualized" includes a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual.

[6] The word "breast" includes a breast that has undergone a mastectomy and includes the breast of a transfeminine woman. It excludes the chest of a transmasculine man.

[7] The government is not required to prove that the person viewed the image. The person may be practically certain that a film contains pornography based on the title, description, or other indicators. *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[8] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards").

[9] *See Miller v. California*, 413 U.S. 15 (1973).

revised code,[10] and, applied here, means that the person must be aware of a substantial risk that the image is obscene, and the person's disregard of the risk must be a gross deviation from the ordinary standard of conduct.

Subparagraph (a)(2)(B) specifies that a person must also be reckless as to the recipient being under 16 years old.[11] The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 16 years of age and the person's disregard of the risk must be a gross deviation from the ordinary standard of conduct.[12]

Paragraph (a)(3) requires that the person is at least 18 years old and at least four years older than the recipient. The term "in fact" indicates that a person is strictly liable as to their age and the relative age of the recipient.[13] It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was less than four years.

Subsection (b) establishes three exclusions from liability for the distribution of an obscene image to a minor offense. Paragraph (b)(1) provides that the statute does not apply to any licensee[14] under the Communications Act of 1934, such as a radio, television, or phone service provider.[15] Paragraph (b)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified licensee. Paragraph (b)(2) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (b)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified interactive computer service.

Paragraph (b)(3) excludes liability for publishing an image in or on a public forum, unless the image is also distributed or displayed directly to a specific viewer.[17]

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[10] RCC § 22E-206.

[11] *See Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1144 (D.C. 2016) (explaining, "[A]lthough courts have been willing to protect the rights of consenting adults to transmit and receive indecent materials, they have also permitted states to regulate the dissemination of some indecent materials to minors and nonconsenting adults.") (citing *Ginsberg v. New York*, 390 U.S. 629, 636, (1968)).

[12] *See* RCC § 22E-701. For example, a 20-year-old who *knows* that the recipient of the obscene image attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in a pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[13] RCC § 22E-207.

[14] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[15] *See* D.C. Code § 22-2201(d).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook

Paragraph (b)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows until the culpable mental states in subparagraphs (b)(3)(A) and (b)(3)(B) are specified. Paragraph (b)(4) excludes liability when the person reasonably believes[18] they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[19] Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[20]

Paragraph (c)(1) establishes an affirmative defense for an employee of a school, museum, library, movie theater, or other venue, who is acting within the scope of their role.[21] The term "movie theater" is defined in RCC § 22E-701.

Paragraph (c)(2) establishes an affirmative defense if the actor and the complainant are, in fact, in a marriage, domestic partnership, or dating relationship. The actor must be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant and be no more than four years older than the complainant. The "romantic, dating, or sexual relationship" language tracks the language in the District's current definition of "intimate partner violence"[22] and is intended to have the same meaning. The actor and the complainant must be the only persons who are depicted in the image. The complainant must give "effective consent" to the prohibited conduct or the actor must reasonably believe[23] that the complainant gave "effective consent" to this conduct. Reasonableness is an objective

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friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

[18] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[19] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.

[20] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[21] The exclusion does not apply to an employee who is acting *ultra vires*. For example, a cashier who accepts a bribe from a 15-year-old to be admitted into an X-ray screening commits distribution of an obscene image to a minor offense.

[22] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[23] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

standard that must take into account certain characteristics of the actor but not others.[24] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." The term "consent" is also defined in RCC § 22E-701.

Subsection (d) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised distribution of obscene materials to a minor offense clearly changes current District law in eight main ways.*

First, the revised statute applies the RCC standardized definitions of "knowingly" and "recklessly." The current obscenity statute in D.C. Code § 22-2201(b) states at the beginning of the offense that, "It shall be unlawful in the District of Columbia for any person knowingly:" then, after the colon, describes all the prohibited conduct. The plain language of the statute thus appears to require a mental state of "knowingly" apply to all elements of the offense. D.C. Code § 22-2201(b)(2)(F) broadly defines "knowingly" to mean "having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both of: (i) The character and content of any material described in paragraph (1) of this subsection which is reasonably susceptible of examination by the defendant; and (ii) The age of the minor." In contrast, the revised offense defines "knowingly" to require practical certainty and defines "recklessness" to require conscious disregard of a substantial risk.[25] The revised statute requires knowledge of the sexual nature of the image but only recklessness as to the age of the minor and as to image being of the sort that is criminally obscene. The revised statute holds an actor strictly liable with respect to the age difference between the defendant and the complainant. Application of the standardized RCC definitions here appears to be largely consistent with District case law interpreting the obscenity statute.[26] Moreover, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American

[24] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[25] RCC § 22E-206.

[26] *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

jurisprudence[27] and courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[28] This change improves the clarity and consistency of the revised statute.

Second, the revised statute criminalizes depictions only of specified parts of the body or types of conduct. Subsection (b) of current D.C. Code § 22-2201 applies broadly to offensive materials that either include "explicit and detailed verbal descriptions or narrative accounts of sexual excitement" or depict "nudity, sexual conduct, or sado-masochistic abuse." The term "nudity" is defined broadly to include the depiction of covered male genitals in a discernibly turgid state, a pubic area or buttocks with less than a full opaque covering, and the female breast with less than a full opaque covering of any portion below the top of the nipple.[29] The term "sexual conduct" is defined broadly to include homosexuality[30] and all physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or female breast.[31] And the term "sado-masochistic abuse" is defined broadly to include any flagellation or physical restraint of a person wearing undergarments, a mask, or a bizarre costume.[32] District case law[33] explains that the proscribed materials in the obscenity statute are limited to the three criteria enumerated in *Miller v. California*.[34] Namely, to determine whether material is obscene, one must

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[27] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[28] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[29] D.C. Code § 22-2201(b)(2)(B).

[30] The term "homosexuality" is undefined and District case law has not addressed its meaning. It is not clear whether the term encompasses sexual acts, sexual contact, or any display of affection between members of the same sex.

[31] D.C. Code § 22-2201(b)(2)(C). It is unclear whether the phrase "clothed or unclothed" modifies only "genitals" or "explicit and detailed verbal descriptions or narrative accounts of sexual excitement."

[32] D.C. Code § 22-2201(b)(2)(D).

[33] D.C. Code § 22-2201 is largely absent from modern District case law, with only one published opinion mentioning it in the past twenty-five years. *See Blackledge v. United States*, 871 A.2d 1193, 1196 (D.C. 2005) (wherein the defendant was found not guilty on the obscenity charge at trial and the issue was not examined on appeal). Otherwise, the statute only appears in the occasional footnote. *See, e.g.*, *Hawkins v. United States*, 119 A.3d 687, 691 n. 7 (D.C. 2015). Indeed, case law involving the statute has not been especially active since the late 1970s, following *Miller v. California*, 413 U.S. 15 (1973), in which the Court established the constitutional baseline, per the First Amendment, for criminal laws prohibiting obscenity.

[34] 413 U.S. 15 (1973); *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction); *see also Hudson v. United States*, 234 A.2d 903, 905 (D.C. 1967) (explaining that the word "obscene" is intended to have a meaning that varies from time to time as general notions of decency in attire and public entertainment tend to change).

consider: (a) whether 'the average person,[35] applying contemporary community standards'[36] would find that the work, taken as a whole, appeals to the prurient interest,[37] (b) whether the work depicts or describes, in a patently offensive way,[38] sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Although local and national community standards may be difficult to discern,[39] a person may be held criminally liable if they comprehend the material's content[40] or character,[41] even if they

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[35] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[36] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[37] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

[38] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[39] *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart concurring) (stating, "I know it when I see it.").

[40] *See* D.C. Code § 22-2201(a)(2)(B); *Lakin v. U. S.*, 363 A.2d 990, 998 (D.C. 1976); *Morris v. U. S.*, 259 A.2d 337, 340 (D.C. 1969); *Huffman v. United States*, 259 A.2d 342, 345 (D.C. 1969); *Smith v. People of the State of California*, 361 U.S. 147, 154-55 (1959).

do not know it to be patently offensive. In contrast, the revised statute is more narrowly limited to depictions that are likely to or designed to appeal to the prurient interest, such as nudity and sexual activity. The revised statute only reaches body parts and conduct that are the subject of other sexual and privacy offenses: an actual or simulated sexual act; sadomasochistic abuse; masturbation; sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering. Since 1967, when this language was adopted, social mores regarding promiscuous and licentious behavior and popular fashion have changed considerably.[42] In modern America, it commonplace for swimwear or evening wear to expose the lower part of the buttocks or breast. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Third, the revised statute criminalizes distribution or display of images only. Subsection (b) of current D.C. Code § 22-2201 applies to any "picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image,"[43] "book, magazine, or other printed matter however reproduced or sound recording,"[44] "explicit and detailed verbal description[] or narrative account[],"[45] and "motion picture, show, or other presentation."[46] In contrast, the revised obscenity offense is limited to the defined term "image," which means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, digital, or other format.[47] Other mediums are less vivid, poignant, or memorable than visual representations, and it appears highly unlikely that they may be said to be "patently offensive" under modern community standards per *Miller v. California*.[48] This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fourth, the revised offense applies to adults only. Current D.C. Code § 22-2201(b) makes it unlawful to distribute obscene materials to any person under 17 years old.[49] It makes no exception for one child who gives obscene materials to another child,

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[41] *Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[42] For example, in 1957, after vocal objections from audiences in Nashville and St. Louis about his wiggling hips, Elvis Presley was filmed from the waist up for a CBS broadcast of the Ed Sullivan Show. *See* Jordan Runtagh, *Elvis Presley on TV: 10 Unforgettable Broadcasts*, ROLLING STONE (January 28, 2016). In the year 2000, rapper Nelly released a music video on cable network BET for his song "Tip Drill," which depicted an orgy of topless women gyrating while men chewed on the women's thong underwear. In 2013, singer Robin Thicke release a video on YouTube featuring topless supermodels dancing around for men's entertainment.

[43] D.C. Code § 22-2201(b)(1)(A)(i).

[44] D.C. Code § 22-2201(b)(1)(A)(ii).

[45] *Id*.

[46] D.C. Code § 22-2201(b)(1)(B).

[47] RCC § 22E-701.

[48] 413 U.S. 15 (1973). In particular, many writings and sound recordings, excluded under the revised statute, are of "serious literary, artistic, political, or scientific value."

[49] *See* D.C. Code § 22-2201(b)(2)(A) (defining "minor").

though a child may not be sophisticated enough to judge whether an item "affronts prevailing standards *in the adult community as a whole* with respect to what is suitable material for minors."[50] In contrast, the revised statute applies only to a person who is over 18 years old who shares obscene materials with a person who is both under 16 years old and four years younger than the accused. This change improves the consistency and proportionality of the revised offenses.

Fifth, the revised statute excludes liability for any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Current D.C. Code § 22-2201(d) provides, "Nothing in this section shall apply to a licensee[51] under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." In contrast, the revised offense excludes liability for a wider array of commercial information technology providers. Unlike radio stations, television broadcasters, and phone service providers, internet service providers are not licensed under the federal communications act. The revised statute better aligns itself with the practicalities of the information age by excepting these service providers as well as other remote communications providers.[52] This change improves the proportionality of the revised offense.

Sixth, the revised statute limits liability for online posts of obscene images. Current D.C. Code § 22-2201 does not directly address publishing sexual material to an online public forum. In contrast, the revised statute limits liability for obscene online publication to conduct that targets an online user. Paragraph (b)(4) of the revised statute requires that either the obscene post be sent directly to another user without their effective consent (e.g., via direct message to that user) or purposely sent to the complainant without their effective consent (e.g., posting the image as a comment on that user's page,[53] tagging that user in the image or image caption[54]). A mere knowledge standard for online publication is insufficient because, in most instances a person who publishes pornography online can be said to be practically certain that they are displaying

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[50] *See* D.C. Code §§ 22-2201(b)(1)(A)(i), (A)(ii), and (B). (Emphasis added.)

[51] The term "licensee" is undefined and District case law has not addressed its meaning. 47 U.S.C. § 153(30) defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter." 47 U.S.C. § 153(49) defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."

[52] *See, e.g.*, D.C. Code § 22-3055(b).

[53] For example, if a person posts a comment below a Washington Post article that includes a .gif of an obscene display of bestiality, that person may have committed distribution of an obscene image to the author of the article but has not committed an offense against every viewer of the article.

[54] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *with People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

that pornography to every person who reaches that particular web address, whether the person consented to viewing sexual images or not. This change improves the proportionality of the revised offense.

Seventh, the revised statute revises the affirmative defense in current law for "individuals having scientific, educational, or other special justification for possession of such material." Current D.C. Code § 22-2201(c) states that it is an affirmative defense that "the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material." The term "special justification" is not defined and District case law has not addressed its meaning. In contrast, the revised offense establishes an affirmative defense for employees of schools, museums, libraries, movie theaters, and other venues who are acting within the reasonable scope of their professional duties.[55] Other general defenses in the RCC's general part may also apply to persons with special justification.[56] This change improves the clarity and consistency of the revised offense.

Eighth, the revised statute codifies an affirmative defense for marriage, domestic partnership, and other romantic relationships. The current obscenity statute[57] does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This is inconsistent with several of the current sex offense statutes[58] and the current sexual performance of a minor offense.[59] In contrast, the revised distribution of an obscene image to a minor statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant. This change improves the consistency and proportionality of the revised statute.

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[55] The exclusions do not apply to a rogue employee who is acting *ultra vires*. For example, a projectionist in a movie theater who displays an obscene, X-rated film in lieu of a G-rated cartoon, commits an offense.

[56] RCC § 22E-408 includes defenses for parents, wards, and emergency health professionals. Consider, for example, a parent who gives a teenager a child birth video to warn them of the consequences of unprotected sexual intercourse. Such a parent may be able to avail themselves of the defense in RCC § 22E-408(a)(1).

[57] D.C. Code § 22-2201.

[58] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[59] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by…an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

Beyond these eight changes to current District law, two other aspects of the revised statute may constitute a substantive change to current District law.

First, the revised statute does not criminalize non-purposefully providing a minor access to an obscene exhibition. Current D.C. Code § 22-2201(b)(1)(B) makes it unlawful to "provide to a minor an admission ticket to, or pass to, or to admit a minor to, premises whereon" patently offensive materials are exhibited. This language is ambiguous in at least three ways. In contrast, consistent with other RCC offenses, the revised statute provides liability for such conduct only when the actor's role meets the standards for accomplice liability under RCC § 22E-210, which requires a more direct causal link between the actor's conduct and the resulting harm. An actor is subject to accomplice liability for purposely encouraging or assisting another person who displays obscene materials to a minor. The revised language eliminates liability for museum workers[60] and other employees who may knowingly, but not purposely, admit a minor to a display of obscene material. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Second, the revised statute excludes liability for a person who reasonably believes they are distributing the image to someone who created the image, appeared in the image, or is responsible for the wellbeing of someone who is.[61] Current D.C. Code § 22-2201 does not include an exception for this conduct and it is unclear whether common law defenses would apply under these circumstances. The revised statute expressly excludes liability when the image is being distributed to someone who is already familiar with it or is responsible for someone who made it or is depicted in it. This change clarifies and improves the completeness of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised offense clarifies the term "licensee" has the meaning specified in 47 U.S.C. § 153(30). Current D.C. Code § 22-2201(d) provides: "Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." The term "licensee" is undefined and District case law has not addressed its meaning. However, Title 47 of the United States Code defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter"[62] and defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by

[60] For example, in 2018, the Smithsonian's Hirshhorn Museum and Sculpture Garden featured the work of Georg Baselitz, including "The Naked Man," which depicts a cadaverous man with a huge erection lying on his back on a table. The painting was confiscated by a state's attorney in 1963. *See* Sebastian Smee, *Georg Baselitz is an overrated hack. Art collectors fell for him — but you don't have to*, WASHINGTON POST (June 24, 2018).

[61] Consider, for example, a parent who discovers an obscene image of their teen engaged in a sexual act with another teen. If the parent sends the image to the other teen and their parents, to ensure the behavior is stopped, that conduct does not amount to an offense under RCC §§ 22E-1805 - 1806.

[62] 47 U.S.C. § 153(30).

whatever name the instrument may be designated by the Commission."[63] The revised statute adopts this definition to clarify the meaning of the revised offense.

Second, the revised statute defines the term "obscene" consistent with U.S. Supreme Court precedent. D.C. Code § 22-2201(b)(1)(B) makes it unlawful to exhibit to a minor "a motion picture, show, or other presentation which, *in whole or in part*, depicts nudity, sexual conduct, or sado-masochistic abuse and which *taken as a whole* is patently offensive *because* it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors." (Emphasis added.) Current D.C. Code §§ 22-2201(b)(1)(A)(i), (A)(ii) contain similar language. District case law has not addressed the meaning of these phrases beyond stating generally[64] that the obscenity statute is to be interpreted consistent with the Supreme Court's ruling in *Miller*.[65] The *Miller* articulation of the standards for interpreting what is patently offensive and whether to assess obscenity in terms of the "whole" work varies[66] slightly from the current District statute. The revised statute, through use of the defined term "obscene," adopts the obscenity standard as articulated in the *Miller* opinion. This change clarifies the revised offense and may help ensure its constitutionality.

[63] 47 U.S.C. § 153(49).
[64] *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976)
[65] *Miller v. California*, 413 U.S. 15 (1973).
[66] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.").

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor.

Explanatory Note.[1] *The RCC creating or trafficking an obscene image of a minor offense prohibits creating, displaying, distributing, selling, or advertising images that depict complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The offense also prohibits a person that is responsible under civil law for a complainant under the age of 18 years from giving effective consent for the recording, photographing, or filming of a complainant engaged in specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted, or will be depicted, in the image. The revised trafficking an obscene image of a minor statute has the same penalties as the RCC arranging a live sexual performance of a minor statute,*[2] *the main difference being that the RCC creating or trafficking an obscene image of a minor offense is limited to images. Along with the possession of an obscene image of a minor offense,*[3] *the arranging a live sexual performance of a minor offense,*[4] *and the attending or viewing a live sexual performance of a minor offense,*[5] *the revised creating or trafficking an obscene image of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree creating or trafficking an obscene image of a minor, the highest gradation of the revised offense. The prohibited conduct is specific to an "image." An "image," as defined in RCC § 22E-701, is a visual depiction, other than a depiction rendered by hand, and includes videos and live broadcasts. Paragraph (a)(1) requires a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she will cause the prohibited result, i.e. creating a specified image. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to each type of prohibited conduct in subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), and (a)(1)(E).

For subparagraph (a)(1)(A), the "knowingly" culpable mental state requires that the actor be "practically certain" that he or she creates an image, other than a derivative image, by recording, photographing, or filming the complainant or that he or she "produces" or "directs" the creation of such an image. "Derivative" is intended to have

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[1] Unless otherwise noted, when discussing the current D.C. Code sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").
[2] RCC § 22E-1809.
[3] RCC § 22E-1808.
[4] RCC § 22E-1809.
[5] RCC § 22E-1810.
[6] D.C. Code § 22-3102.
[7] D.C. Code § 22-3101.
[8] D.C. Code § 22-3103.
[9] D.C. Code § 22-3104.

its common meaning as "having parts that originate from another source."[10] The exclusion of derivative images, in conjunction with the requirements in paragraph (a)(2), requires the defendant to record, photograph, or film the complainant engaged in live sexual conduct. There is no liability in subparagraph (a)(1)(A) for recording, photographing, or filming a pre-existing image of the complainant or creating a composite image of the complainant.[11] However, if the defendant records, photographs, or films a pre-existing image or creates a composite image of the complainant with intent to distribute that image, there may be liability under subparagraph (a)(1)(D).

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" from giving "effective consent" for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image. The phrase "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is identical to the language in the special defense in RCC § 22E-408, and has the same meaning as discussed in that commentary. The "knowingly" culpable mental state in paragraph (a)(1) here requires that the actor be "practically certain" that he or she is giving effective consent for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image.[12] In conjunction with the requirements in paragraph (a)(2), the exclusion on derivative images requires the defendant to give effective consent for the complainant to engage in or submit to the recording, photographing, or filming of live sexual conduct, as opposed to recording, photographing, or filming a pre-existing image or creating a composite image.[13] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." As is discussed in the commentary to the RCC definition of "consent," there are circumstances in which indirect types of agreement or inaction may be sufficient. There is no requirement for liability in subparagraph (a)(1)(B) that an image actually be created; it is sufficient that the actor give effective consent for the complainant to engage in or submit to the creation of an image.[14]

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[10] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[11] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[12] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state also applies to the fact that the actor is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The actor must be "practically certain" that he or she is such a person.

[13] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[14] This provision is redundant in the case of a responsible individual who has a higher culpable mental state than "knowingly." In those cases, the RCC solicitation (RCC § 22E-302) and RCC accomplice (RCC § 22E-210) provisions would establish liability, as they would for any other defendant. However, the RCC solicitation and accomplice provisions require a culpable mental state of "purposely" and have other more stringent requirements. Subparagraph (a)(1)(B) is intended to provide liability for responsible individuals who are merely "practically certain" that they are giving effective consent to the complainant engaging in

For subparagraph (a)(1)(C), the actor must be "practically certain" that he or she will display, distribute, or manufacture an image. "Display" has its ordinary meaning and is intended to indicate ways of showing an image without distributing it—i.e. showing an image to another person without actually relinquishing it. "Distribute" has its ordinary meaning, involving a transfer of an item, more than a mere display.[15] Additionally, for manufacturing in subparagraph (a)(1)(D), the actor must have the "intent" to distribute the image. Manufacturing images for personal use is characterized as possession and is penalized under the less serious offense of possession of an obscene image of a minor statute (RCC § 22E-1808). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would distribute the image. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant distributed the manufactured image, only that the defendant believed to a practical certainty that he or she would do so. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(C) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[16]

For subparagraph (a)(1)(D), the actor must be "practically certain" that he or she will make an image accessible to another user on an electronic platform. An accidental posting to an electronic platform[17] is insufficient for liability under the trafficking statute. The phrase "accessible to another user on an electronic platform" includes peer-to-peer sharing sites and web sites where it may be difficult to determine site views or membership or whether the image was actually displayed or distributed. It is sufficient that only one other user has access to the image. The term "user" excludes network administrators and others that are not also users of the electronic platform. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(D) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[18]

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or submitting to the creation of an image. The lower culpable mental state is warranted because these responsible individuals are likely violating their duty of care to the complainant by giving effective consent. These responsible individuals may still claim that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

[15] RCC § 22E-701 defines a "live broadcast" as "a streaming video, or any other electronically transmitted image for simultaneous viewing by one or more people." Thus, transmitting a live broadcast is sufficient for distribution of those images if the other requirements of the revised trafficking offense are met. If the individual that transmits a live broadcast is the same individual that is directing the live sexual conduct being broadcast, the individual could also have liability for directing or creating a live sexual performance under the RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809), which has the same penalties as the revised trafficking offense. However, due to the RCC merger provision in RCC § 22E-214, the actor cannot have liability for both trafficking and arranging the same live performance.

[16] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[17] For example, accidentally uploading the wrong file.

[18] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2)

For subparagraph (a)(1)(E), the actor must be "practically certain" that he or she sells or advertises an image. "Advertise" is not limited to commercial settings and includes promoting or drawing attention to an image without any expectation of financial gain. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(E) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[19]

Paragraph (a)(2) specifies additional requirements for the image. First, the image must depict, or will depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor, but there is no requirement that the government prove the identity of the minor. Second, the image must depict, or will depict, the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area,[20] or anus, when there is less than a full opaque covering.[21] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "reckless." "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the image depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state also applies to the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted or will be depicted in the image is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree creating or trafficking an obscene image of a minor. Paragraph (b)(1), subparagraphs (b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(1)(D), and (b)(1)(E), and paragraph (b)(2) have the same

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images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[19] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[20] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[21] If the genitals, pubic area, or anus of the minor have a full opaque covering, or will have a full opaque covering, there is no liability under first degree trafficking an obscene image. However, if the image depicts, or will depict, a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised trafficking an obscene image statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

requirements as paragraph (a)(1), subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), and (a)(1)(E), and paragraph (a)(2) in first degree creating or trafficking an obscene image of a minor. However, the types of prohibited sexual conduct are different in second degree creating or trafficking an obscene image. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[22] The terms "obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes two exclusions from liability for the RCC trafficking an obscene image offense. Paragraph (c)(1) provides that the statute does not apply to any person that is a licensee[23] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified licensee. Paragraph (c)(2) provides that the statute does not apply to any person that is an interactive computer service as defined in 47 U.S.C. § 230(f)(2).[24] Paragraph (c)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified interactive computer service.

Subsection (d) establishes several affirmative defenses for the RCC creating or trafficking an obscene image statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[25] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[26] However, the affirmative defense recognizes that there may be rare situations where images of such conduct warrant First Amendment protection. Paragraph (d)(1) specifies "in fact." "In fact" is a defined term

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[22] If the specified part of the breast or the buttocks has a full opaque covering, and the image does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree trafficking an obscene image. However, there may be liability for causing the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304).

[23] The term "licensee" is defined in paragraph (c)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[24] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[25] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[26] *Miller v. California*, 413 U.S. 15, 24 (1973).

in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the image has, or will have, serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (d)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Per paragraph (d)(2), the affirmative defense applies to subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D) of the offense— all prohibited conduct in the offense except selling or advertising an image in subparagraphs (a)(1)(E) and (b)(1)(E). Paragraph (d)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(2) applies to subparagraphs (d)(2)(A) and (d)(2)(B) and sub-subparagraphs (d)(2)(B)(i) and (d)(2)(B)(ii) and there is no culpable mental state requirement for any of these elements. Subparagraph (d)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (d)(2)(B). Sub-subparagraph (d)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is, or who will be, depicted in the image. In the alternative, sub-subparagraph (d)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are, or who will be, depicted in the image. Under sub-subparagraph (d)(2)(B)(ii), the actor must reasonably believe[27] that every person under 18 years of age who is, or who will be, depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (d)(2) applies to sub-subparagraph (d)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (d)(2)(B)(ii). However, sub-subparagraph (d)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is, or who will be, depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[28] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (d)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Per

[27] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[28] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

paragraph (d)(3), the affirmative defense applies to subparagraphs (a)(1)(A), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(C), and (b)(1)(D)) of the offense—all prohibited conduct in the offense except a person responsible for the complainant under civil law giving effective consent (subparagraphs (a)(1)(B) and (b)(1)(B)) and selling or advertising an image (subparagraphs (a)(1)(E) and (b)(1)(E)). Paragraph (d)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(3) applies to the remaining elements of the defense under subparagraphs (d)(3)(A) through (d)(3)(E) and there is no culpable mental state requirement for any of these elements.

There are several requirements to the affirmative defense under paragraph (d)(3). First, per subparagraph (d)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (d)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs (d)(3)(B)(i) and (d)(3)(B)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant (sub-subparagraph (d)(3)(B)(ii)). "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[29] and is intended to have the same meaning. There are additional requirements if the actor is in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (d)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-sub-subparagraph (d)(3)(B)(ii)(I)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-sub-subparagraph (d)(3)(B)(ii)(II)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-sub-subparagraphs (d)(3)(B)(ii)(I) and (d)(3)(B)(ii)(II) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (d)(3)(C), the complainant must be the only person who is depicted, or who will be depicted, in the image, or the actor and the complainant must be the only persons who are depicted, or who will be depicted in the image. The marriage or romantic partner defense is not available when the image shows, or will show, third persons. Third, per subparagraph (d)(3)(D), the actor must "reasonably believe"[30] that the complainant gives "effective consent" to the actor to engage in the

[29] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[30] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As was stated earlier, the "in fact" specified in paragraph (d)(3) applies to subparagraph (d)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (d)(3)(D). However, subparagraph (d)(3)(D) still requires that the actor subjectively believe that the complainant gives "effective consent" to the actor to engage in the conduct that constitutes the

conduct that constitutes the offense. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Finally, for display, distribution, manufacturing with intent to distribute, or an electronic platform, subparagraph (d)(3)(E) requires that the actor "reasonably believe"[31] that the recipient, the planned recipient, or the user of the electronic platform is the complainant.

Paragraph (d)(4) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations. Per paragraph (d)(4), the defense applies to the display or distribution of an image under subparagraphs (a)(1)(C) and (b)(1)(C) of the offense. Subparagraph (d)(4)(A) requires that the actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[32] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant successfully reported illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would do so. Subparagraph (d)(4)(B) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(4)(B) and sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii) and there is

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offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[31] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As stated earlier, the "in fact" specified in paragraph (d)(3) applies to subparagraph (d)(3)(E) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (d)(3)(E). However, subparagraph (d)(3)(E) still requires that the actor subjectively believe that the complainant is the recipient, the planned recipient, or user of the electronic platform, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[32] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

no culpable mental state requirement for any of the elements in these subparagraphs and sub-subparagraphs. Subparagraph (d)(4)(B) requires that the actor display or distribute the image to a person the actor reasonably believes[33] is a person specified in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), such as a law enforcement officer or a person responsible under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believes is depicted in the image or involved in the creation of the image.

Paragraph (d)(5) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. "Movie theater" is a defined term in RCC § 22E-701. The affirmative defense applies to subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E).[34] Paragraph (d)(5) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the image. The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

Subsection (e) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

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[33] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As was stated earlier, the "in fact" specified in subparagraph (d)(4)(B) applies to sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to these sub-subparagraphs. However, the actor must subjectively believe that the person is one of the specified individuals in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.

[34] This defense does not apply to creating images derived from recording, photographing, or filming live sexual conduct (subparagraphs (a)(1)(A), and (b)(1)(A)) because such actions create child pornography directly from the sexual abuse of minors (as compared to creating a composite image from pre-existing photographs). However, there may be a separate defense for first degree creating or trafficking an obscene image for images that have serious artistic or other value (subsection (d)(1)), or an argument that the images are not "obscene" as required for second degree.

This defense also does not apply to individuals that are responsible for the complainant under civil law and give effective consent for the complainant to engage in the creation of an image derived from live sexual conduct (subparagraphs (a)(1)(B) and (b)(1)(B)) because these individuals are likely violating their duty of care to the complainant. These individuals can still argue that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised creating or trafficking an obscene image of a minor statute clearly changes current District law in twelve main ways.*

First, the revised creating or trafficking an obscene image statute punishes creating, displaying, distributing, selling, or advertising a prohibited image more severely than possessing a prohibited image. The current D.C. Code sexual performance of a minor statute has the same penalties for creating, displaying, distributing, selling, advertising, and possessing a prohibited image,[35] even though creating and distributing are direct forms of child abuse[36] and selling and advertising are "an integral part" of the market.[37] In contrast, the revised creating or trafficking an obscene image statute penalizes creating,[38] displaying, distributing, selling, or advertising a prohibited image more severely than possessing a prohibited image in the revised possession statute (RCC § 22E-1808). Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other current District offenses.[39] The revised creating or trafficking statute also prohibits in subparagraphs (a)(1)(D) and (b)(1)(D) making an image accessible to another user on an electronic platform because this kind of electronic access can be as harmful as actual distribution.

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[35] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[36] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."); *id.* at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

[37] *Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[38] The revised creating or trafficking an obscene image statute prohibits two ways of creating an image. First, subparagraphs (a)(1)(A) and (b)(1)(A) prohibit creating an image by filming, recording, or photographing the complainant engaging in live sexual conduct. Second, subparagraphs (a)(1)(D) and (b)(1)(D) prohibit manufacturing "with intent to distribute" an image. This is not limited to recording live conduct, and includes taking a screenshot of a pre-existing image or video and making a composite image, whether from "real" images, computer-generated images, or a combination of both, as long as there is the intent to distribute.

[39] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

As part of this revision, the revised statute no longer uses the current D.C. Code statute's defined term "promote" and splits the conduct referred to in that definition between the revised trafficking an obscene image and possession of an obscene image offenses.[40] This change improves the consistency and proportionality of the revised offense.

Second, the revised creating or trafficking an obscene image statute grades penalties based upon the type of sexual conduct depicted in the image. The current D.C. Code sexual performance of a minor statute prohibits images of "sexual conduct,"[41] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC creating or trafficking an obscene image statute reserves the first degree gradation for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised trafficking an obscene image statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex

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[40] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code § 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. As is discussed in the commentary, the revised trafficking an obscene image statute retains "distribute," "sell," and "advertise." In addition, the revised trafficking statute prohibits "present" and "exhibit" in the prohibitions on display and electronic platforms in subparagraphs (a)(1)(C), (b)(1)(C), (a)(1)(D), (b)(1)(D). However, instead of "manufacture" and "transmute," the revised statute requires manufacturing with intent to distribute (subparagraphs (a)(1)(C) and (b)(1)(C)). Manufacturing or transmuting images, without more, is characterized as possession, and is criminalized by the less serious possession of an obscene image statute (RCC § 22E-1808). The remaining possessory aspect of the current definition, "procure," is criminalized in the less serious RCC possession of an obscene image offense.
"Offer or agree to do the same" is deleted from the current definition of "promote" because inchoate liability, such as attempt and conspiracy, provides more consistent and proportional punishment for this conduct. For example, under the current statute, a defendant that "offers" to "direct" and film a live sexual performance could be charged with attempted sexual performance of a minor, which, for a first offense, would have a maximum term of imprisonment of 180 days. D.C. Code §§ 22-1803; 22-3102(a)(2) (prohibiting "direct[ing]" a sexual performance of a minor); 22-3103(1). However, if this conduct were charged under the current definition of "promote" as offering to "manufacture" a film of a sexual performance, the defendant would face a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3102(a)(2); 22-3103(1). In the RCC, the defendant would be charged with attempted trafficking of an obscene image (RCC § 22E-1807 (offers to "record[], photograph[], or film[]" the complainant).
The remainder of the current definition is deleted as redundant with distribution (issue, give, provide, lend, mail, deliver, transfer, publish, circulate, disseminate).

[41] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting a "sexual performance" or a "performance which includes sexual conduct by a person under 18 years of age."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

offenses.[42] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised creating or trafficking an obscene image statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[43] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." The creation, distribution, or possession of images of minors engaging in "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[44] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[45] with no enhancements for the obscene materials depicting a minor.[46] In contrast, first degree of the revised creating or trafficking an obscene image statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701, consistent with other RCC offenses. As defined, such sexual conduct may be as graphic[47] as other conduct penalized by the current D.C. Code statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a

[42] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[43] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[44] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, distribution, and possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[45] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[46] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[47] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised trafficking an obscene image of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

"lewd exhibition of the genitals."[48] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[49] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised creating or trafficking an obscene image statute expands the prohibited sexual conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a "lewd exhibition of the genitals." However, the creation, distribution, or possession of images of minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[50] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[51] with no enhancements for the obscene materials depicting a minor.[52] In contrast, the RCC revised creating or trafficking an obscene image of a minor statute criminalizes the creation and distribution of certain depictions of the pubic area[53] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[54] As defined, display of the pubic

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[48] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[49] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[50] The current obscenity statute, D.C. Code § 22-2201 generally criminalizes the creation, distribution, and possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[51] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[52] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[53] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[54] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v.*

area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised creating or trafficking an obscene image statute expands the current exception to liability for conduct by persons under 18 years of age and makes it an affirmative defense. In the current D.C. Code sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[55] or, if there are multiple minors depicted, all of the minors consent.[56] A minor that is not depicted,[57] or an adult that is not more than four years older than the minor or minors depicted,[58] is not liable for

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Ferber, 458 U.S. 747, 764-66 (1982). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams,* the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC trafficking an obscene statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC trafficking an obscene image statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised trafficking an obscene image statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

[55] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[56] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[57] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[58] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: .

possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[59] and minors are still liable under the current statute for creating images of themselves or other minors[60] or engaging in sexual conduct.[61] There is no DCCA case law interpreting the current exclusion. In contrast, the revised trafficking an obscene image statute excludes from liability all persons under the age of 18 years,[62] applies to all images,[63] and applies to all prohibited conduct, except selling or advertising images (subparagraphs (a)(1)(E) and (b)(1)(E)). Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[64] The only requirements of the

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. (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[59] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[60] A minor that creates a prohibited image of himself or herself or of other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[61] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[62] The revised creating or trafficking statute excludes from liability minors that have a responsibility under civil law for the health, welfare, or supervision of the complainant. These minors would otherwise have liability under subparagraphs (a)(1)(B) and (b)(1)(B) for giving effective consent for another minor to engage in or submit to the recording, photographing, or filming of a non-derivative image. This exclusion ensures that the revised creating or trafficking an obscene image statute is reserved for predatory adults. However, such a minor may still have liability under the RCC criminal abuse and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502) and the RCC sex offenses. In addition, the revised exclusion only applies if the minor that is under the care of the responsible minor gives effective consent to the actions of the responsible minor.

[63] The current exclusion applies only to a "still or motion picture," but there is no substantive difference between the definition of "still or motion picture" and the RCC definition of "image." *Compare* D.C. Code § 22-3102(d)(2) (defining "still or motion picture" as "includ[ing] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced.") *with* RCC § 22E-701 (defining "image" as a "a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format."). The revised trafficking an obscene image statute deletes the current definition of "still or motion picture."

[64] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography

revised exclusion are either: 1) The minor is the only person under the age of 18 years who is depicted, or who will be depicted, in the image;[65] or 2) The actor reasonably believes that the actor has the effective consent of every person under 18 years of age who is, or who will be, depicted in the image.[66] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Per the revised statute, a minor still may be liable for selling or advertising images, even of himself or herself,[67] or for distribution or display of an image without the recipient's effective consent.[68] This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised trafficking an obscene image statute expands the current affirmative defense for a librarian or motion picture theater employee to include similarly positioned museum, school, and other venue employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[69] for a "librarian engaged in the normal course of his or her

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frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[65] If a minor is the only person under the age of 18 years that is depicted, or will be depicted, in the image, it is irrelevant under the exclusion if the image depicts, or will depict, an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1802), electronic stalking (RCC § 22E-1803), unlawful disclosure of sexual recordings (RCC § 22E-1804), distribution of an obscene image (RCC § 22E-1805), or sexual assault (RCC § 22E-1301).

[66] If both minors and adults are depicted, or will be depicted, in the image, it is irrelevant under the defense if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803), electronic stalking (RCC § 22E-1802), unlawful disclosure of sexual recordings (RCC § 22E-1804), distribution of an obscene image (RCC § 22E-1805), or sexual assault (RCC § 22E-1301).

[67] For example, a sixteen year old who sells images of himself or herself masturbating to an online buyer may be liable under the revised statute. Even if the minor's conduct in such situations appears to be consensual, when a minor sells or advertises sexual images such conduct supports the market for prohibited sexual images.

[68] The RCC distribution of an obscene image statute (RCC § 22E-1805) and RCC distribution of an obscene image to a minor statute (RCC § 22E-1806) prohibit the distribution or display of an image without the recipient's effective consent. The RCC distribution of an obscene image to a minor statute (RCC § 22E-1806) requires that the defendant be at least 18 years of age, but the general distribution of an obscene image statute does not, and applies if the recipient is a minor.

[69] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-

employment"[70] and certain movie theater employees[71] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[72] There is no DCCA case law interpreting this defense. In contrast, the revised trafficking an obscene image statute expands this affirmative defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[73] For reasons discussed the in explanatory note to this offense, the affirmative defense is limited to the conduct prohibited in subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E). Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's affirmative defense in paragraph (d)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised trafficking an obscene image statute expands the "innocent possession" affirmative defense in the current D.C. Code sexual performance of a minor statute to include conduct involving more images and display or distribution to authorities other than law enforcement, so long as the actor has a socially beneficial intent. The current D.C. Code sexual performance of a minor statute has an affirmative defense for possessing five or fewer images or one motion picture and requires either that the defendant take reasonable steps to destroy the material or report the material to a law enforcement agency and afford that agency access.[74] There is no DCCA case law interpreting the current defense. In contrast, the RCC affirmative defense is available for the distribution or display of any number of images to any number of recipients,

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3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[70] D.C. Code § 22-3104(b)(1)(A).

[71] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[72] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[73] For example, the defense would not apply to the curator of an art museum who selects prohibited images for an exhibition and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who escorts patrons to the exhibition or sells prints of the prohibited images at the museum gift shop. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in paragraph (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

[74] D.C. Code § 22-3104(c) ("It shall be an affirmative defense to a charge under § 22-3102 that the defendant: (1) Possessed or accessed less than 6 still photographs or one motion picture, however produced or reproduced, of a sexual performance by a minor; and (2) Promptly and in good faith, and without retaining, copying, or allowing any person, other than a law enforcement agency, to access any photograph or motion picture: (A) Took reasonable steps to destroy each such photograph or motion picture; or (B) Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.").

including a law enforcement officer or person with a responsibility under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction when the actor has the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney." The current affirmative defense unnecessarily restricts the number of images or motion pictures and excludes well-intentioned individuals who seek legal advice or report images to authorities other than law enforcement. The expanded defense recognizes that parents, schools, and others have a vital interest in addressing wrongful creation, distribution, and sale of prohibited images, and good faith sharing of information such authorities should not be a crime.[75] The number of images or motion pictures an individual displays or distributes is not limited, but may be relevant to a fact finders' determination of the actor's intent. This change improves the consistency and proportionality of the revised statute.

Eighth, the revised trafficking an obscene image statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[76] The current D.C. Code sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference.[77] There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised trafficking an obscene image statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements

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[75] For example, if a parent discovers multiple video clips on their child's phone of what appear to be another minor engaging in sexual conduct at the child's school, the parent should be able to send the video to school administrators, the parents of the minor, and/or possibly an attorney for further investigation and resolution without having committed a crime.

[76] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[77] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

The defense only applies to creating an image by recording, photographing, or filming the complainant (subparagraphs (a)(1)(A) and (b)(1)(A)), displaying, distributing, or manufacturing with intent to distribute (subparagraphs (a)(1)(C) and (b)(1)(C)), and placing an image on an electronic platform (subparagraphs (a)(1)(D) and (b)(1)(D)). The prohibited conduct must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the actor has the complainant's effective consent. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised trafficking statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes. This change improves the consistency and proportionality of the revised statute.

Ninth, the revised trafficking an obscene image statute has an affirmative defense for subsection (a) that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. The current sexual performance of a minor statute does not have any defense if the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current D.C. Code statute appears to criminalize the creation, sale, promotion, or possession of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to images with serious literary, artistic, political, or scientific value, when considered as a whole.[78] In contrast, first degree of the revised creating or trafficking an obscene image statute has an affirmative defense that the image has, or will have serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[79] Despite this defense, however, there may still be liability under the RCC sex offenses for

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[78] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.

[79] *Miller v. California*, 413 U.S. 14, 24 (1973).

causing or attempting to cause a minor to engage in the prohibited sexual conduct.[80] This change improves the constitutionality of the revised statute.

Tenth, through the RCC definition of "image," the revised trafficking an obscene image statute excludes hand-rendered depictions. The current D.C. Code sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."[81] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current D.C. Code statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[82] The Supreme Court struck down as unconstitutionally overbroad a federal statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation.[83] In contrast, through the definition of "image" in RCC § 22E-701, the revised creating or trafficking an obscene image statute is limited to images that are not hand-rendered. Limiting the revised statute to images that are not hand-rendered helps ensure that the images feature "real" minors,[84] and, for second

[80] For example, a defendant that causes minors to engage in sexual intercourse for an artistic film may have a successful affirmative defense under subsection (d)(1) of the RCC creating or trafficking offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301). If the sexual activity doesn't actually occur, there may still be liability under enticing a minor into sexual conduct (RCC § 22E-1305) or arranging for sexual conduct with a minor or person incapable of consenting (RCC § 22E-1306).

[81] D.C. Code § 22-3101(3).

[82] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

[83] In *Aschcroft v. Free Speech Coalition*, the Supreme Court held that a provision in a federal statute that extended to "any visual depiction" that "is, or appears to be a minor engaging in sexually explicit conduct" was unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 256 (2002). However, most of the Court's analysis focused on the "appears to be language," and it was in this context that the Court also discussed the problematic scope of "any visual depiction," noting that "the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology" because it is a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241. The Court in *Free Speech Coalition* also noted that these images "do not involve . . . let alone harm any children in the production process," *id.* at 241, and, accordingly found the Government's arguments for the restriction unpersuasive, *id.* at 246-56, 256. Although not squarely addressed in the opinion, it seems clear that the medium of a visual depiction is not dispositive in the constitutional analysis. A watercolor painting that is derived from painting live conduct is still a product of child sexual abuse and may be prohibited. *Id.* at 249 ("Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. . . . The fact that a work contained serious literary, artistic, or other value did not excuse the harm to its child participants.").

[84] As is discussed elsewhere in this commentary, in *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. However, for many hand-rendered depictions, such as paintings, it may be difficult to determine if the depiction was of a "real" minor or just an individual's artistic rendering. For example, a defendant that sells or shares a realistic painting of female genitalia falls within the scope of the current statute, but without additional information, it is impossible to know if the painting is of a "real"

degree, that the images are "patently offensive" under modern community standards per *Miller v. California*.[85] This change improves the clarity, consistency, and constitutionality of the revised statute.

Eleventh, the revised creating or trafficking an obscene image statute no longer separately prohibits "employ[ing]," "authoriz[ing]," or "induc[ing]" a minor to engage in a sexual performance, instead penalizing such conduct under the RCC solicitation statute at half the penalty of the completed offense. The current D.C. Code sexual performance of a minor statute specifically states that a person commits the offense if he "employs, authorizes, or induces" a minor to engage in a sexual performance.[86] The precise scope of conduct intended by these verbs, and whether such verbs are intended to equate with solicitation of a crime under common law, is unclear. There is no DCCA case law interpreting this provision. Regardless, although such conduct may be far-removed from an actual image, employing, authorizing, or inducing a minor to engage in a sexual performance has the same 10 year penalty as actually filming or directing a sexual performance.[87] In contrast, the revised creating or trafficking an obscene image statute removes employing, authorizing, and inducing as a discrete means of liability. Conduct that facilitates the minor engaging in the creation of an image instead is covered by the RCC solicitation offense (RCC § 22E-302),[88] defined in a manner consistent with other serious offenses against persons, and subject to a penalty one-half of the completed offense. "Employing" a minor to engage in a sexual performance may also make the actor subject to attempt liability[89] depending on the facts of the case. This change improves the clarity, consistency, and proportionality of the revised statute.

Twelfth, the revised statute excludes liability for commercial telecommunications service providers. The current D.C. Code sexual performance of a minor statute makes it unlawful to "transmit" a still or motion picture depicting a sexual performance by a minor "by any means, including electronically."[90] The crime makes no exception for a company or employee who merely facilitates the transmission of an image or sound at a user's request.[91] District case law has not addressed the issue. In contrast, the revised trafficking an obscene image offense excludes liability for any licensee under the Communications Act of 1934,[92] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[93] The revised offense also excludes liability for any interactive computer service, as defined in

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minor. If the painting is not of a "real" minor, and is not otherwise obscene, it is unconstitutional to prohibit its creation, distribution, etc.

[85] 413 U.S. 15 (1973).

[86] D.C. Code § 22-3102(a)(1).

[87] D.C. Code § 22-3102(1).

[88] Depending on the facts of the case, there may also be accomplice liability under RCC § 22E-210 or conspiracy liability under § 22E-301 for one who "employs, authorizes, or induces" in concert with others.

[89] RCC § 22E-301.

[90] D.C. Code § 22-3102(d)(3).

[91] Consider, for example, a social media platform that "transmits" the obscene image one user posts to other users of the platform. Consider also a television station that "transmits" a live broadcast of local news coverage, during which two minors begin engaging in a sexual act in the background.

[92] 47 U.S.C. § 151 et seq.

[93] *See* D.C. Code § 22-2201(d); RCC §§ 22E-1805 and 1806.

section 230(e)(2) of the Communications Act of 1934,[94] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[95] This change improves the consistency and proportionality of the revised offense.

Beyond these twelve changes to current District law, eight other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised creating or trafficking an obscene image statute requires a "knowingly" culpable mental state for the prohibited conduct—creating an image, giving consent for a minor to create an image, displaying, distributing, or manufacturing an image, making an image accessible on an electronic platform, and selling or advertising an image. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[96] The statute does not specify whether this culpable mental state extends to the prohibited conduct, such as creating the image, and the definition of "knowingly"[97] in the current statute is unclear. There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[98] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[99] Resolving this ambiguity, the revised creating or trafficking an obscene image statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited

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[94] 7 U.S.C. § 230(f)(2).

[95] *See* D.C. Code § 22-3055(b); RCC § 22E-1804.

[96] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[97] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[98] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[99] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

conduct—creating an image, giving consent for a minor to create an image, displaying, distributing, or manufacturing an image, making an image accessible on an electronic platform, and selling or advertising an image. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[100] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised creating or trafficking an obscene image statute requires recklessness as to the content of the image and, in second degree, as to whether the content is obscene. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[101] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[102] There is no DCCA case law interpreting the definition of "knowingly"[103] or how it applies to the current statute. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[104] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[105] Resolving this ambiguity, the revised

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[100] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[101] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[102] D.C. Code § 22-3101(1).

[103] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[104] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[105] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the

creating or trafficking an obscene image statute requires recklessness as to the content of the image,[106] and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[107] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[108] This change improves the clarity and consistency of the revised statute

Third, the revised creating or trafficking an obscene image statute requires that the image depicts, or will depict, at least part of a real complainant under the age of 18 years, and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted, or will be depicted, in an image must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[109] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised creating or trafficking an obscene image statute specifies that at least part[110] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[111] Distribution of obscene images of purely computer-generated or other

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accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[106] While the revised creating or trafficking an obscene image statute requires "recklessness" as to the content of the image (whether it depicts or will depict part or all of a real complainant under the age of 18 years engaging in the prohibited sexual conduct), the closely-related distribution of an obscene image statute (RCC § 22E-1805) and distribution of an obscene image to a minor statute (RCC § 22E-1806) require a higher "knowingly" culpable mental state for the equivalent element (whether an image depicts any person, real or fictitious, of any age, engaging in the prohibited sexual conduct). The higher culpable mental state in these offenses is warranted because they prohibit a much broader array of images.

[107] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[108] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[109] D.C. Code § 22-3101(2).

[110] The revised creating or trafficking an obscene image statute includes composite images of minors if at least part of the composite is of a real minor, such as a real minor's head on an adult body, or an adult's head on a real minor's body. There is no requirement that the government prove the identity of a real minor.

[111] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings,

fictitious minors[112] may be prohibited under the RCC distribution of an obscene image statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, through use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for images of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits "simulated" sexual intercourse,[113] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way that realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[114] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[115] and is supported by Supreme Court case law.[116] Distribution

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including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. *Ferber* was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further. The RCC requirement that the image is at least partially comprised of a real minor ensures the revised trafficking offenses is constitutional.

[112] Under Supreme Court case law, images of computer-generated minors and other fake minors retain First Amendment protection and can only be prohibited if they are also obscene. *Ferber*, 458 U.S. at 764-65 ("We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."). In *Ashcroft v. Free Speech Coalition*, the Court held that a federal statute that prohibited "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," without any obscenity requirement, was overbroad and unconstitutional. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 249, 256 (2002). The Court noted that unlike *Ferber*, where the images were "the record of sexual abuse, [the federal statute at issue] prohibits speech that records no crime and creates no victims by its production." *Ashcroft*, 535 U.S. at 250. The Court found unpersuasive the Government's arguments about the need for the statute and held that it was overbroad and unconstitutional. *Id.* 250-51, 252-56. In *United States v. Williams*, the Court stated that a federal statute that prohibited "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008).

[113] D.C. Code § 22-3101(5)(A).

[114] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[115] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

of obscene images that do not satisfy the definition of "simulated" may be prohibited under the RCC distribution of an obscene image statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and constitutionality of the revised statute.

Fifth, the revised creating or trafficking an obscene image statute provides liability for a person responsible for the complainant under civil law giving "effective consent" to the complainant's participation in the recording, photographing, or filming, and requires a "knowingly" culpable mental state for this element.[117] The current D.C. Code sexual performance using a minor statute prohibits a "parent, legal guardian, or custodian" of a minor from "consent[ing] to the participation by a minor in a sexual performance."[118] The statute does not define "consent" or specify a culpable mental state for this element and there is no DCCA case law on this issue. Resolving this ambiguity, the revised creating or trafficking statute requires that the individual responsible under civil law for the health, welfare, or supervision of the complainant give "effective consent," as defined in RCC § 22E-701, and requires a "knowing" culpable mental state for this element. The term "under civil law for the health, welfare, or supervision of the complainant" includes parents, legal guardians, and custodians who at the time have a legal duty of care for the complainant. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception" and is used consistently throughout the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[119] This change improves the clarity and consistency of the revised statute.

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[116] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[117] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) and paragraph (b)(1) also applies to the fact that the defendant is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant."

[118] D.C. Code § 22-3102(a)(1).

[119] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

Sixth, the revised creating or trafficking an obscene image statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current D.C. Code sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[120] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[121] It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence,[122] and it is also unclear whether the mental state applies to the age of the complainant.[123] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[124] which suggests that negligence is not sufficient for liability and that "recklessly" or "knowingly" applies to the age of the complainant. Resolving this ambiguity, the revised creating or trafficking an obscene image statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[125] and

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[120] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[121] D.C. Code § 22-3101(1).

[122] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[123] The legislative history for the prohibition in the current statute against attending, transmitting or possessing a sexual performance by a minor (D.C. Code § 22-3102(b)), states that the defendant "must know that the performance will depict a minor." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This prohibition was added to the current statute in 2010 and there is no discussion of how the "knowing" culpable mental state in pre-existing parts of the statute applies to the age of the complainant. Regardless, it is persuasive authority that the defendant must "know" the age of the complainant in the other parts of the statute, although the meaning of that definition remains unclear.

[124] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[125] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised creating or trafficking an obscene image statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must consciously disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the person is aware of, the actor's conscious disregard is a gross deviation

clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[126] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[127] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[128] This change improves the clarity and consistency of the revised statute.

Seventh, the revised creating or trafficking an obscene image statute does not criminalize a person with specified responsibility under civil law for the complainant giving effective consent for the complainant to aid the creation of derivative images. The definition of "performance"[129] in the current D.C. Code sexual performance of a minor statute includes live conduct as well as images (e.g., photographs) of live conduct, and appears to include derivative images (e.g., photographs of photographs). The current statute prohibits a parent, guardian, or custodian from giving consent for "participation by a minor in a sexual performance,"[130] but it is unclear what "participation" means and if this provision extends to giving consent for the minor to create an image derived from a source other than live conduct. There is no DCCA case law on these issues. Resolving this ambiguity, subparagraphs (a)(1)(B) and (b)(1)(B) of the revised statute exclude a "derivative image." Read in conjunction with the requirements in subsections (a)(2) and (b)(2), these subparagraphs require the defendant to give effective consent for the minor to engage in or submit to the recording, photographing, or filming of live sexual conduct. This change improves the clarity and consistency of the revised statute.

Eighth, the revised creating or trafficking an obscene image statute no longer separately prohibits producing or directing a derivative image. The current D.C. Code sexual performance of a minor statute prohibits "produc[ing]" or "direct[ing]" a sexual performance of a minor.[131] The definition of "performance"[132] in the current sexual performance of a minor statute includes live conduct, as well as still images (e.g., photographs). There is no DCCA case law on the intended scope or meaning of "directing" or "producing," and whether the current statute criminalizes producing or

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from the ordinary standard of conduct. A reasonable mistake as to the complainant's age would negate the recklessness required. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[126] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[127] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

[128] RCC § 22E-701 defines "protected person" to include certain individuals under the age of 18 years or over the age of 65 years and several RCC offenses, like assault (RCC § 22E-1202), require a "reckless" culpable mental state for the fact that the complainant is a "protected person." In addition, several of the penalty enhancements for the RCC sexual assault offense (RCC § 22E-1301) require a "reckless" culpable mental state for the age of the complainant.

[129] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[130] D.C. Code § 22-3102(a)(1).

[131] D.C. Code § 22-3102(a)(2).

[132] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

directing the creation of a derivative image.[133] The legislative history notes that "producing a performance [includes] giving financial backing, making background arrangements for a performance such as buying or leasing equipment for a sexual performance or purchasing equipment to film or exhibit a sexual performance."[134] Resolving this ambiguity, the revised creating or trafficking an obscene image statute eliminates separate liability for producing or directing a derivative image as a discrete means of liability. The revised trafficking an obscene image statute continues to criminalize knowingly producing or directing the creation of an image that involves recording, photographing, or filming the complainant.[135] "Produc[ing]" includes actions that facilitate the creation, sales, or advertising of a live performance, such as "giving financial backing" and "making background arrangements for a performance such as buying or leasing equipment for a sexual performance."[136] However, a person who produces or directs the creation of a derivative image is not criminally liable under the revised trafficking statute unless they satisfy the requirements under the RCC accomplice liability statute (RCC § 22E-210).[137] This change improves the clarity and consistency of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute deletes subsection (a) of the current D.C. Code statute: "It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor."[138] It is unclear whether this is a general statement or part of the actual offense for which a person can be charged and convicted.[139] The revised creating or trafficking an obscene image statute

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[133] For example, knowingly providing a computer or internet services to a person who creates a compilation of sexualized images of minors copied from the internet.

[134] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[135] For example, an actor that gives money to another individual, knowing that the individual is buying video equipment and filming prohibited images would have liability for "producing" the creation of an image derived from recording, photographing, or filming live conduct. Producing or directing a live performance under the RCC arranging a live sexual performance of a minor statute RCC § 22E-1809 may also provide similar liability.

[136] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[137] For example, if an actor knows that a person creates derivative images of minors engaging in sex acts on their computer, and *purposely* buys that person sophisticated software or pays the rent at their location to facilitate that conduct or to aid the distribution or sale of derivative, there may be accomplice liability for trafficking an obscene image under RCC § 22E-210.

[138] D.C. Code § 22-3102(a).

[139] The current statute substantively encompasses the "use" and "promot[ion] of a minor in a sexual performance, regardless of the meaning of subsection (a). D.C. Code §§ 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age."); 22-3101(4) (defining "promote" as "to

substantively encompasses the "use" of a minor in a sexual performance and "promot[ing]" a sexual performance by a minor, rendering current subsection (a) superfluous. This improves the clarity of the revised offense without changing the law.

Second, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[140] However, it is counterintuitive to construe a "performance" as including a still image (e.g., a photograph). To clarify that both images and live performances fall within the revised statutes, the RCC creating or trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and attending a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—creating or trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Third, the revised creating or trafficking an obscene image statute no longer uses the defined term "minor."[141] Instead, consistent with the current statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[142] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fourth, the revised creating or trafficking an obscene image statute replaces "parent, legal guardian, or custodian of a minor" with a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The current D.C. Code sexual performance of a minor statute prohibits a "parent, legal guardian, or custodian of a minor" from "consent[ing] to the participation by a minor in a sexual performance."[143] There is no DCCA case law on the scope of "parent, legal guardian, or custodian" in the current statute. However, the legislative history for the current statute indicates a broad scope: "[A] parent, whether natural, or adoptive, or a foster parent, a legal guardian defined in D.C. Code, sec. 21-101 to 103 or custodian . . . [c]ustodian means any person who has responsibility for the care of a child without regard to whether

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procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.").

[140] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

[141] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[142] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[143] D.C. Code § 22-3102(a)(1).

a formal legal arrangement exists."[144] The revised statute similarly uses a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant," which is used elsewhere in the RCC, such as the special defenses in RCC § 22E-408. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised creating or trafficking an obscene image statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[145] but otherwise refers generally to the complainant's sexual conduct.[146] The revised creating or trafficking statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g., unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised creating or trafficking an obscene image statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current D.C. Code sexual performance of a minor statute prohibits, including bestiality.[147] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[148] the revised creating or trafficking an obscene image statute prohibits a "sexual or sexualized display" when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA has approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the

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[144] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[145] D.C. Code § 22-3102(a)(1).

[146] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

[147] The current sexual performance of a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i) of the current statutory language. Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[148] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[149] The revised creating or trafficking an obscene image statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Eighth, the revised creating or trafficking an obscene image statute deletes the definitions of "transmit" and "transmission" in the current D.C. Code statute[150] because they are redundant with distribution. Deleting them clarifies the revised statute without changing current law.

Ninth, the revised creating or trafficking an obscene image statute clarifies that filming live conduct is a discrete means of liability. The current D.C. Code sexual performance of a minor statute extends to filming live conduct, but it is not explicitly stated in the statute.[151] To better communicate in plain language the scope of the offense, the revised statute specifies that recording, photographing, or filming live conduct are all means of liability. This revision improves the clarity of the revised statute without changing current District law.

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[149] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.
The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[150] D.C. Code § 22-3102(d)(3) ("For the purposes of subsections (b) and (c) of this section, the term: . . . . 'Transmit' or 'transmission' includes distribution, and can occur by any means, including electronically.". [sic].").

[151] The current definitions of "performance" and "sexual performance" include both still images and live performances. D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age."). Thus, each provision of the current statute extends to using a minor or giving consent for a minor to engage in or participate in live conduct. D.C. Code § 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

Tenth, the definition of "movie theater" in RCC § 22E-701[152] applies to the affirmative defense in paragraph (d)(5) of the revised creating or trafficking an obscene image statute. The current D.C. Code sexual performance of a minor statute has a similar affirmative defense[153] that applies to specified employees of a "motion picture theater," but does not define the term. There is no DCCA case law interpreting the term "motion picture theater" in this affirmative defense. The RCC definition of "motion picture theater" limits the affirmative defense to certain employees of a theater or other venue that is being utilized primarily for the exhibition of a motion picture to the public, which is consistent with the scope of the affirmative defense. This change improves the clarity of the revised statute.

[152] RCC § 22E-701 defines "movie theater" as "a theater, auditorium, or other venue that is being utilized primarily for the exhibition of a motion picture to the public."

[153] D.C. Code § 22-3104 (b)(1) ("Except as provided in paragraph (2) of this subsection, in any prosecution for an offense pursuant to § 22-3102(2) it shall be an affirmative defense that the person so charged was: (A) A librarian engaged in the normal course of his or her employment; or (B) A motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater.").

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

Explanatory Note. [1] *The RCC possession of an obscene image of a minor offense prohibits possessing images that depict complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted in the image. The revised possession of an obscene image of a minor statute has the same penalties as the RCC attending or viewing a live sexual performance of a minor statute,*[2] *the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the creating or trafficking of an obscene image of a minor offense,*[3] *the arranging a live sexual performance of a minor offense,*[4] *and the attending or viewing a live sexual performance of a minor offense,*[5] *the revised possession of an obscene image of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Paragraph (a)(1) specifies the prohibited conduct in first degree possession of an obscene image of a minor, the highest gradation of the revised possession offense—"possesses" an "image." An "image," as defined in RCC § 22E-701, is a visual depiction, other than a depiction rendered by hand, and includes videos and live broadcasts.[10] "Possesses" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over."[11] The RCC definition of "knowingly" in RCC § 22E-206 here means the actor must be "practically certain" that he or she will either hold or carry an image on his or her person or have the ability and desire to exercise control over an image.

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[1] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current D.C. Code statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[2] RCC § 22E-1810.

[3] RCC § 22E-1807.

[4] RCC § 22E-1809.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

[10] Depending on the facts of a given situation, there may also be liability for viewing a live broadcast under the RCC viewing a live performance of a minor statute (RCC § 22E-1810). However, due to the RCC merger provision in RCC § 22E-214, an individual may not be convicted of both possessing and viewing the same live broadcast on the same occasion.

[11] Read in conjunction with the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807), the RCC possession of an obscene image characterizes as possession: 1) manufacturing an image without an intent to distribute that image; and 2) uploading or making available an image on an electronic platform that is available only to the actor and no other user, i.e. an actor e-mailing himself or herself a prohibited image.

Paragraph (a)(2) specifies additional requirements for the image. First, the image must depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the image must depict the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area,[12] or anus, when there is less than a full opaque covering.[13] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "reckless." "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the image depicts, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "reckless" culpable mental state also applies to the prohibited sexual conduct in sub-paragraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted in the image is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree possession of an obscene image of a minor. Paragraph (b)(1) and paragraph (b)(2) have the same requirements as paragraph (a)(1) and paragraph (a)(2) in first degree. However, the types of prohibited sexual conduct are different for second degree possession of an obscene image. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact" and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[14] RCC § 22E-701 defines "obscene" and "sexual contact." Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes two exclusions from liability for the RCC possession of an obscene image offense. Paragraph (c)(1) provides that the statute does not apply to

[12] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[13] If the genitals, pubic area, or anus of the minor have a full opaque covering, there is no liability under first degree of the revised possession statute. However, if the image depicts a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised possession of an obscene image statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

[14] If the specified part of the breast or the buttocks has a full opaque covering, and the image does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree possession of an obscene image.

any person that is a licensee[15] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified licensee. Paragraph (c)(2) provides that the statute does not apply to any person that is an interactive computer service as defined in 47 U.S.C. § 230(f)(2).[16] Paragraph (c)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor is a specified interactive computer service.

Subsection (d) establishes several affirmative defenses for the RCC possession of an obscene image statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the image has serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[17] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, are not subject to the First Amendment requirements set out in *Miller v. California*.[18] However, the affirmative defense recognizes that there may be rare situations where images of such conduct warrant First Amendment protection. Paragraph (d)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the image has serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (d)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Paragraph (d)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(2) applies to subparagraphs (d)(2)(A) and (d)(2)(B) and sub-subparagraphs (d)(2)(B)(i) and (d)(2)(B)(ii) and there is no culpable mental state requirement for any of these elements. Subparagraph (d)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (d)(2)(B). Sub-subparagraph (d)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is depicted in the image. In the alternative, sub-subparagraph (d)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are depicted in the image. Under sub-subparagraph (d)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age who is depicted in

[15] The term "licensee" is defined in paragraph (c)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[16] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[17] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[18] *Miller v. California*, 413 U.S. 15, 24 (1973).

the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense. Under sub-subparagraph (d)(2)(B)(ii), the actor must reasonably believe[19] that every person under 18 years of age who is depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (d)(2) applies to sub-subparagraph (d)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (d)(2)(B)(ii). However, sub-subparagraph (d)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is depicted in the image gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[20] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (d)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Paragraph (d)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (d)(3) applies to the remaining elements of the defense under subparagraphs (d)(3)(A) through (d)(3)(D) and there is no culpable mental state requirement for any of these elements.

There are several requirements to the affirmative defense under paragraph (d)(3). First, per subparagraph (d)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (d)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs (d)(3)(B)(i) and (d)(3)(B)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant (sub-subparagraph (d)(3)(B)(ii)). "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[21] and is intended to have the same meaning. There are additional

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[19] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[20] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[21] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or

requirements if the actor is in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (d)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-sub-subparagraph (d)(3)(B)(ii)(I)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-sub-subparagraph (d)(3)(B)(ii)(II)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-sub-subparagraphs (d)(3)(B)(ii)(I) and (d)(3)(B)(ii)(II) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (d)(3)(C), the complainant must be the only person who is depicted in the image, or the actor and the complainant must be the only persons who are depicted in the image. The marriage or romantic partner defense is not available when the image shows third persons. Third, per subparagraph (d)(3)(D), the actor must "reasonably believe"[22] that the complainant gives "effective consent" to the actor to engage in the conduct that constitutes the offense. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (d)(4) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations. Subparagraph (d)(4)A requires that the actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[23] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant successfully reported illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would do so. Subparagraph (d)(4)(B) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC §

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was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[22] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As was stated earlier, the "in fact" specified in paragraph (d)(3) applies to subparagraph (d)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to subparagraph (d)(3)(D). However, subparagraph (d)(3)(D) still requires that the actor subjectively believe that the complainant gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[23] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(4)(B), sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and sub-subparagraphs (d)(4)(C)(i) and (d)(4)(C)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs or sub-subparagraphs. Subparagraph (d)(4)(B) requires that the actor promptly contact a person the actor reasonably believes[24] is a person specified in sub-subparagraphs (d)(4)(C)(i) and (d)(4)(C)(ii), such as a "law enforcement officer" or a person responsible under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believes[25] is depicted in the image or involved in the creation of the image. "Law enforcement officer" is a defined term in RCC § 22E-701. Per sub-subparagraph (d)(4)(C)(i) and sub-subparagraph (d)(4)(C)(ii), the actor must also promptly distribute the image to one of the specified individuals or authorities, without making or retaining a copy, or allow a law enforcement agency access to the image.

Paragraph (d)(5) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. "Movie theater" is a defined term in RCC § 22E-701. Paragraph (d)(5) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (d)(5)(A), (d)(5)(B), and (d)(5)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the image. The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

Subsection (d)(6) establishes an affirmative defense for when the actor possesses the image, with intent, exclusively and in good faith, to permanently dispose of the item, and, in fact, the actor does not possess the item longer than is reasonably necessary to permanently dispose of the item.[26] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's

[24] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[25] As was stated earlier, the "in fact" specified in subparagraph (d)(4)(B) applies to sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and no culpable mental state, as defined in RCC § 22E-205, applies to these sub-subparagraphs. However, the actor must subjectively believe that the person is one of the specified individuals in sub-subparagraphs (d)(4)(B)(i) and (d)(4)(B)(ii), and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[26] For example, the defense may arise if a person finds prints of images subject to prosecution under RCC § 22E-1808 in an outdoor location and carries them on their person for a short period of time with intent exclusively and in good faith to destroy the images.

culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant successfully disposed of the item, only that the defendant believed to a practical certainty that he or she would do so. "In fact" is a defined term in RCC § 22E-207 that, applied here, specifies that there is no culpable mental state requirement as to whether the item was possessed no longer than reasonably necessary to dispose of it. This defense is substantially similar to the temporary possession defense in RCC § 22E-502.

Subsection (e) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised possession of an obscene image of a minor statute clearly changes current District law in twelve main ways.*

First, the revised possession of an obscene image statute punishes possessing a prohibited image less severely than creating, displaying, distributing, selling, or advertising a prohibited image. The current D.C. Code sexual performance of a minor statute has the same penalties for creating, displaying, distributing, selling, advertising, and possessing an image,[27] even though creating and distributing are direct forms of child abuse[28] and selling and advertising are "an integral part" of the market.[29] In contrast, the revised possession of a prohibited image statute punishes possessing a prohibited image less severely than creating, displaying, distributing, selling, or advertising an image in the RCC creating or trafficking an obscene image offense (RCC § 22E-1807). Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other current District offenses.[30] As part of this revision, the

[27] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[28] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."); *id.* at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

[29] *Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[30] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1

revised statute no longer uses the term "promote" or its definition in the current statute and splits the conduct referred to in that definition between the revised creating or trafficking an obscene image and possession of an obscene image offenses.[31] This change improves the consistency and proportionality of the revised offense.

Second, the revised possession of an obscene image statute grades penalties based upon the sexual conduct depicted in the image. The current D.C. Code sexual performance of a minor statute prohibits images of "sexual conduct,"[32] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC possession of an obscene image statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised possession of an obscene image statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex offenses.[33] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised possession of an obscene image statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[34] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that

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year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[31] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code §§ 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. The revised possession of an obscene image statute criminalizes as possession, with a lower penalty, certain aspects of the current definition of "promote": 1) "manufacture[s]" or "transmute[s]" an image; and 2) "procure"; and The commentary to the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807) discusses the remainder of the current definition of "promote."

[32] D.C. Code §§ 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attending, transmit, or possess a sexual performance by a minor."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[33] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[34] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

required for masturbation or a "lewd exhibition of the genitals." The possession of images of minors engaging in "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[35] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[36] with no enhancements for the obscene materials depicting a minor.[37] In contrast, first degree of the revised possession of an obscene image statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701, consistent with other RCC offenses. As defined, such sexual conduct may be as graphic[38] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[39] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[40] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised possession of an obscene image statute expands the prohibited sexual conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a

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[35] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[36] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[37] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[38] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised possession of an obscene image of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[39] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[40] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

"lewd exhibition of the genitals."[41] However, the possession of images of minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[42] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[43] with no enhancements for the obscene materials depicting a minor.[44] In contrast, the RCC revised possession of an obscene image statute criminalizes possessing certain depictions of the pubic area[45] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[46] As defined,

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[41] D.C. Code § 22-3101(5)(E).

[42] The current obscenity statute, D.C. Code § 22-2201 generally criminalizes the possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[43] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[44] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[45] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[46] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment, even when the defendant only possesses these images. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams,* the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC possession of an obscene image statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays

display of the pubic area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised possession of an obscene image statute expands the "innocent possession" affirmative defense in the current sexual performance of a minor statute to include conduct involving more images and display or distribution to authorities other than law enforcement, so long as the actor has a socially beneficial intent. The current D.C. Code sexual performance of a minor statute has an affirmative defense for possessing five or fewer images or one motion picture and requires either that the defendant take reasonable steps to destroy the material or report the material to a law enforcement agency and afford that agency access.[47] There is no DCCA case law interpreting the current defense. In contrast, the RCC affirmative defense is available for possessing any number of images, if the actor also promptly contacts a specified individual, such as a law enforcement officer or person with a responsibility under civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction when the actor has the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney." The actor must also distribute the image to one of the specified authorities or afford a law enforcement agency access. The current affirmative defense unnecessarily restricts the number of images or motion pictures and excludes well-intentioned individuals who seek legal advice or report images to authorities other than law enforcement. The expanded defense recognizes that parents, schools, and others have a vital interest in addressing wrongful creation, distribution, and sale of prohibited images, and good faith sharing of information such authorities should not be a crime.[48]

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in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC possession of an obscene image statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised possession of an obscene image statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[47] D.C. Code § 22-3104(c) ("It shall be an affirmative defense to a charge under § 22-3102 that the defendant: (1) Possessed or accessed less than 6 still photographs or one motion picture, however produced or reproduced, of a sexual performance by a minor; and (2) Promptly and in good faith, and without retaining, copying, or allowing any person, other than a law enforcement agency, to access any photograph or motion picture: (A) Took reasonable steps to destroy each such photograph or motion picture; or (B) Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.").

[48] For example, if a parent discovers multiple video clips on their child's phone of what appear to be another minor engaging in sexual conduct at the child's school, the parent should be able to send the video to school administrators, the parents of the minor, and/or possibly an attorney for further investigation and resolution without having committed a crime.

The number of images or motion pictures an individual possesses is not limited, but may be relevant to a fact finders' determination of the actor's intent. This change improves the consistency and proportionality of the revised statute.

Sixth, the revised possession of an obscene image statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current D.C. Code sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[49] The current D.C. Code sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[50] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference. There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised possession of an obscene image statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements. The prohibited conduct must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the actor has the complainant's effective consent. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised possession statute would criminalize possessing images of consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes. This change improves the consistency and proportionality of the revised statute.

Seventh, the revised statute applies the current affirmative defense for a librarian or motion picture theater employee to possessing an image and expands the defense to include similarly positioned employees of museums, schools, and other venues. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or

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[49] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[50] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

promot[ing]"[51] any sexual performance of a minor[52] for a "librarian engaged in the normal course of his or her employment"[53] and certain movie theater employees[54] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[55] There is no DCCA case law interpreting this defense. In contrast, the revised possession of an obscene image statute applies this defense to possessing a prohibited image and expands the defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[56] Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in paragraph (d)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Eighth, the revised possession of an obscene image statute has an affirmative defense for subsection (a) that the image has serious literary, artistic, political, or scientific value, when considered as a whole. The current D.C. Code sexual performance of a minor statute does not have any defense if the image has serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize the possession of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to images with

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[51] As is discussed elsewhere in this commentary, the current definition of "promote" appears to include purely possessory conduct, such as "procures." D.C. Code § 22-3101(4). Thus, it is possible that the current affirmative defense could be construed to include mere possession of prohibited images.

[52] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[53] D.C. Code § 22-3104(b)(1)(A).

[54] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[55] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[56] For example, the defense would not apply to the curator of an art museum who selects prohibited images for an exhibition and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who possesses the images while constructing the exhibition or arranging for-sale prints of the image in the gallery gift shop. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

serious literary, artistic, political, or scientific value, when considered as a whole.[57] In contrast, first degree of the revised possession of an obscene image statute has an affirmative defense that the image has serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[58] This change improves the constitutionality of the revised statute.

Ninth, through the RCC definition of "image," the revised possession of an obscene image statute excludes hand-rendered depictions. The current D.C. Code sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."[59] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[60] The Supreme Court struck down as unconstitutionally overbroad a federal statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation.[61] In contrast, through the definition of "image" in RCC

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[57] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.
The statute in *Ferber* prohibited the production and distribution of prohibited images, but the Court in *Osborne v. Ohio* recognized that overbreadth is also an issue in statutes that ban the possession of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 112, 113, 114 (1990) (stating that "in light of the statute's exemptions and 'proper purposes' provisions, the statute [at issue] may not be substantially overbroad in our cases" and that the appellant's "overbreadth challenge, in any event, fails" because the Ohio Supreme Court had construed the statute to "avoid[] penalizing persons for viewing or possessing innocuous photographs of naked children.").

[58] *Miller v. California*, 413 U.S. 14, 24 (1973).

[59] D.C. Code § 22-3101(3).

[60] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

[61] In *Aschcroft v. Free Speech Coalition*, the Supreme Court held that a provision in a federal statute that extended to "any visual depiction" that "is, or appears to be a minor engaging in sexually explicit conduct" was unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 256 (2002). However, most of the Court's analysis focused on the "appears to be language," and it was in this context

§ 22E-701, the revised trafficking an obscene image statute is limited to images that are not hand-rendered. Limiting the revised statute to images that are not hand-rendered helps ensure that the images feature "real" minors,[62] and, for second degree, that the images are "patently offensive" under modern community standards per *Miller v. California*.[63] This change improves the clarity, consistency, and constitutionality of the revised statute.

Tenth, the revised statute excludes liability for commercial telecommunications service providers. The current D.C. Code sexual performance of a minor statute makes it unlawful to "transmit" a still or motion picture depicting a sexual performance by a minor "by any means, including electronically."[64] The statutes make no exception for a company or employee who merely facilitates the transmission of an image or sound at a user's request, and in doing so, possesses it. District case law has not addressed the issue. In contrast, the revised possession of an obscene image offense excludes liability for any licensee under the Communications Act of 1934,[65] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[66] The revised offense also excludes liability for any interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934,[67] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[68] This change improves the consistency and proportionality of the revised offense.

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that the Court also discussed the problematic scope of "any visual depiction," noting that "the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology" because it is a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241. The Court in *Free Speech Coalition* also noted that these images "do not involve . . . let alone harm any children in the production process," *id.* at 241, and, accordingly found the Government's arguments for the restriction unpersuasive, *id.* at 246-56, 256. Although not squarely addressed in the opinion, it seems clear that the medium of a visual depiction is not dispositive in the constitutional analysis. A watercolor painting that is derived from painting live conduct is still a product of child sexual abuse and may be prohibited. *Id.* at 249 ("Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. . . . The fact that a work contained serious literary, artistic, or other value did not excuse the harm to its child participants.").

[62] The Supreme Court held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography." *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). *Osborne* did not explicitly state that the children must be "real" children, but in *Ashcroft v. Free Speech Coalition*, the Court held that a federal statute that banned possession of images of what "is, or appears to be" minors engaged in prohibited sexual conduct was overbroad, in part because it could extend to "virtual child pornography" that does not use or harm real children. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239, 241, 256 (2002). However, for many hand-rendered depictions, such as paintings, it may be difficult to determine if the depiction was of a "real" minor or just an individual's artistic rendering. For example, a defendant that owns a realistic painting of female genitalia falls within the scope of the current statute, but without additional information, it is impossible to know if the painting is of a "real" minor. If the painting is not of a "real" minor, and is not otherwise obscene, it is unconstitutional to prohibit its creation, distribution, etc.

[63] 413 U.S. 15 (1973).

[64] D.C. Code § 22-3102(d)(3)

[65] 47 U.S.C. § 151 et seq.

[66] *See* D.C. Code § 22-2201(d); RCC §§ 22E-1805 and 1806.

[67] 7 U.S.C. § 230(f)(2).

[68] *See* D.C. Code § 22-3055(b); RCC § 22E-1804.

Eleventh, the revised possession of an obscene image statute extends liability to the knowing possession of an "electronically received or accessible" image the same as to any other prohibited image of a minor. The current D.C. Code sexual performance of a minor statute states that possession "requires accessing the sexual performance if electronically received or available."[69] There is no DCCA case law on this language limiting possession liability. The definition does not impose any limitations on possession of any other type of image (i.e. not "electronically received or available"). In contrast, through use of the RCC definition of "possession,"[70] the revised offense includes liability for constructive possession of an "electronically received or accessible" image the same as other images. The plain language of the current statute appears to categorically exclude liability for a person who, "knowing the character and content thereof," retains possession of prohibited images without actually accessing them, regardless of the method of delivery.[71] Use of the standard RCC definition of "possession" and its constructive possession requirements to have "the ability and desire to exercise control over" the image assigns criminal liability consistent with other RCC and current D.C. law concerning contraband. This change improves the clarity and consistency of the revised offense, and closes a gap in liability.

Twelfth, the revised statute includes an affirmative defense to possession when the person does so with intent, exclusively and in good faith, to permanently destroy the image and does not possess the item longer than reasonably necessary to do so. The current D.C. Code sexual performance of a minor statute does not have any defense for temporary possession with intent to destroy an image, and there is no case law on point. In contrast, the RCC defense recognizes the need to shield socially beneficial conduct intended to destroy an image subject to prosecution under RCC §22E-1808.[72] This affirmative defense is consistent with the requirements of the temporary possession defense, RCC § 22E-502. This change improves the clarity and proportionality of the revised statutes.

Beyond these twelve changes to current District law, six other aspects of the revised statute may constitute substantive changes to current District law.

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[69] D.C. Code § 22-3102(d)(1) ("For the purposes of subsections (b) and (c) of this section, the term 'possess,' 'possession,' or 'possessing requires accessing the sexual performance if electronically received or available.").

[70] The definition of "possession" in RCC § 22E-701 requires a person to "hold or carry on one's person" or to "have the ability and desire to exercise control over."

[71] It is unclear why a person who knowingly receives a package containing prohibited images, and without opening the package, stores them for future viewing should be liable for possession, but a person who knowingly receives electronic files or a password to an online vault containing prohibited images and stores the file or password for future viewing is not.

[72] Note that the defense is not necessary when, for example, a person finds an image and immediately discards or abandons the image. Such a person has not met the basic elements of the statute as the possession was not "voluntary" within the meaning of § 22E-203. See commentary to § 22E-203. Moreover, the fact that a discarded image may reside in a trash can (a physical can or on a computer) in a location owned by the actor does not necessarily amount to proof of possession unless it is proven that, per the definition of "possession," the actor knowingly had "the ability and desire to exercise control over" the image. The need for the affirmative defense in RCC § 22E-1808 only arises when the actor has possession for a significant (but reasonable) amount of time with intent to permanently dispose of the image.

First, the revised possession of an obscene image statute clarifies the requirements for "possession" and requires a "knowingly" culpable mental state for this element. Additionally, although the current D.C. Code statute requires the defendant to "know[] the character and content" of the sexual performance,[73] it does not specify whether this culpable mental state extends to possession, and the definition of "knowingly"[74] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[75] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[76] Resolving this ambiguity, the revised possession of an obscene image statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for possessing an image. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence[77] and is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised possession of an obscene image statute requires recklessness as to the content of the image and, in second degree, as to whether the content is obscene. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[78] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which

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[73] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[74] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[75] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[76] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[77] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[78] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to . . . possess a sexual performance by a minor.")

warrants further inspection or inquiry, or both."[79] There is no DCCA case law interpreting the definition of "knowingly"[80] or how it applies to the current statute. The current obscenity statute has a substantively identical definition of "knowingly,"[81] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[82] Resolving this ambiguity, the revised possession of an obscene image statute requires recklessness as to the content of the image,[83] and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[84] but courts

[79] D.C. Code § 22-3101(1).

[80] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[81] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[82] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[83] While the revised possession of an obscene image statute requires "recklessness" as to the content of the image (whether it depicts part or all of a real complainant under the age of 18 years engaging in the prohibited sexual conduct), the closely-related distribution of an obscene image statute (RCC § 22E-1805) and distribution of an obscene image to a minor statute (RCC § 22E-1806) require a higher "knowingly" culpable mental state for the equivalent element (whether an image depicts any person, real or fictitious, of any age, engaging in the prohibited sexual conduct). The higher culpable mental state in these offenses is warranted because they prohibit a much broader array of images.

[84] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[85] This change improves the clarity and consistency of the revised statute.

Third, the revised possession of an obscene image statute requires that the image depicts at least part of a real complainant under the age of 18 years, and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted in an image must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[86] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised possession of an obscene image statute specifies that at least part[87] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[88] The RCC does not ban possession of obscene images that depict entirely computer-generated or other fictitious minors, although there is liability for the distribution of these images under the RCC distribution of an obscene image to a minor statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, through use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for images of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits "simulated" sexual intercourse,[89] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way that realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised

[85] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").
[86] D.C. Code § 22-3101(2).
[87] The revised possession statute includes composite images of minors if at least part of the composite is of a real minor, such as a real minor's head on an adult body, or an adult's head on a real minor's body. There is no requirement that the government prove the identity of a real minor.
[88] The Supreme Court held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography." *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). *Osborne* was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further. The RCC requirement that the image is at least partially comprised of a real minor ensures the revised possession offense is constitutional.
[89] D.C. Code § 22-3101(5)(A).

statute,[90] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[91] and is supported by Supreme Court case law.[92] Possession of suggestive or obscene images that do not satisfy the definition of "simulated" is not prohibited in the RCC. This change improves the clarity, consistency, and constitutionality of the revised statute.

Fifth, the revised possession of an obscene image statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current D.C. Code sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[93] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[94] The legislative history states that the defendant must "know that the performance will depict a minor,"[95] but it is unclear whether the current definition of "knowingly" requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence.[96] There is no DCCA case law on this issue. However, the current statute

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[90] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[91] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[92] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[93] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to . . . possess a sexual performance by a minor.")

[94] D.C. Code § 22-3101(1).

[95] Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This provision was added to the current sexual performance of a minor statute in 2010.

[96] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747,

has an affirmative defense for a reasonable mistake of age,[97] which suggests that negligence is not sufficient for liability. Resolving this ambiguity, the revised possession of an obscene image statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[98] and clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[99] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[100] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[101] This change improves the clarity and consistency of the revised statute.

Sixth, the revised possession of an obscene image statute clarifies the current exception to liability for conduct by persons under 18 years of age and makes it an affirmative defense. Under the current D.C. Code sexual performance of a minor statute, minors are exempt from liability for possessing prohibited still images or motion pictures when the minor is the only person under 18 years of age that is depicted,[102] or when all the minors depicted in the still or motion picture consent.[103] The current exclusion does

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765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[97] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[98] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised possession of an obscene image statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must consciously disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature of and motivation for the actor's conduct and the circumstances the actor is aware of, the actor's conscious disregard is a gross deviation from the ordinary standard of conduct. A reasonable mistake as to the complainant's age would negate the recklessness required. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[99] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[100] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

[101] RCC § 22E-701 defines "protected person" to include certain individuals under the age of 18 years or over the age of 65 years and several RCC offenses, like assault (RCC § 22E-1202), require a "reckless" culpable mental state for the fact that the complainant is a "protected person." In addition, several of the penalty enhancements for the RCC sexual assault offense (RCC § 22E-1301) require a "reckless" culpable mental state for the age of the complainant.

[102] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[103] D.C. Code § 22-3102(c)(1), (c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission; . . . (2) Shall not apply to possession of a still or motion picture by a minor . . .

not define "consent" and does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent.[104] There is no DCCA case law on the current exclusion. Resolving these ambiguities, the revised statute consistently requires that the minor reasonably believed that every person under the age of 18 years[105] depicted in the image[106] gave effective consent to the minor. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. This change improves the clarity, consistency, and proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[107] However, it is counterintuitive to construe a "performance" as including a still image (e.g., a photograph). To clarify that both images and live performances fall within the revised statutes, the RCC trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and attending a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

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who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[104] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[105] If both minors and adults are depicted in the image it is irrelevant under the defense if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803), electronic stalking (RCC § 22E-1802), or unlawful disclosure of sexual recordings (RCC § 22E-1804).

[106] The current "sexting" exclusion applies only to a "still or motion picture," but there is no substantive difference between the definition of "still or motion picture" and the RCC definition of "image." *Compare* D.C. Code § 22-3102(d)(2) (defining "still or motion picture" as "includ[ing] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced.") *with* RCC § 22E-701 (defining "image" as a "a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format.").

[107] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

Second, the revised possession of an obscene image statute no longer uses the defined term "minor."[108] Instead, consistent with the current D.C. Code statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[109] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Third, the revised possession of an obscene image statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current D.C. Code sexual performance of a minor statute prohibits, including bestiality.[110] This change clarifies the revised statute.

Fourth, instead of prohibiting a "lewd" exhibition,[111] first degree of the revised possession of an obscene image statute prohibits a "sexual or sexualized display" when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[112] The revised possession of an obscene image statute's reference to "sexual or

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[108] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[109] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[110] The current sexual performance of a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i) of the current statutory language. Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[111] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[112] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other

sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Fifth, the revised possession of an obscene image statute requires that the image depict the complainant "engaging in or submitting to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits possessing a "sexual performance by a minor,"[113] and refers generally to the complainant's sexual conduct."[114] The revised possession statute prohibits images that depict the complainant "engaging in or submitting to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply to depictions of a complainant that is an active participant or a completely passive (e.g., unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the definition of "movie theater" in RCC § 22E-701[115] applies to the affirmative defense in paragraph (d)(5) of the revised possession of an obscene image statute. The current D.C. Code sexual performance of a minor statute has a similar affirmative defense[116] that applies to specified employees of a "motion picture theater," but does not define the term. There is no DCCA case law interpreting the term "motion picture theater" in this affirmative defense. The RCC definition of "motion picture theater" limits the affirmative defense to certain employees of a theater or other venue that is being utilized primarily for the exhibition of a motion picture to the public, which is consistent with the scope of the affirmative defense. This change improves the clarity of the revised statute.

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enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[113] D.C. Code § 22-3102(b).

[114] "Sexual performance" is defined as "any performance or part thereof which includes sexual conduct by a person under 18 years of age" and the definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant. D.C. Code §" 22-3101(5), (6).

[115] RCC § 22E-701 defines "movie theater" as "a theater, auditorium, or other venue that is being utilized primarily for the exhibition of a motion picture to the public."

[116] D.C. Code § 22-3104 (b)(1) ("Except as provided in paragraph (2) of this subsection, in any prosecution for an offense pursuant to § 22-3102(2) it shall be an affirmative defense that the person so charged was: (A) A librarian engaged in the normal course of his or her employment; or (B) A motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater.").

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

Explanatory Note. [1] *The RCC arranging a live performance of a minor offense prohibits creating, selling admission to, and advertising a live performance that depicts complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The offense also prohibits a person that is responsible under civil law for a complainant under the age of 18 years from giving effective consent for the complainant to engage in a live performance the depicts the specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted, or will be depicted in the live performance. The revised arranging a live performance of a minor statute has the same penalties as the RCC creating or trafficking an obscene image of a minor statute,*[2] *the main difference being that the RCC arranging a live performance of a minor offense is limited to live performances. Along with the trafficking of an obscene image of a minor offense,*[3] *the possession of an obscene image of a minor offense,*[4] *and the attending a live performance of a minor offense,*[5] *the revised arranging a live performance of a minor statute replaces the current sexual performance using a minor offense*[6] *in the current D.C. Code, as well as the current definitions,*[7] *penalties,*[8] *and affirmative defenses*[9] *for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree arranging a live performance of a minor statute, the highest gradation of the revised offense. The prohibited conduct is specific to a "live performance." "Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience, including an audience of one person." Paragraph (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she will cause the prohibited result, i.e. creating a live performance. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to each type of prohibited conduct in subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C).

For subparagraph (a)(1)(A), the "knowingly" culpable mental state requires, in part, that the actor be "practically certain" the he or she is "creat[ing], produc[ing], or direct[ing]" a "live performance." The "knowingly" culpable mental state applies to the RCC definition of "live performance" and requires that the actor is "practically certain" that the visual presentation is "for an audience, including an audience of one person." An

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[1] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[2] RCC § 22E-1807.

[3] RCC § 22E-1807.

[4] RCC § 22E-1808.

[5] RCC § 22E-1810.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

actor that "creates" or directs" a visual presentation will nearly always be sufficient for the audience requirement, even if the actor does not watch the presentation.[10] There may also be liability if the audience is not physically present for the presentation.[11] "Produc[ing]" a live performance in subparagraph (a)(1)(A) includes actions that facilitate the creation, sales, or advertising of a live performance, such as "giving financial backing" and "making background arrangements for a performance such as buying or leasing equipment for a sexual performance."[12]

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant" from giving "effective consent" for the complainant to engage in or submit to the creation of a live performance. "Person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is identical to the language in the special defense in RCC § 22E-408, and has the same meaning as discussed in that commentary. The "knowingly" culpable mental state in paragraph (a)(1) here requires that the actor be "practically certain" that he or she will give "effective consent" for the complainant to engage in or submit to the creation of a live performance.[13] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." As is discussed in the commentary to the RCC definition of "consent," there are circumstances in which indirect types of agreement or inaction may be sufficient. There is no requirement for liability in subparagraph (a)(1)(B) that a live performance actually occur; it is sufficient that the actor give effective consent for the complainant to engage in or submit to the creation of a live performance.[14]

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[10] When the actor creates or directs a visual presentation and also watches the visual presentation, the actor is clearly the audience. However, an actor cannot avoid liability for creating or directing a visual presentation simply because the actor does not also watch the visual presentation. For example, an actor that directs the complainant to perform a striptease or sexual dance, but does not watch it, still has liability because the striptease or dance is "for" the actor. If an actor creates or directs a visual presentation in an area where other individuals are present and can watch, such as a bar or a park, there is liability if the actor is "practically certain" that those other individuals might watch the performance because the performance is "for" them (and likely also the actor).

[11] An actor is liable if he or she creates or directs a visual presentation and is "practically certain" that a third party could watch from a physically distant location. For example, an actor that directs a play, knowing that a third party may be able to watch or is watching from across the street or several blocks away through a telescope is liable because the actor is "practically certain" that the presentation is "for" an audience. In addition, as previously noted, the actor is likely sufficient for "an audience."

[12] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[13] Per the rule of construction, the "knowingly" culpable mental state also applies to the fact that the actor is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The actor must be "practically certain" that he or she is such a person.

[14] This provision is redundant in the case of a responsible individual who has a higher culpable mental state than "knowingly." In those cases, the RCC solicitation (RCC § 22E-302) and RCC accomplice (RCC § 22E-210) provisions would establish liability, as they would for any other defendant. However, the RCC solicitation and accomplice provisions require a culpable mental state of "purposely" and have other more stringent requirements. Subparagraph (a)(1)(B) is intended to provide liability for responsible individuals who are merely "practically certain" that they are giving effective consent to the complainant engaging in or submitting to the creation of a live performance. The lower culpable mental state is warranted because these responsible individuals are likely violating their duty of care to the complainant by giving effective

For subparagraph (a)(1)(C), the actor must be "practically certain" that he or she will sell admission to[15] or advertise a live performance. "Advertise" is not limited to commercial settings and includes promoting or drawing attention to a live performance without any expectation of financial gain.

Paragraph (a)(2) specifies additional requirements for the live performance. First, the live performance must depict, or will depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the live performance must depict, or will depict, the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.[16] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "recklessly." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the live performance depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state also applies to the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted or will be depicted in the live performance is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree arranging a live performance of a minor. Paragraph (b)(1), subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C), and paragraph (b)(2) have the same requirements as paragraph (a)(1), subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C), and paragraph (a)(2) in first degree. However, the types of prohibited sexual conduct are different. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the

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consent. These responsible individuals may still claim that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

[15] If a live performance is filmed, recorded, or photographed, and the resulting film or photograph is sold or distributed, there may be liability for distributing an "image" under the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807).

[16] If the genitals, pubic area, or anus of the minor have a full opaque covering, or will have a full opaque covering, there is no liability under first degree arranging a live performance. However, if the live performance depicts, or will depict, a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised arranging a live performance statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

buttocks, when there is less than a full opaque covering.[17] The terms "obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes several affirmative defenses for the RCC arranging a live performance statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (c)(1) establishes an affirmative defense to subsection (a) of the revised statute that the live performance has, or will have, serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[18] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[19] However, the affirmative defense recognizes that there may be rare situations where live performances of such conduct warrant First Amendment protection. Paragraph (c)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the live performance has, or will have, serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (c)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Per paragraph (c)(2), the affirmative defense applies to subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B) of the offense—all prohibited conduct except selling admission to or advertising a live performance in subparagraphs (a)(1)(C) and (b)(1)(C). Paragraph (c)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in paragraph (c)(2) applies to subparagraphs (c)(2)(A) and (c)(2)(B) and sub-subparagraphs (c)(2)(B)(i) and (c)(2)(B)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs or sub-subparagraphs. Subparagraph (c)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (c)(2)(B). Sub-subparagraph (c)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is, or who will be, depicted in the live performance. In the alternative, sub-subparagraph (c)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are, or who will be, depicted in the live performance. Under sub-subparagraph

[17] If the specified part of the breast or the buttocks has a full opaque covering, and the live performance does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree arranging a live performance. However, there may be liability for causing the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304).

[18] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[19] *Miller v. California*, 413 U.S. 15, 24 (1973).

(c)(2)(B)(ii), the actor must reasonably believe[20] that every person under 18 years of age who is, or who will be, depicted in the live performance gives "effective consent" to the actor. Under sub-subparagraph (c)(2)(B)(ii), the actor must reasonably believe that every person under 18 years of age who is, or who will be, depicted in the live performance gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (c)(2) applies to sub-subparagraph (c)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (c)(2)(B)(ii). However, sub-subparagraph (c)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is, or who will be, depicted in the live performance gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[21] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Paragraph (c)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Per paragraph (c)(3), the affirmative defense applies to subparagraphs (a)(1)(A) and (b)(1)(A) of the offense. Paragraph (c)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element under subparagraph (c)(3)(A) through subparagraph (c)(3)(E) and there is no culpable mental state required for any of these elements.

There are several requirements to the affirmative defense under paragraph (c)(3). First, per subparagraph (c)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (c)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs c)(3)(B)(i) and (c)(3)(B)(ii), the actor must either be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant. "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[22] and is intended to have

[20] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[21] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[22] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or

the same meaning. There are additional requirements if the actor in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (c)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-sub-subparagraph (c)(3)(B)(ii)(I)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-sub-subparagraph (c)(3)(B)(ii)(II)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-sub-subparagraphs (c)(3)(A)(ii)(I) and (c)(3)(A)(ii)(II) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (c)(3)(C), the complainant must be the only person who is depicted, or who will be depicted, in the live performance, or the actor and the complainant must be the only persons who are depicted, or who will be depicted in the live performance. The marriage or romantic partner defense is not available when the live performance shows, or will show, third persons. Third, per subparagraph (c)(3)(D), the actor must reasonably believe[23] that the actor has the complainant's "effective consent" to the prohibited conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Fourth, per subparagraph (c)(3)(E), the actor must reasonably believe[24] that the actor is the only audience for the live performance, other than the complainant.[25]

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was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[23] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the complainant gives the actor "effective consent" to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[24] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(E) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the actor is the only audience for the live performance other than the complainant, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the

Paragraph (c)(4) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. "Movie theater" is a defined term in RCC § 22E-701. The affirmative defense applies to subparagraphs (a)(1)(C) and (b)(1)(C).[26] Paragraph (c)(4) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (c)(4)(A), (c)(4)(B), and (c)(4)(C) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the image. The actor must not record, photograph, or film the live performance.[27] The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised arranging a live sexual performance of a minor statute clearly changes current District law in nine main ways.*

First, the revised arranging a live performance statute punishes creating, selling, or advertising a live performance more severely than attending or viewing a live performance.[28] The current D.C. Code sexual performance of a minor statute has the same penalties for creating, selling, advertising, attending, and viewing a live

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heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[25] The "reasonably believes" requirement parallels the requirements of subparagraphs (a)(1)(A) and (b)(1)(A) of the offense. As is discussed earlier in the explanatory note, those subparagraphs apply a "knowingly" culpable mental state to the "live performance" element and require that the actor be "practically certain" that the visual presentation is "for an audience." The "audience" can extend beyond the actor or the complainant to include other people that are watching or may watch the performance as long as the actor is "practically certain" of this fact. For the defense, if an actor reasonably believes that the actor, the complainant, or both of them, are the only audience for the performance, it is irrelevant that there may be other people watching.

[26] This defense does not apply to creating, producing, or directing a live performance (subparagraphs (a)(1)(A) and (b)(1)(A)) because such actions create child pornography directly from the sexual abuse of minors. However, there may be a separate defense for first degree arranging a live sexual performance of a minor image for live performances that have serious artistic or other value (paragraph (d)(1)), or an argument that the images are not "obscene" as required for second degree.

This defense also does not apply to individuals that are responsible for the complainant under civil law and give effective consent for the complainant to engage in the creation of an image derived from live sexual conduct (subparagraphs (a)(1)(B) and (b)(1)(B)) because these individuals are likely violating their duty of care to the complainant. These individuals can still argue that they are not violating their duty of care under the general special responsibility defenses in RCC § 22E-408.

[27] If an actor records, photographs, or films the live performance, he or she is creating a prohibited image of a minor and there may be liability under the RCC trafficking an obscene image offense (RCC § 22E-1807).

[28] The RCC attending a live performance of a minor statute (D.C. Code § 22E-1810) prohibits attending or viewing a live performance, as well as viewing a live broadcast. However, for simplicity, this discussion will refer to attending or viewing a "live performance" only.

performance,[29] even though creating a live performance is a direct form of child abuse[30] and selling and advertising are "an integral part" of the market.[31] In contrast, the revised arranging a live performance of a minor statute penalizes the creating, selling, or advertising of a live performance more severely than viewing or attending a live performance in RCC § 22E-1810. The different penalties recognize that this conduct harms children and supports the market and are consistent with the penalty scheme in other current and RCC offenses. Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[32] As part of this revision, the revised statute no longer uses the current statute's defined term "promote" and instead codifies directly in the revised statute the relevant conduct in that definition.[33] This change improves the consistency and proportionality of the revised offense.

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[29] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[30] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

[31] *Id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[32] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[33] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code § 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. As is discussed in the commentary, the revised trafficking an obscene image statute retains "sell" and "advertise." The revised arranging a live performance statute also prohibits creating, producing, or directing a live performance, which covers "present" and "exhibit" in the current definition. "Offer or agree to do the same" is deleted from the current definition of "promote" because inchoate liability, such as attempt and conspiracy, provides more consistent and proportional punishment for this conduct. For example, under the current statute, a defendant that "offers" to "direct" a live sexual performance could be charged with attempted sexual performance of a minor, which, for a first offense, would have a maximum term of imprisonment of 180 days. D.C. Code §§ 22-1803; 22-3102(a)(2) (prohibiting "direct[ing]" a sexual performance of a minor); 22-3103(1). However, if this conduct were charged under the current definition of "promote" as offering to "manufacture," "present," or "exhibit" a live performance, the defendant would face a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3102(a)(2); 22-3103(1). In the RCC, the defendant would be charged with attempted arranging a live sexual performance of a minor (offers to "create[], produce[], or direct[]" a live performance).
The remainder of the current definition of "promote" is inapplicable to a live performance. The commentaries to the revised trafficking an obscene image of a minor statute (RCC § 22E-1807) and revised possession of an obscene image of a minor statute (RCC § 22E-1808) discuss this prohibited conduct.

Second, the revised arranging a live performance statute grades punishments based upon the sexual conduct depicted in the live performance. The current D.C. Code sexual performance of a minor statute prohibits live performances of "sexual conduct,"[34] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC arranging a live performance statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised arranging a live performance of a minor statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex offenses.[35] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised arranging a live performance statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[36] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." However, creating, producing, or directing live performances that feature "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[37] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[38] with no enhancements for the obscene

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[34] D.C. Code §§ 22-3102(a)(1), (a)(2), (a)(3) (prohibiting a "sexual performance" or a "performance which includes sexual conduct by a person under 18 years of age."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[35] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[36] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[37] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, production, or direction of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[38] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this

materials depicting a minor.[39] In contrast, first degree of the revised arranging a live performance statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701. As defined, such sexual conduct may be as graphic[40] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[41] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[42] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised arranging a live performance statute expands the prohibited conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a "lewd exhibition of the genitals." However, creating, producing, or directing live performances that feature minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[43] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[44] with no

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section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[39] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[40] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised arranging a live performance of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[41] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[42] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[43] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, production, or direction of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[44] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this

enhancements for the obscene materials depicting a minor.[45] In contrast, the RCC criminalizes creating, producing, and directing live performances featuring certain depictions of the pubic area[46] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[47] As defined, display of the pubic area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

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section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[45] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[46] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[47] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams,* the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC arranging a live performance statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC arranging a live performance statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised arranging a live performance statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

Fifth, the revised arranging a live performance statute expands the current exceptions to liability for conduct by persons under 18 years of age and makes it an affirmative defense. In the current D.C. Code sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[48] or, if there are multiple minors depicted, all of the minors consent.[49] A minor that is not depicted,[50] or an adult that is not more than four years older than the minor or minors depicted,[51] is not liable for possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[52] and minors are still liable under the current statute for creating live performances with themselves or other minors[53] or engaging in sexual conduct.[54] There is no DCCA case law interpreting the current exclusion. In contrast, the revised arranging a live performance statute excludes from liability all persons under the age of 18 years,[55] and applies to all prohibited conduct, except selling admission to or

[48] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[49] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section:(1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[50] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[51] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: . . (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[52] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[53] A minor that creates a prohibited live performance involving himself or herself or other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[54] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[55] The revised arranging a live performance statute excludes from liability minors that have a responsibility under civil law for the health, welfare, or supervision of the complainant. These minors would otherwise have liability under subparagraphs (a)(1)(B) and (b)(1)(B) for giving effective consent for another minor to

advertising live performance (subparagraphs (a)(1)(C) and (b)(1)(C)). Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[56] The only requirements of the revised exclusion are either: 1) The minor is the only person under the age of 18 years who is depicted, or who will be depicted, in the live performance;[57] or 2) The actor reasonably believes that the actor has the effective consent of every person under 18 years of age who is, or who will be, depicted in the live performance.[58] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. A minor may still be liable for selling admission to or advertising a live performance under the revised statute, even if the live performance is of himself or herself,[59] and there may be liability under the RCC indecent exposure statute (RCC § 22E-4206) for a live performance done without the effective consent of those that may view it. This change improves the clarity, consistency, and proportionality of the revised offense.

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engage in or submit to the creation of a live performance. This exclusion ensures that the revised arranging a live performance statute is reserved for predatory adults. However, such a minor may still have liability under the RCC criminal abuse and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502) and the RCC sex offenses. In addition, the revised exclusion only applies if the minor that is under the care of the responsible minor gives effective consent to the actions of the responsible minor.

[56] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[57] If a minor is the only person under the age of 18 years that is depicted, or will be depicted, in the live performance, it is irrelevant under the exclusion if the live performance depicts, or will depict, an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[58] If both minors and adults are depicted, or will be depicted, in the live performance, it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[59] For example, a sixteen year old who sells admission to an exhibition of himself or herself masturbating may be liable under the revised statute. Even if the minor's conduct in such situations appears to be consensual, when a minor sells or advertises sexual performance such conduct supports the market for prohibited sexual performances.

Sixth, the revised arranging a live performance statute expands the current affirmative defense for a librarian or motion picture theater employee to include similarly positioned museum, school, and other venue employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[60] for a "librarian engaged in the normal course of his or her employment"[61] and certain movie theater employees[62] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[63] There is no DCCA case law interpreting this defense. In contrast, the revised arranging a live performance statute expands this affirmative defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[64] For reasons discussed the in explanatory note to this offense, the affirmative defense is limited to the conduct prohibited in subparagraphs (a)(1)(C) and (b)(1)(C) provided that the actor does not record, film, or photograph the live performance. Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in paragraph (c)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised arranging a live performance statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current D.C. Code sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes

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[60] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[61] D.C. Code § 22-3104(b)(1)(A).

[62] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[63] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[64] For example, the defense would not apply to the curator of an art museum who decides to feature an exhibition of prohibited sexual conduct and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who escorts patrons to the exhibition. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

sexual conduct that only involves the defendant and the minor.[65] The current D.C. Code sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[66] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference.[67] There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised arranging a live performance statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements. The defense only applies to creating, producing, or directing a live performance (sub-paragraphs (a)(1)(A) and (b)(1)(B)). The live performance must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the actor has the complainant's effective consent. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Finally, the actor must reasonably believe that he or she is the only audience for the live performance, other than the complainant. Without this defense, the revised arranging a live performance statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes. This change improves the consistency and proportionality of the revised statute.

Eighth, the revised arranging a live performance statute has an affirmative defense for subsection (a) that the live performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. The current D.C. Code sexual performance of a minor statute does not have any defense if the performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize the creation, sale, or promotion, of artistic films, or newsworthy events that display real minors engaging in the prohibited

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[65] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[66] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[67] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to live performances with serious literary, artistic, political, or scientific value, when considered as a whole.[68] In contrast, the revised arranging a live performance statute has an affirmative defense that the live performance has, or will have serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[69] Despite this defense, however, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[70] This change improves the constitutionality of the revised statute.

Ninth, the revised arranging a live performance statute no longer separately prohibits "employ[ing]," "authoriz[ing]," or "induc[ing]" a minor to engage in a sexual performance, instead penalizing such conduct under the RCC solicitation statute at half the penalty of the completed offense. The current D.C. Code sexual performance of a minor statute specifically states that a person commits the offense if he "employs, authorizes, or induces" a minor to engage in a sexual performance.[71] The precise scope of conduct intended by these verbs, and whether such verbs are intended to equate with solicitation of a crime under common law, is unclear. There is no DCCA case law interpreting this provision. Regardless, although such conduct may be far-removed from an actual live performance, employing, authorizing, or inducing a minor to engage in a live performance has the same 10 year penalty as actually creating or directing a live performance.[72] In contrast, the revised arranging a live performance statute removes employing, authorizing, and inducing as a discrete means of liability. Conduct that

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[68] In *Ferber*, the Court acknowledged that some applications of the statute, which extended to live performances, at issue would be unconstitutional:

> While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n. 28.

[69] *Miller v. California*, 413 U.S. 14, 24 (1973).

[70] For example, a defendant that causes minors to engage in sexual intercourse for a live play may have a successful affirmative defense under the RCC arranging a live performance offense or RCC attending a live performance offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301), as either a principal or an accomplice (RCC § 2E-210).

[71] D.C. Code § 22-3102(a)(1).

[72] D.C. Code § 22-3102(1).

facilitates the minor engaging in the creation of a live performance instead is covered by the RCC solicitation offense (RCC § 22E-302),[73] defined in a manner consistent with other serious offenses against persons, and subject to a penalty one-half of the completed offense. "Employing" a minor to engage in a live performance may also make the actor subject to attempt liability[74] depending on the facts of the case. This change improves the clarity, consistency, and proportionality of the revised statute.

Beyond these nine changes to current District law, seven other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised arranging a live performance statute requires a "knowingly" culpable mental state for the prohibited conduct—creating a live performance, giving consent for a minor to engage in a live performance, or selling or advertising a live performance. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[75] The statute does not specify whether this culpable mental state extends to the prohibited conduct, such as creating the live performance, and the definition of "knowingly"[76] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[77] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[78] Resolving this ambiguity, the revised arranging a live performance

[73] Depending on the facts of the case, there may also be accomplice liability under RCC § 22E-210 or conspiracy liability under § 22E-301 for one who "employs, authorizes, or induces" in concert with others.
[74] RCC § 22E-301.
[75] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").
[76] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.
[77] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").
[78] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the

statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited conduct—creating a live performance, giving consent for a minor to engage in a live performance, or selling or advertising a live performance. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[79] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised arranging a live performance statute requires a "knowingly" culpable mental state for the fact that a visual presentation is "for an audience," as required by the RCC definition of "live performance." The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance,[80] but neither the statute nor the current definition of "sexual performance"[81] specifies whether the visual presentation must be for an audience.[82] In addition, the definition of "knowingly"[83] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has

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accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[79] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[80] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[81] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[82] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[83] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

a substantively identical definition of "knowingly,"[84] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[85] Resolving these ambiguities, the revised arranging a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the fact that the visual presentation is a "live performance" as defined in RCC § 22E-701.[86] The RCC definition of "live performance" requires that the visual presentation be "for an audience," and read in conjunction with the RCC definition of "knowingly," requires that the defendant be "practically certain" that the presentation is "for an audience."[87] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[88] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Third, the revised arranging a live performance statute requires recklessness as to the content of the live performance and, in second degree, as to whether the content is obscene. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[89] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[90] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current

[84] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[85] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[86] The RCC definition of "live performance" is substantively identical to the current definition of "performance" as it pertains to live conduct, differing only in the explicit requirement that the presentation be "for an audience, including an audience of one person." *Compare* D.C. Code § 22-3101(3) (defining "performance" as "any play . . . electronic representation, dance, or any other visual presentation or exhibition.") *with* RCC § 22E-701 (defining "live performance" as a "play, dance, or other visual presentation or exhibition for an audience.").

[87] This requirement is discussed further in the explanatory note for the revised offense.

[88] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[89] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[90] D.C. Code § 22-3101(1).

statute.[91] However, the current obscenity statute has a substantively identical definition of "knowingly,"[92] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[93] Resolving this ambiguity, the revised arranging a live performance statute requires recklessness as to the content of the live performance, and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[94] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[95] This change improves the clarity and consistency of the revised statute

Fourth, the revised arranging a live performance statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current D.C. Code sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[96] and

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[91] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[92] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[93] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[94] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019)* (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[95] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[96] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she

defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[97] It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence,[98] and it is also unclear whether the mental state applies to the age of the complainant.[99] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[100] which suggests that negligence is not sufficient for liability and that "recklessly" or "knowingly" applies to the age of the complainant. Resolving this ambiguity, the revised arranging a live performance statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[101] and clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[102] However, recklessness has been upheld

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consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[97] D.C. Code § 22-3101(1).

[98] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[99] The legislative history for the prohibition in the current statute against attending, transmitting or possessing a sexual performance by a minor (D.C. Code § 22-3102(b)), states that the defendant "must know that the performance will depict a minor." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This prohibition was added to the current statute in 2010 and there is no discussion of how the "knowing" culpable mental state in pre-existing parts of the statute applies to the age of the complainant. Regardless, it is persuasive authority that the defendant must "know" the age of the complainant in the other parts of the statute, although the meaning of that definition remains unclear.

[100] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[101] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised arranging a live performance statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature and motivation of the actor's conduct and the circumstances the person is aware of, the actor's conscious disregard is a gross deviation from the ordinary standard of conduct. A reasonable mistake as to the complainant's age would negate the recklessness required. *See* RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element.

[102] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

in some cases as a minimal basis for punishing morally culpable crime.[103] This change improves the clarity and consistency of the revised statute.

Fifth, the revised arranging a live performance statute requires that the live performance depicts, or will depict, at least part of a real complainant under the age of 18 years and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted, or will be depicted, in a live performance must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[104] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised arranging a live performance statute specifies that at least part[105] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[106] The RCC does not criminalize an obscene live performance with computer-generated minors or other "fake" minors, such as youthful looking adults, although there may be liability under the RCC indecent exposure statute (RCC § 22E-4206).[107] This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, through the use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for live performances of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits "simulated" sexual intercourse,[108] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a

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[103] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

[104] D.C. Code § 22-3101(2).

[105] The revised arranging a live performance statute includes performances that show at least part of a real minor, such as a real minor's head that seems to be attached to an adult body, or an adult's head that seems to be attached to a real minor's body. There is no requirement that the government prove the identity of a real minor.

[106] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings, including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. The opinion was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "morphed images may fall within the definition of virtual child pornography, [but] they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further.

[107] The actor would have to meet the requirements of the RCC indecent exposure statute, as well an RCC inchoate offense, such as solicitation (RCC § 22E-302) or accomplice liability (RCC § 22E-210), unless the actor was also directly involved in the performance.

[108] D.C. Code § 22-3101(5)(A).

sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way that realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[109] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[110] and is supported by Supreme Court case law.[111] This change improves the clarity, consistency, and constitutionality of the revised statute.

Seventh, the revised arranging a live performance statute provides liability for a person responsible for the complainant under civil law giving "effective consent" to the complainant's participation in the live performance, and requires a "knowingly" culpable mental state for this element.[112] The current D.C. Code sexual performance using a minor statute prohibits a "parent, legal guardian, or custodian" of a minor from "consent[ing] to the participation by a minor in a sexual performance."[113] The statute does not define "consent" or specify a culpable mental state for this element and there is no DCCA case law on this issue. Resolving this ambiguity, the revised arranging a live performance statute requires that the individual responsible under civil law for the health, welfare, or supervision of the complainant give "effective consent," as defined in RCC § 22E-701, and requires a "knowing" culpable mental state for this element. The term "under civil law for the health, welfare, or supervision of the complainant" includes parents, legal guardians, and custodians who at the time have a legal duty of care for the complainant. "Effective consent" is a defined term in RCC § 22E-701 that means

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[109] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[110] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[111] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[112] Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) and paragraph (b)(1) also applies to the fact that the defendant is a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant."

[113] D.C. Code § 22-3102(a)(1).

"consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception" and is used consistently throughout the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[114] This change improves the clarity and consistency of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute deletes subsection (a) of the current D.C. Code statute: "It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor."[115] It is unclear whether this is a general statement or part of the actual offense for which a person can be charged and convicted.[116] The revised arranging a live performance statute substantively encompasses the "use" of a minor in a sexual performance and "promot[ing]" a sexual performance by a minor, rendering current subsection (a) superfluous. This improves the clarity of the revised offense without changing the law.

Second, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[117] However, it is counterintuitive to construe a "performance" as including a still image (e.g., photograph). To clarify that both images and live performances fall within the revised statutes, the RCC creating or trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and viewing a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or

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[114] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[115] D.C. Code § 22-3102(a).

[116] The current statute substantively encompasses the "use" and "promot[ion] of a minor in a sexual performance, regardless of the meaning of subsection (a). D.C. Code §§ 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age."); 22-3101(4) (defining "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.").

[117] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Third, the revised arranging a live performance statute no longer uses the defined term "minor."[118] Instead, consistent with the current D.C. Code statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[119] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fourth, the revised arranging a live performance statute replaces "parent, legal guardian, or custodian of a minor" with a "person with a responsibility under civil law for the health, welfare, or supervision of the complainant." The current D.C. Code sexual performance of a minor statute prohibits a "parent, legal guardian, or custodian of a minor" from "consent[ing] to the participation by a minor in a sexual performance."[120] There is no DCCA case law on the scope of "parent, legal guardian, or custodian" in the current statute. However, the legislative history for the current statute indicates a broad scope: "[A] parent, whether natural, or adoptive, or a foster parent, a legal guardian defined in D.C. Code, sec. 21-101 to 103 or custodian . . . [c]ustodian means any person who has responsibility for the care of a child without regard to whether a formal legal arrangement exists."[121] The revised statute uses a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant," which is used elsewhere in the RCC, such as the special defenses in RCC § 22E-408. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised arranging a live performance statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[122] but otherwise refers generally to the complainant's actions.[123] The revised arranging a live performance statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g.,

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[118] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[119] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[120] D.C. Code § 22-3102(a)(1).

[121] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[122] D.C. Code § 22-3102(a)(1).

[123] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised arranging a live performance statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current sexual performance of a minor statute prohibits and includes bestiality.[124] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[125] the revised arranging a live performance statute prohibits a "sexual or sexualized display" of certain body parts when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[126] The revised arranging a live performance statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

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[124] The current sexual performance using a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i). Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[125] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[126] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

Eighth, the revised arranging a live performance statute prohibits selling "admission to" a live performance. The current sexual performance of a minor statute prohibits "sell[ing]" a live performance,[127] but in the context of a live sexual performance, it is more accurate to say selling "admission to."[128] This change improves the clarity of the revised statute without changing current District law.

Sixth, the definition of "movie theater" in RCC § 22E-701[129] applies to the affirmative defense in paragraph (d)(4) of the revised arranging a live performance statute. The current D.C. Code sexual performance of a minor statute has a similar affirmative defense[130] that applies to specified employees of a "motion picture theater," but does not define the term. There is no DCCA case law interpreting the term "motion picture theater" in this affirmative defense. The RCC definition of "motion picture theater" limits the affirmative defense to certain employees of a theater or other venue that is being utilized primarily for the exhibition of a motion picture to the public, which is consistent with the scope of the affirmative defense. This change improves the clarity of the revised statute.

[127] D.C. Code §§ 22-3102(a)(2) (prohibiting "promotes" any sexual performance with a minor); 22-3101(4) (defining "promote" to include "sell.").

[128] If a live performance is filmed, photographed, etc., and the resulting image is sold, there is liability under the RCC creating or trafficking an obscene image statute (RCC § 22E-1807).

[129] RCC § 22E-701 defines "movie theater" as "a theater, auditorium, or other venue that is being utilized primarily for the exhibition of a motion picture to the public."

[130] D.C. Code § 22-3104 (b)(1) ("Except as provided in paragraph (2) of this subsection, in any prosecution for an offense pursuant to § 22-3102(2) it shall be an affirmative defense that the person so charged was: (A) A librarian engaged in the normal course of his or her employment; or (B) A motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater.").

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

Explanatory Note.[1] *The RCC attending or viewing a live sexual performance of a minor offense prohibits attending or viewing a live performance or live broadcast that depicts complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted in the live performance or live broadcast. The revised attending or viewing a live sexual performance of a minor statute has the same penalties as the RCC possession of an obscene image of a minor statute,[2] the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the creating or trafficking of an obscene image of a minor offense,[3] the possession of an obscene image of a minor offense,[4] and the arranging a live sexual performance of a minor offense,[5] the revised attending or viewing a live sexual performance of a minor statute replaces the current sexual performance using a minor offense[6] in the current D.C. Code, as well as the current definitions,[7] penalties,[8] and affirmative defenses[9] for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree attending or viewing a live sexual performance of a minor statute, the highest gradation of the revised offense. Paragraph (a)(1) specifies the prohibited conduct—attending or viewing a "live performance" or "live broadcast."[10] "Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience, including an audience of one person." "Live broadcast" is defined in RCC § 22E-701 as "a streaming video, or any other electronically transmitted image for viewing by an audience, including an audience of one person." Paragraph (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she attends or views a "live performance" or "live broadcast."[11] As applied to the elements "live performance" and

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[1] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current D.C. Code statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[2] RCC § 22E-1808.

[3] RCC § 22E-1807.

[4] RCC § 22E-1808.

[5] RCC § 22E-1809.

[6] D.C. Code § 22-3102.

[7] D.C. Code § 22-3101.

[8] D.C. Code § 22-3103.

[9] D.C. Code § 22-3104.

[10] It is arguably redundant to prohibit attending or viewing a "live broadcast" because an actor that attends or views a "live broadcast" has likely also attended or viewed a "live performance." As defined in the RCC § 22E-701, a "live broadcast" is essentially a "live performance" that is streamed or electronically transmitted. However, the revised statute includes both live performances and live broadcasts for clarity.

[11] The revised statute prohibits both attending and viewing a live performance or live broadcast because it is possible to attend such a visual presentation without viewing it. An actor that is "practically certain" that he or she is attending a live performance or live broadcast cannot avoid liability by not watching the

"live broadcast," the "knowingly" culpable mental state requires that the actor be "practically certain" that the visual presentation is for an audience or one or more people."[12]

Paragraph (a)(2) specifies additional requirements for the live performance or live broadcast. First, the live performance or live broadcast must depict the body of a real complainant under the age of 18 years. "Body" includes the face, as well as other parts of the body of a real complainant under the age of 18 years. Any depiction of a part of the complainant's body is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the live performance or live broadcast must depict the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.[13] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "recklessly." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state also applies to the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted in the live performance or live broadcast is one of the types prohibited in

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performance, i.e. closing his or her eyes, or leaving the room, but staying in reasonably close physical proximity to the performance or broadcast. In addition, an actor cannot avoid liability for being in reasonably close physical proximity to the live performance or live broadcast, but in another part of the facility, venue, or area if the other requirements of the offense are met.

[12] The actor must be "practically certain" that the live performance or live broadcast is "for" an audience, including an audience of one person, and the visual presentation must, in fact, be "for" an audience. It is a fact-specific inquiry as to whether a live performance or live broadcast is "for" an audience. For example, a couple having sex in the privacy of their bedroom, or the relative privacy of a car or their backyard, is likely not having sexual activity "for" an audience. An actor that spies on the couple may be liable for voyeurism under RCC § 22E-1803, but there is no liability for attending or viewing a live performance. In contrast, if the actor views a live performance that is happening openly in a public park, or if he or she has to pay for admission or seek permission to enter a venue or area where the performance occurs, the presentation likely is "for" an audience and likely satisfies the RCC definition of "live performance." It should be noted that in many instances, the actor is the only "audience" and is the same individual that creates, produces, or directs the live performance or live broadcast. Due to the RCC merger provision in RCC § 22E-214, the actor cannot have liability for creating, producing, directing, and attending the same live performance.

[13] If the genitals, pubic area, or anus of the minor have a full opaque covering, there is no liability under first degree of the revised attending a live performance statute. However, if the live performance depicts a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised attending a live performance statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree attending or viewing a live sexual performance of a minor. Paragraph (b)(1) and paragraph (b)(2) have the same requirements as paragraph (a)(1) and paragraph (a)(2) in first degree. However, the types of prohibited sexual conduct are different in second degree. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[14] "Obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene" "sexual contact" or a specified "obscene" sexual display. Per the rules of interpretation in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must consciously disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display.

Subsection (c) establishes several affirmative defenses for the RCC attending or viewing a live performance statute. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all affirmative defenses in the RCC.

Paragraph (c)(1) establishes an affirmative defense to subsection (a) of the revised statute that the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[15] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[16] However, the affirmative defense recognizes that there may be rare situations where live performances or live broadcasts of such conduct warrant First Amendment protection. Paragraph (c)(1) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole.

Paragraph (c)(2) establishes an affirmative defense for an actor that is under the age of 18 years. Paragraph (c)(2) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact"

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[14] If the specified part of the breast or the buttocks has a full opaque covering, and the live performance does not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(A), there is no liability under second degree attending a live performance. However, there may be liability if the actor caused the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304).

[15] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[16] *Miller v. California*, 413 U.S. 15, 24 (1973).

specified in paragraph (c)(2) applies to subparagraphs (c)(2)(A) and (c)(2)(B) and sub-subparagraphs (c)(2)(B)(i) and (c)(2)(B)(ii) and there is no culpable mental state requirement for any of the elements in these subparagraphs or sub-subparagraphs. Subparagraph (c)(2)(A) requires that the actor is under the age of 18 years. There are two alternative requirements for the affirmative defense under subparagraph (c)(2)(B). Sub-subparagraph (c)(2)(B)(i) requires that the actor is the only person under the age of 18 years who is depicted in the live performance or live broadcast. In the alternative, sub-subparagraph (c)(2)(B)(ii) applies if there are multiple people under the age of 18 years who are depicted in the live performance or live broadcast. Under sub-subparagraph (c)(2)(B)(ii), the actor must reasonably believe[17] that every person under 18 years of age who is depicted in the live performance or live broadcast gives "effective consent" to the actor to engage in the conduct that constitutes the offense. The "in fact" specified in paragraph (c)(2) applies to sub-subparagraph (c)(2)(B)(ii) and no culpable mental state, as defined in RCC § 22E-205, applies to sub-subparagraph (c)(2)(B)(ii). However, sub-subparagraph (c)(2)(B)(ii) still requires that the actor subjectively believe that every person under 18 years of age who is depicted in the live performance or live broadcast gives "effective consent" to the actor to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[18] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception.

Paragraph (c)(3) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. Paragraph (c)(3) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to every element under subparagraph (c)(3)(A) through subparagraph (c)(3)(E) and there is no culpable mental state required for any of these elements.

There are several requirements to the affirmative defense under paragraph (c)(3). First, per subparagraph (c)(3)(A), the affirmative defense only applies if the actor is at least 18 years of age. An actor that is under the age of 18 years has the broader affirmative defense under paragraph (c)(2) that applies to any actor under the age of 18 years, regardless of the actor's relationship to the complainant. Under sub-subparagraphs c)(3)(B)(i) and (c)(3)(B)(ii), the actor must either be married to, or in a domestic

[17] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[18] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant. "Domestic partnership" is a defined term in RCC § 22E-701 and the reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[19] and is intended to have the same meaning. There are additional requirements if the actor in a "romantic, dating, or sexual relationship" with the complainant under sub-subparagraph (c)(3)(B)(ii). When the complainant is under 16 years of age, the actor must be less than four years older (sub-sub-subparagraph (c)(3)(B)(ii)(I)), and when the complainant is under 18 years of age and the actor is at least four years older, the actor must not be in a "position of trust with or authority over" the complainant (sub-sub-subparagraph (c)(3)(B)(ii)(II)). "Position of trust with or authority over" is a defined term in RCC § 22E-701. The requirements in sub-sub-subparagraphs (c)(3)(A)(ii)(I) and (c)(3)(A)(ii)(II) mirror the requirements for liability in the RCC sexual abuse of a minor statute (RCC § 22E-1302).

Second, per subparagraph (c)(3)(C), the complainant must be the only person who is depicted in the live performance or live broadcast, or the actor and the complainant must be the only persons who are depicted in the live performance or live broadcast. The marriage or romantic partner defense is not available when the live performance or live broadcast shows third persons. Third, per subparagraph (c)(3)(D), the actor must reasonably believe[20] that the actor has the complainant's "effective consent" to the prohibited conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Fourth, per subparagraph (c)(3)(E), the actor must reasonably believe[21] that the actor is the only audience for the live performance or live broadcast, other than the complainant.[22]

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[19] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[20] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(D) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the complainant gives the actor "effective consent" to engage in the conduct that constitutes the offense, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[21] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. As was stated earlier, the "in fact" specified in subparagraph (c)(3) applies to subparagraph (c)(3)(E) and no culpable mental state, as defined in RCC § 22E-205, applies to this subparagraph. However, the actor must subjectively believe that the actor is the only audience for the live performance or live broadcast other than the complainant, and that belief must be reasonable. Reasonableness is an objective standard that must take into account certain characteristics of the actor but

Paragraph (c)(4) establishes an affirmative defense for employees of a school, museum, library, movie theater, or other venue. "Movie theater" is a defined term in RCC § 22E-701. Paragraph (c)(4) specifies "in fact." Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, "in fact" applies to subparagraphs (c)(4)(A), (c)(4)(B), (c)(4)(C), and (c)(4)(D) and there is no culpable mental state requirement for any of the elements in these subparagraphs. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the live performance or live broadcast. The actor must not record, photograph, or film the live performance or live broadcast.[23] The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised attending or viewing a live sexual performance of a minor statute clearly changes current District law in eight main ways.*

First, the revised attending a live performance statute punishes attending or viewing a live performance or live broadcast less severely than the creating, selling, or advertising a live performance. The current D.C. Code sexual performance of a minor statute has the same penalties for creating, selling, advertising, attending, and viewing a live performance,[24] even though creation of a live performance is a direct form of child

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not others. *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[22] The "reasonably believes" requirement parallels the requirements of paragraphs (a)(1) and (b)(1) of the offense. As is discussed earlier in the explanatory note, those subparagraphs apply a "knowingly" culpable mental state to the "live performance" and "live broadcast" elements and require that the actor be "practically certain" that the visual presentation is "for" an audience. The "audience" can extend beyond the actor or the complainant to include other people that are watching or may watch the performance as long as the actor is "practically certain" of this fact. For the defense, if an actor reasonably believes that the actor, the complainant, or both of them, are the only audience for the performance, it is irrelevant that there may be other people watching.

[23] If an actor records, photographs, or films the live performance, he or she is creating a prohibited image of a minor and there may be liability under the RCC creating or trafficking an obscene image offense (RCC § 22E-1807).

[24] D.C. Code § 22-3102(a)(1), (a)(2), (b) (prohibiting "employ[ing], authoriz[ing], or induc[ing] a person under 18 years of age to engage in a sexual performance, the parent, legal guardian, or custodian giving such consent, "produc[ing], direct[ing], or promot[ing]" any sexual performance, and "attend[ing], direct[ing], or promot[ing] any sexual performance"), 22-3104 (punishing a first violation with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

abuse[25] and selling and advertising are "an integral part" of the market.[26] In contrast, the revised attending a live performance statute penalizes attending or viewing a live performance or a live broadcast less severely than creating, selling or advertising a live performance or a live broadcast in the revised arranging a live performance statute (RCC § 22E-1809) or revised creating or trafficking an obscene image statute (RCC § 22E-1807). The different penalties recognize that creating, selling, or advertising a live performance directly harms children and supports the market. Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[27] This change improves the consistency and proportionality of the revised offense.

Second, the revised attending a live performance statute grades punishments based upon the sexual conduct depicted in the live performance or live broadcast. The current D.C. Code sexual performance of a minor statute prohibits attending live performances of "sexual conduct,"[28] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC attending a live performance statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised attending a live performance is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[29] This change improves the consistency, proportionality, and constitutionality of the revised statute.

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[25] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

[26] *Id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[27] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[28] D.C. Code §§ 22-3102(b) (prohibiting a attending a "sexual performance by a minor."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[29] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

Third, the revised attending a live performance statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current D.C. Code sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[30] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." However, attending or viewing a live performance or live broadcast that features "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[31] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[32] with no enhancements for the obscene materials depicting a minor.[33] In contrast, first degree of the revised attending a live performance statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701. As defined, such sexual conduct may be as graphic[34] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[35] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[36] This change improves the consistency and proportionality of the revised statute.

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[30] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[31] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes "participat[ing] in the preparation or presentation" of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[32] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[33] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[34] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised arranging a live performance of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[35] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[36] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for

Fourth, the revised attending a live performance statute includes a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current D.C. Code sexual performance of a minor statute is limited to a "lewd exhibition of the genitals," and does not include a lewd exhibition of the pubic area, anus, breast, or buttocks. However, attending or viewing a live performance or live broadcast that features "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[37] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[38] with no enhancements for the obscene materials depicting a minor.[39] In contrast, the RCC criminalizes attending or viewing live performances or live broadcasts that feature certain depictions of the pubic area[40] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[41] As defined, display of the pubic area or anus is as graphic as other conduct

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"obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[37] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes "participat[ing] in the preparation or presentation" of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[38] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[39] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[40] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[41] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). It is unclear if the Court intended "viewing" to include viewing a live performance. At the time *Osborne* was decided, the relevant Ohio statute prohibited possessing or viewing "any material or performance," but it is unclear whether the statute then defined "performance" to include live conduct, like it does now. Ohio Rev. Code Ann. § 2907.01(K) ("'Performance' means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition

penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised attending a live performance statute expands the current exceptions to liability for conduct by persons under 18 years of age. In the current D.C. Coode sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[42] or, if there are multiple minors depicted, all of the minors consent.[43] A minor that is not depicted,[44] or an adult that is not more than four years older than the

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performed before an audience."). Regardless, it seems unlikely that the Court would strike down a state law that prohibits viewing a live sexual performance of minors after upholding Ohio's ban on possessing images of that conduct.

The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams,* the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC arranging a live performance statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC attending a live performance statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised arranging a live performance statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

[42] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[43] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[44] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

minor or minors depicted,[45] is not liable for possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[46] and minors are still liable under the current statute for creating or viewing live performances or live broadcasts with themselves or other minors[47] or engaging in sexual conduct.[48] There is no DCCA case law interpreting the current exclusion. In contrast, the revised attending a live performance statute excludes from liability all persons under the age of 18 years from attending or viewing a live performance or a live broadcast. Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[49] The minor must be the only person under the age of 18 years who is depicted in the live performance or live

[45] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: . . (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[46] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[47] A minor that creates a live performance of himself or herself or of other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[48] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[49] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

broadcast,[50] or the minor must reasonably believe that he or she has the effective consent of every person under 18 years who is depicted in the live performance or live broadcast.[51] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised attending a live performance statute applies the current affirmative defense for a librarian or motion picture theater employee to attending or viewing a live performance or live broadcast and expands it to include similarly positioned museum, school, and other venue employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[52] for a "librarian engaged in the normal course of his or her employment"[53] and certain movie theater employees[54] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[55] There is no DCCA case law interpreting this defense. In contrast, the revised attending a live performance statute applies this defense to attending or viewing a live performance or a live broadcast and expands this affirmative defense to include employees at museums, schools, and other venues who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the live performance or live broadcast.[56] Practically, the

[50] If a minor is the only person under the age of 18 years that is depicted in the live performance or live broadcast, it is irrelevant under the exclusion if the live performance or live broadcast depicts an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[51] If both minors and adults are depicted in the live performance or live broadcast, it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[52] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[53] D.C. Code § 22-3104(b)(1)(A).

[54] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[55] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[56] For example, the defense would not apply to the curator of an art museum who decides to feature an exhibition of prohibited sexual conduct and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum employee who attends the live performance as an usher. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the live performance or live broadcast had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in subsection (c)(1) to first degree for live performances or live broadcasts with serious artistic or other value, or, in second degree, the argument that the live performances or live broadcasts are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised attending a live performance statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current D.C. Code sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[57] The current D.C. Code sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[58] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference. There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised attending a live performance statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant, with several additional requirements. The live performance or live broadcast must be limited to the actor and the complainant or just the complainant, and the actor must reasonably believe that the complainant gave effective consent to the conduct. The actor must reasonably believe that the actor is the only person that attended or viewed the live performance or live broadcast, other than the complainant. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised attending a live performance statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual

[57] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[58] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

abuse statutes. This change improves the consistency and proportionality of the revised statute.

Eighth, the revised attending a live performance statute has an affirmative defense for subsection (a) that the live performance or live broadcast has serious literary, artistic, political, or scientific value, when considered as a whole. The current D.C. Code sexual performance of a minor statute does not have any defense if the performance has serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize attending or viewing artistic films or newsworthy events that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to live performances or live broadcasts with serious literary, artistic, political, or scientific value, when considered as a whole.[59] In contrast, the revised attending a live performance statute has an affirmative defense that the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[60] Despite this defense, however, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[61] This change improves the constitutionality of the revised statute.

Beyond these eight changes to current District law, five other aspects of the revised statute may constitute substantive changes to current District law.

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[59] In *Ferber*, the Court acknowledged that some applications of the statute at issue, which extended to live performances would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n. 28.

[60] *Miller v. California*, 413 U.S. 14, 24 (1973).

[61] For example, a defendant that causes minors to engage in sexual intercourse for a live play may have a successful affirmative defense under the RCC arranging a live performance offense or RCC attending a live performance offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301), as either a principal or an accomplice (RCC § 2E-210).

First, the revised attending a live performance statute requires a "knowingly" culpable mental state for the prohibited conduct—attending or viewing a live performance or live broadcast. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[62] The statute does not specify whether this culpable mental state extends to attending or viewing a live performance or live broadcast, and the definition of "knowingly"[63] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[64] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[65] Resolving this ambiguity, the revised attending a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited conduct—attending or viewing a live performance or live broadcast. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[66] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised attending a live performance statute requires a "knowingly" culpable mental state for the fact that a visual presentation is "for" an audience, as required by the RCC definitions of "live performance" and "live broadcast." The current sexual performance of a minor statute requires the defendant to "know[] the character and

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[62] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[63] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[64] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[65] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[66] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

content" of the sexual performance,[67] but neither the statute nor the current definition of "sexual performance"[68] specifies whether the visual presentation must be for an audience.[69] In addition, the definition of "knowingly"[70] in the current statute is unclear. There is no DCCA case law on these issues. The current D.C. Code obscenity statute has a substantively identical definition of "knowingly,"[71] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[72] Resolving these ambiguities, the revised attending a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the fact that the visual presentation is a "live performance"[73] or "live broadcast" as defined in RCC § 22E-701.

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[67] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[68] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[69] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[70] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[71] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[72] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[73] The RCC definition of "live performance" is substantively identical to the current definition of "performance" as it pertains to live conduct, differing only in the explicit requirement that the presentation be "for an audience, including an audience of one person." *Compare* D.C. Code § 22-3101(3) (defining "performance" as "any play . . . electronic representation, dance, or any other visual presentation or exhibition.") *with* RCC § 22E-701 (defining "live performance" as a "play, dance, or other visual presentation or exhibition for an audience.").

The RCC definitions of "live performance" and "live broadcast" require that the visual presentation be "for" an audience and read in conjunction with the RCC definition of "knowingly," requires that the defendant be "practically certain" that the live performance is "for" an audience or the live broadcast is "for" one or more people.[74] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[75] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Third, the revised attending a live performance statute requires recklessness as to the content of the live performance or live broadcast and, in second degree, as to whether the content is obscene. The current D.C. Code sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[76] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[77] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current statute.[78] However, the current obscenity statute has a substantively identical definition of "knowingly,"[79] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[80] Resolving this ambiguity, the revised

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[74] This requirement is discussed further in the explanatory note for the revised offense.

[75] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[76] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[77] D.C. Code § 22-3101(1).

[78] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber,* the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[79] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[80] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

attending a live performance statute requires recklessness as to the content of the live performance or live broadcast, and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[81] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[82] This change improves the clarity and consistency of the revised statute.

Fourth, the revised attending a live performance statute requires that the live performance or live broadcast depicts at least part of a real complainant under the age of 18 years and excludes purely computer-generated or other fictitious minors. The current D.C. Code sexual performance of a minor statute does not specify whether the complainant that is depicted in a live performance must be a "real," i.e. not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[83] which arguably suggests that the complainant must be a "real," i.e. not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised attending a live performance statute specifies that at least part[84] of a "real," i.e. not fictitious, complainant under the age of 18 years must be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[85] The RCC does not criminalize attending or viewing an obscene live performance or live broadcast with computer-

[81] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States,* 139 S. Ct. 2191, 2195 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[82] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[83] D.C. Code § 22-3101(2).

[84] The revised attending a live performance statute includes performances that show at least part of a real minor, such as a real minor's head that seems to be attached to an adult body, or an adult's head that seems to be attached to a real minor's body. There is no requirement that the government prove the identity of a real minor.

[85] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings, including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. The opinion was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "morphed images may fall within the definition of virtual child pornography, [but] they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further.

generated minors or other "fake" minors, such as youthful looking adults. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, through the use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for live performances of sexual conduct that is apparently fake. The current D.C. Code sexual performance of a minor statute prohibits "simulated" sexual intercourse, but does not define the term.[86] It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way that realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[87] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[88] and is supported by Supreme Court case law.[89] This change improves the clarity, consistency, and constitutionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised attending a live performance statute clarifies that viewing a "live performance" is a discrete form of liability.[90] The current D.C. Code sexual performance

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[86] D.C. Code § 22-3101(5)(A).

[87] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[88] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[89] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[90] For example, an actor that views from across the street a live sexual performance that is taking place in a park could be said to have "viewed" the performance without also attending it. Similarly, an actor several blocks away that views a live sexual performance in a park through a telescope has also "viewed" the performance without attending it.

of a minor statute prohibits "attend[ing]" or "possess[ing]" a sexual "performance."[91] There is no DCCA case law or legislative history interpreting the scope of "attending." However, limiting "attending" to being physically in the immediate vicinity of a live performance would lead to counterintuitive results and disproportionate penalties for similar conduct.[92] This change clarifies current law without changing it.

Second, the revised attending a live performance statute clarifies that attending or viewing a "live broadcast" is a discrete form of liability. The current D.C. Code sexual performance of a minor statute prohibits "attend[ing]" or "possess[ing]" a sexual "performance."[93] The current definition of "performance" includes any "visual representation or exhibition,"[94] which would appear to include live broadcasts. This change clarifies current law without changing it.

Third, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current D.C. Code sexual performance of a minor statute includes both still images and live performances.[95] However, it is counterintuitive to construe a "performance" as including a still image (e.g., photograph). To clarify that both images and live performances fall within the revised statutes, the RCC creating or trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and viewing a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—creating or trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

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[91] D.C. Code § 22-3102(b).

[92] For the purposes of the possession offense, the current sexual performance of a minor statute defines "still or motion picture" to "include[] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced." D.C. Code § 22-3102(d)(2). In addition, for possession of an "electronically received or available" still image or motion picture, the current statute requires that the defendant "access" the still image or motion picture. D.C. Code § 22-3102(b), (d)(3). Thus, a defendant that views a live sexual performance that is being streamed over the Internet would be liable for possessing the resulting images or the motion picture. However, if the defendant were watching the live sexual performance through means other than electronic transmission, such as from across the street or several blocks away through a telescope, it is arguable that the defendant has not "attended" that performance and there would be no liability under the current statute.

[93] D.C. Code § 22-3102(b).

[94] D.C. Code § 22-3101(3). In addition to the general definition of "performance," the current sexual performance of a minor statute, for the possession and attendance prongs, defines a "still or motion picture" to "include[] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced." D.C. Code § 22-3102(d)(2).

[95] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

Fourth, the revised attending a live performance statute no longer uses the defined term "minor."[96] Instead, consistent with the current D.C. Code statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[97] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised attending a live performance statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current D.C. Code sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[98] but otherwise refers generally to the complainant's actions.[99] The revised attending a live performance statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g., unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised attending a live performance statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current D.C. Code sexual performance of a minor statute prohibits and includes bestiality.[100] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[101] the revised attending a live performance statute prohibits a "sexual or sexualized display" of certain body parts when there is less than a full opaque covering. The current D.C. Code sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the

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[96] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[97] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[98] D.C. Code § 22-3102(a)(1).

[99] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

[100] The current sexual performance using a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i). Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[101] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[102] The revised attending a live performance statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Eighth, the definition of "movie theater" in RCC § 22E-701[103] applies to the affirmative defense in paragraph (d)(4) of the revised attending a live performance statute. The current D.C. Code sexual performance of a minor statute has a similar affirmative defense[104] that applies to specified employees of a "motion picture theater," but does not define the term. There is no DCCA case law interpreting the term "motion picture theater" in this affirmative defense. The RCC definition of "motion picture theater" limits the affirmative defense to certain employees of a theater or other venue that is being utilized primarily for the exhibition of a motion picture to the public, which is consistent with the scope of the affirmative defense. This change improves the clarity of the revised statute.

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[102] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.
The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[103] RCC § 22E-701 defines "movie theater" as "a theater, auditorium, or other venue that is being utilized primarily for the exhibition of a motion picture to the public."

[104] D.C. Code § 22-3104 (b)(1) ("Except as provided in paragraph (2) of this subsection, in any prosecution for an offense pursuant to § 22-3102(2) it shall be an affirmative defense that the person so charged was: (A) A librarian engaged in the normal course of his or her employment; or (B) A motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater.").

COMMENTARY:
SUBTITLE III – V, OUTSIDE TITLE 22,
& STATUTES RECOMMENDED FOR REPEAL

COMMENTARY:
SUBTITLE III. PROPERTY OFFENSES

RCC § 22E-2001. Aggregation to Determine Property Offense Grades.

Explanatory Note. *For specified property offenses in the RCC, this section permits the government to aggregate the values, amounts of damage, or quantities of property involved in a single scheme or systematic course of conduct in order to bring one charge of a more serious grade, instead of multiple charges of a less serious grade. Aggregation is permitted regardless of whether the property was taken, transferred, etc. from one person or several, provided that the taking, transferring, etc. was pursuant to one scheme or systematic course of conduct. The words "scheme or systematic course of conduct" have the same meaning as under current law, and includes separate acts that are nonetheless part of a common plan or pattern of behavior.*[1] *The revised aggregation to determine property offense grades statute ("aggregation statute") replaces the "Aggregation of amounts received to determine grade of offense" statute*[2] *in the current D.C. Code.*

Relation to Current District Law. *The revised aggregation statute clearly changes current District law in one main way.*

The revised aggregation statute expands the number of offenses for which values and quantities of property may be aggregated to fourteen. Under the current D.C. Code aggregation statute, only six statutes are subject to aggregation.[3] The nine RCC offenses[4] added to the revised aggregation statute comprise all the property offenses in the RCC which have more than one gradation based on the quantity, value, or damage done to property. Some of the added offenses seem particularly likely to involve a scheme or systematic course of conduct involving multiple properties.[5] The expansion of offenses subject to the aggregation statute improves the administrative efficiency and proportionality of these offenses.

Beyond this change to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised aggregation statute refers generally to "the values, amounts of damage, or quantities of the property involved in" the scheme or systematic course of conduct. The

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[1] *See*, Comments on Bill No. 4-193, the 1982 Theft and White Collar Crime Act.

[2] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[3] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[4] The nine offenses are: § 22E-2105 Unlawful Creation or Possession of a Recording; § 22E-2203 Check Fraud; § 22E-2204 Forgery; § 22E-2206 Unlawful Labeling of a Recording; § 22E-2208 Financial Exploitation of a Vulnerable Adult; § 22E-2301 Extortion; § 22E-2401 Possession of Stolen Property; § 22E-2403 Alteration of Motor Vehicle Identification Number; and § 22E-2503 Criminal Damage to Property.

[5] E.g., § 22E-2403 Alteration of Motor Vehicle Identification Number, which specifically applies not only to motor vehicles but to motor vehicle parts, in part targets fences of stolen property similar to the trafficking in stolen property offense.

current D.C. Code aggregation statute refers to "amounts or property received" pursuant to a single scheme or systematic course of conduct. There is no case law interpreting this phrase in the current D.C. Code statute. The revised aggregation statute's reference to "the values, amounts of damage, or quantities of the property involved in" the scheme or systematic course of conduct is intended to cover all the ways in which property may be the subject of one of the listed offenses, not just "receives."[6] In many RCC property offenses, it is the values of the relevant property that may be aggregated.[7] For some offenses, however, it is the quantity of property, not the value, which may be aggregated.[8] In still other offenses, it is the amount of damage that may be aggregated.[9] This change improves the clarity, consistency, and proportionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised aggregation statute states that "[W]hen a single scheme or systematic course of conduct could give rise to multiple charges of" an offense listed in subsection (b), aggregation may determine "the grade of the offense." The current D.C. Code aggregation statute refers to aggregation for "determining the grade of *the* offense and the sentence for *the* offense" (emphasis added).[10] The revised statute clarifies that only property involved in a scheme or systematic course of conduct for one offense may be aggregated. This revision clarifies the aggregation statute and improves the proportionality of the referenced offenses.

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[6] There is no indication in the legislative history or otherwise that the use of the word "receives" was intended to omit property that was stolen or part of a fraudulent scheme that a person exercised control over, transferred, paid for, etc., but never "received."

[7] For example, if an actor watching an unattended table walks by and commits theft under RCC § 22E-2101 by taking a coat and a laptop left at the table, those items may be aggregated as being stolen pursuant to the same act or course of conduct. The value of those items would be added together to determine the appropriate grade of theft.

[8] For example, a person who, in violation of unlawful creation or possession of a recording (UCPR) per RCC § 22E-2105, one afternoon unlawfully makes 60 copies of one sound recording and 60 copies of different sound recording as part of the same act or course of conduct, may be charged with felony UCPR instead of two misdemeanor charges of UCPR pursuant to the revised aggregation statute. The number of recordings would be added together to determine the appropriate grade of UCPR.

[9] For example, if a person throws a rock through a display case, breaking multiple glass objects in violation of criminal damage to property (CDP) per RCC § 22E-2503, those items may be aggregated as being damaged pursuant to the same act or course of conduct. The amount of damage to each item would be added together to determine the appropriate grade of CDP. (See Commentary to RCC § 22E-2503).

[10] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft)… *or* § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense."(emphasis added)). There is non DDCA case law interpreting this language.

RCC § 22E-2101. Theft.

Explanatory Note. *This section establishes the revised theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct in which there is an intent to deprive another of property without an owner's consent. The penalty gradations are primarily based on the value of the property involved in the crime. The revised theft offense replaces the theft statute,[1] the theft penalty statute,[2] and the breaking and entering a vending machine and similar devices statute[3] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct for first degree theft—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in paragraph (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the consent of an owner." "Consent" is a defined term in RCC § 22E-701 that means "a word or action that indicates, explicitly or implicitly, agreement to particular conduct or a particular result" and given by a person that is generally competent to do so. Any indication of agreement that satisfies the definition of "consent," even if obtained by deception, coercive threat, or physical force, negates the element "without the consent of an owner" and the accused is not guilty of theft. However, there may be liability under the RCC fraud offense (RCC § 22E-2101) or the RCC extortion offense (RCC § 22E-2301) if the taking was committed by deception, a coercive threat, or physical force. "Owner" is defined to mean a person holding an interest in property with which the actor is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), here requiring the accused to be aware to a practical certainty that he or she lacks the consent of an owner.

Paragraph (a)(3) requires that the defendant had an "intent to deprive" an owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective

[1] D.C. Code § 22-3211.
[2] D.C. Code § 22-3212.
[3] D.C. Code § 22-601 (Whoever in the District of Columbia breaks open, opens, or enters, without right, any parking meter, coin telephone, vending machine dispensing goods or services, money changer, or any other device designed to receive currency, with intent to carry away any part of such device or anything contained therein, shall be sentenced to a term of imprisonment of not more than 3 years or to a fine of not more than the amount set forth in § 22-3571.01, or both.).

element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

The requirements for liability in paragraphs (b)(1) - (b)(3) (second degree theft), paragraphs (c)(1) - (c)(3) (third degree theft), paragraphs (d)(1) - (d)(3) (fourth degree theft), and paragraphs (e)(1) - (e)(3) (fifth degree theft) are the same as those in paragraphs (a)(1) - (a)(3) for first degree theft. The theft gradations differ only in the requirements as to the amount and type of property at issue.

The various gradation requirements for theft are in paragraph (a)(4) (first degree theft), in paragraph (b)(4) (second degree theft), under paragraph (c)(4) (third degree theft), under paragraph (d)(4) (fourth degree theft), and in paragraph (e)(4) (fifth degree theft). Paragraphs (a)(4), (b)(4), (c)(4), (d)(4), and (e)(4) specify "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. Each gradation of theft refers to "value," a defined term in RCC § 22E-701 that generally means the fair market value of property, although, as will be discussed, some gradations of the RCC theft offense have additional bases for liability.

Paragraph (a)(4) specifies that first degree theft requires that "in fact" the property has a value of $500,000 or more. The defendant is strictly liable as to the value of the property.

Paragraph (b)(4) specifies that second degree theft requires that "in fact" the property has a value of $50,000 or more. The defendant is strictly liable as to the value of the property.

For third degree theft, paragraph (c)(4) and subparagraph (c)(4)(A) require "in fact" that the property has a value of $5,000 or more. The defendant is strictly liable as to the value of the property. Paragraph (c)(4) and subparagraph (c)(4)(B) specify an alternative basis for liability for third degree theft—that the property "in fact" is a motor vehicle. "Motor vehicle" is defined in RCC § 22E-701 as a vehicle designed to be propelled only by an internal-combustion engine or electricity. The defendant is strictly liable as to whether the property is a motor vehicle.

For fourth degree theft, paragraph (d)(4) and subparagraph (d)(4)(A) require that "in fact" the property has a value of $500 or more. The defendant is strictly liable as to the value of the property. Paragraph (d)(4) and subparagraph (d)(4)(B) specify an alternative basis for liability for fourth degree theft—that the property "in fact" is taken from a complaint who "possesses" the property within the complainant's immediate physical control. "Possesses" is defined in RCC § 22E-701 as to "[h]old or carry on one's person or [h]ave the ability and desire to exercise control over." The defendant is strictly liable as to whether the complainant holds or carries the property on his or her person[4] or the

[4] When to "hold or carry on one's person" in the RCC definition of "possesses" is inserted into subparagraph (d)(4)(B), the gradation requires that the property is taken from a complainant who "holds or carries on one's person the property within the complainant's immediate physical control." However, when a complainant holds or carries the property on the complainant's person, it will also be within the complainant's immediate physical control. Thus, the requirement in subparagraph (d)(4)(B) that the property be within the complainant's immediate physical control only applies to constructive possession—defined in the RCC as when the complainant has the ability and desire to exercise control over the property.

complainant has the ability and desire to exercise control over property within his or her immediate physical control.

Paragraph (e)(4) specifies that fifth degree theft requires that "in fact" the property has any value. The defendant is strictly liable as to the property having any value.

Subsection (f) codifies an exception to liability for fare evasion. Conduct that violates D.C. Code § 35-252 is not a violation of theft. Subsection (f) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state required for the fact that the conduct constitutes a violation of D.C. Code § 35-252.

Subsection (g) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (h) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised theft statute clearly changes current District law in five main ways.*

First, the revised theft offense no longer includes conduct that constitutes "obtaining property by trick," "false pretense," "deception," "false token," or "larceny by trick."[5] Under District current law, such conduct is criminalized both as theft[6] and fraud.[7] Currently, a defendant may be convicted of both theft and fraud based on the same act or course of conduct, even though he or she must be concurrently sentenced for these convictions.[8] In contrast, in the RCC, conduct that constitutes "obtaining property by trick," "false pretense," "deception," or "larceny by trick" is criminalized only in RCC § 22E-2201, the revised fraud offense. Conduct previously known as "larceny by trust," "embezzlement," or obtaining property by "tampering" remains part of theft, except insofar as such conduct involves obtaining consent by deception and is therefore part of the revised fraud statute (RCC § 22E-2201). This revision reduces unnecessary overlap among offenses and improves the proportionality of the revised theft and fraud statutes.

Second, the revised theft offense eliminates as a separate means of proving liability for theft that the defendant have an intent to "appropriate"[9] property. The current D.C. Code defines "appropriate" as "to take or make use of without authority or right."[10] As applied to the current D.C. Code theft statute, the definition of "appropriate" means that any unauthorized taking or use of property, no matter how brief, can suffice for a theft conviction and is punishable the same as the more serious intent to interfere with property that is required by "with intent to deprive."[11] In contrast, in the RCC, conduct that is punishable under "with intent to appropriate" in the current theft statute instead will be punished under the revised unauthorized use of property offense in section RCC § 22E-2102. This revision improves the proportionality of the revised theft offense and reduces the overlap that currently exists between theft and theft-related offenses such as

[5] D.C. Code § 22-3211(a)(3).
[6] D.C. Code § 22-3211.
[7] D.C. Code § 22-3221.
[8] D.C. Code § 22-3203. However, even if the imprisonment sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences.
[9] D.C. Code § 22-3211(b)(2).
[10] D.C. Code § 22-3201(1).
[11] D.C. Code §§ 22-3201(2); 22-3211(b)(1).

unauthorized use of a motor vehicle,[12] receiving stolen property,[13] and taking property without right,[14] which either require a lesser intent or no intent with regards to the defendant's level of interference with property.

Third, the revised theft statute increases the number and type of grade distinctions, grading primarily based on the value of the property. The current D.C. Code theft offense is limited to two gradations based solely on value.[15] In contrast, the revised theft offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade, and include a gradation for theft of a motor vehicle. Third degree theft includes theft of any motor vehicle, allowing for theft of low-value motor vehicles to be treated as higher value property, with correspondingly greater penalties than they would otherwise receive if treated as fourth or fifth degree theft. This special treatment of low-value motor vehicles recognizes that such vehicles are often targeted for theft. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft and fraud offenses.

Fourth, the revised theft statute criminalizes as property crimes the non-violent taking of a motor vehicle (third degree) and most[16] non-violent takings of any property[17] from the actual possession of another person or from within his or her immediate physical control (fourth degree). The current D.C. Code robbery[18] and carjacking[19] statutes criminalize takings of property from the immediate actual possession of another person[20] "by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear." The DCCA has interpreted the current D.C. Code robbery statute to include taking property that was not on the complainant's person[21] and taking property without the complainant's knowledge,[22] when the only "force or violence"

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[12] D.C. Code § 22-3215.
[13] D.C. Code § 22-3232.
[14] D.C. Code § 22-3213.
[15] First degree theft involves property with a value of $1,000 or more and is punished as a serious felony; second degree theft involves property valued at less than $1,000 and is a misdemeanor. D.C. Code § 22-3212.
[16] The RCC robbery statute prohibits removing property from the "hand or arms of the complainant." This conduct overlaps with the theft from a person gradation in subparagraph (d)(4)(B) of the revised theft statute. If a defendant were charged with both robbery and theft for this conduct based on the same course of conduct, the convictions would merge under the RCC merger provision (RCC § 22E-214).
[17] "Property" in subparagraph (d)(4)(B) of fourth degree theft would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a basis of liability for third degree theft under subparagraph (c)(4)(B).
[18] D.C. Code § 22-2801.
[19] D.C. Code § 22-2803.
[20] The DCCA has defined "immediate actual possession" under the robbery statute as "the area within which the victim can reasonably be expected to exercise some physical control over the property." *Sutton v. United States*, 988 A.2d 478, 485 (D.C. 2010). *See also*, *Beaner v. United States*, 845 A.2d 525, 532-33 (D.C. 2004) (holding that the term "immediate actual possession," as used in the carjacking statute was borrowed from the robbery statute, includes a car that was several feet from the owner when it was taken).
[21] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).
[22] *Spencer v. United States*, 73 App. D.C. 98 (D.C. Cir. 1940) (affirming robbery conviction when defendant took cash from person's pants, which were resting on a chair at the foot of a bed that defendant was using at the time); *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

involved was the force of moving the object taken.[23] It appears that the current D.C. Code carjacking statute has a similar scope.[24] While the DCCA has suggested that there is a limit to sudden or stealthy seizures or snatchings under the current robbery statute due to the statutory "by force or violence" requirement, the precise contours of this limit have not been articulated.[25] In contrast, the RCC criminalizes as a property crime non-violent takings of a motor vehicle (third degree) and most[26] non-violent takings of any property[27] from the actual possession of another person or from within his or her immediate physical control (fourth degree), instead of as robbery or carjacking offenses against persons. Such non-violent takings merit less severe punishment as theft as opposed to robbery.

This revision leads to several additional changes to current District law. First, under the revised theft statute, non-violent takings of motor vehicles and non-violent

[23] District case law states that any taking from the immediate actual possession of another person satisfies the "by force or violence" requirement in the current robbery statute. *See, e.g.*, *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926) ("[T]he requirement for force is satisfied within the sense of the statute by an actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.").

[24] Unlike the clear case law on robbery, whether current District law on carjacking extends liability to takings that occur without a threat or use of force is not firmly established in District case law. However, the statutory language regarding "sudden or stealthy seizure, or snatching" that requires no use of force or criminal menace is identical in the current robbery and carjacking statutes. And, in at least one case, the DCCA, ruling on other issues, appears to have upheld a carjacking conviction on facts that involved a sudden and stealthy seizure with no apparent threat, use of physical force, or bodily injury. *See Young v. United States*, 111 A.3d 13, 14 (D.C. 2015) (affirming multiple convictions for carjacking, first degree theft, and unauthorized use of a motor vehicle based on the defendant's taking a car with keys in it while the owner was standing nearby).

[25] In a 2017 case, in response to an argument in the dissent, the DCCA rejected the proposition that any taking from the immediate actual possession of another person is robbery instead of theft because "[s]uch a principle would completely nullify the 'by force or violence' element of robbery." *Gray v. United States*, 155 A.3d 377, 386 (D.C. 2017); *see also id.* at 386 n.18 (recognizing that "there are passages in opinions . . . that, divorced from context, could be read as supporting the broad proposition advanced by the dissent" that any theft from a person or from his or her immediate possession constitutes a robbery, but stating that "[w]e are unaware of any opinion binding on us that actually *holds* that this is the case."). However, this discussion about the limits of sudden or stealthy seizure or snatching under the current robbery statute is dicta. The jury was not instructed on sudden or stealthy seizure or snatching, *id.* at 382 & n. 13, and this provision of the current robbery statute was not addressed in the court's holding. The issue in *Gray* was whether the trial court erred in refusing to instruct the jury on the lesser included offense of second degree theft. *Id.* at 382. The court stated that "[o]ur earlier opinions glossed 'by force or violence' as 'using force or violence' or 'accomplished by force of by putting the victim in fear' . . . suggesting that we understood the statute to require proof of some sort of purposeful employment or at least knowing exploitation of force or violence." *Id.* at 384 (internal citations omitted). The DCCA held that the trial court did err because, under the "unusual" facts of the case, "the jury rationally could have doubted that [appellant] assaulted the women intending to effectuate the theft or that, in taking [complainant's] money, [appellant] was conscious of any fear (and lowered resistance) [complainant] might have experienced from the assaults." *Id.* at 383.

[26] The RCC robbery statute prohibits removing property from the "hand or arms of the complainant." This conduct overlaps with the theft from a person gradation in subparagraph (d)(4)(B) of the revised theft statute. If a defendant were charged with both robbery and theft for this conduct based on the same course of conduct, the convictions would merge under the RCC merger provision (RCC § 22E-214).

[27] "Property" in subparagraph (d)(4)(B) of fourth degree theft would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a basis of liability for third degree theft under subparagraph (c)(4)(B).

takings of any property[28] from the actual possession of another person or from within his or her immediate physical control are no longer subject to the "while armed" penalty enhancement in D.C. Code § 22-4502[29] or to penalty enhancements for the status of the complainant[30] as they are under current law. These enhanced penalties are unnecessary for non-violent conduct that constitutes theft, although there may be liability for possession of a dangerous weapon in such circumstances under other provisions in the RCC.[31] Second, the revised theft statute punishes attempted non-violent takings of property from the actual possession of another person or from within his or her immediate physical control consistent with other criminal attempts. The D.C. Code currently codifies a penalty for attempted robbery[32] that differs from the general penalty for attempted crimes, but there is no clear rationale for such special attempt penalties in robbery as compared to other offenses. Under the revised theft statute, the RCC attempt

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[28] "Property" in subparagraph (d)(4)(B) of fourth degree theft would include a motor vehicle. However, the theft of any motor vehicle, including from the complainant's actual possession or immediate physical control, is a basis of liability for third degree theft under subparagraph (c)(4)(B).

[29] The current robbery statute is subject to enhanced penalties for committing robbery "while armed" with or "having readily available" a dangerous weapon. D.C. Code § 22-4502. In most non-violent takings of property from the actual possession of another person or from within his or her immediate physical control, the defendant will not be "armed" with a dangerous weapon and will only have it "readily available." Regardless, under current law, the entire enhancement in D.C. Code § 22-4502 applies to the current robbery statute. The current D.C. Code has a separate armed carjacking offense for committing carjacking "while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade knife, razor, blackjack, billy, or metallic or other false knuckles)." D.C. Code § 22-2803(b)(1). Despite this offense, both carjacking and armed carjacking are subject to the additional penalty in D.C. Code § 22-4502 for committing the offenses "while armed" or "having readily available" a dangerous weapon.

However, DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the while armed enhancement in D.C. Code § 22-4502(a)(1) may not be applied to the current armed carjacking offense because it overlaps with an element of the offense. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.* assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[30] The District's protection of District public officials statute penalizes various actions, including taking the property of any District official or employee while in the course of his or her duties or on account of those duties. D.C. Code § 22-851(c). The District has penalty enhancements for robbery when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751; 22-3752); a transit operator or Metrorail station manager (D.C. Code §§ 22-3751.01; 22-3752); or a member of a citizen patrol (D.C. Code § 22-3602). The District has penalty enhancements for carjacking when the complainant is: a minor (D.C. Code §§ 22-3611; 23-1331(4)); a senior citizen (D.C. Code § 22-3601); a taxicab driver (D.C. Code §§ 22-3751.01; 22-3752); and a transit operator or Metrorail station managers (D.C. Code §§ 22-3751.01; 22-3752).

[31] *See, e.g.*, RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition. In addition, an actor may face an enhanced penalty under RCC § 22E-608, the hate crime penalty enhancement, if he or she targets the complainant because of a characteristic such as his or her sex.

[32] D.C. Code § 22-2802 (making attempted robbery punishable with a maximum term of imprisonment of three years).

provision (RCC § 22E-301) specifies what must be proven to establish attempt liability and establish penalties for attempted theft consistent with other offenses. Third, the revised theft statute requires a person to act "knowingly" with respect to taking or exercising control over a motor vehicle and whether the motor vehicle satisfies the RCC definitions of "property" and "property of another." The current carjacking statute requires only that a person acts "recklessly" with respect to the taking or exercise of control over the motor vehicle,[33] although it is unclear in the legislative history whether the Council intended this culpable mental state.[34] DCCA case law and current District practice suggest that the offense requires the property to be of another.[35] Requiring a "knowingly" culpable mental state is consistent with the culpable mental state in other RCC property offenses,[36] which generally require that the defendant act knowingly with respect to the elements of the offense, as is requiring that the motor vehicle be "property" and "property of another," as those terms are defined in the RCC.[37] Collectively, these

[33] D.C. Code § 22-2803(a)(1).

[34] The legislative history of the current carjacking statute does not discuss why a recklessly mental state was adopted. The committee report makes no mention of recklessness, and actually states that the statute "[d]efines the offenses of carjacking and armed carjacking as the knowing and/or forceful taking from another the possession of that person's motor vehicle." Committee Report to the Carjacking Prevention Act of 1993, Bill 10-16 at 3.

[35] Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership. *See Allen v. United States*, 697 A.2d 1 (D.C. 1997) (listing as one of the elements of carjacking as the taking "of a person's vehicle," implying the taking of a vehicle owned by someone other than the defendant); *see also Pixley v. United States*, 692 A.2d 438 (D.C. 1997) (making no distinction between robbery and carjacking on the issue of actual ownership; thus, implying that a defendant could not be guilty of carjacking if he was the lawful owner of the motor vehicle).").

[36] There are two additional changes in current District law for carjacking that are related to culpable mental states. First, the revised theft statute requires an intent to deprive. Current District law does not have such a requirement for carjacking. In the RCC, a non-violent taking of a motor vehicle without intent to deprive would be criminalized under either the unauthorized use of property statute (RCC § 22E-2102) or unauthorized use of a motor vehicle statute (RCC § 22E-2103). Second, the revised theft statute requires that the defendant know that he or she lack the consent of the owner. As this commentary discusses later, District practice supports requiring lack of consent as an element of carjacking. The current carjacking statute requires a "knowingly or recklessly" culpable mental state, but it is unclear how the DCCA would construe these mental states in relation to the lack of consent of the owner, particularly when this element is not in the current statute. The current unauthorized use of a motor vehicle statute, for example, requires "without the consent of the owner," but does not contain any culpable mental states. D.C. Code § 22-3215(b). DCCA case law for UUV, however, requires a "knowing" mental state for this element. *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[37] RCC § 22E-701 defines property as "anything of value" which would include a motor vehicle. The RCC definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest with which the actor is not privileged to interfere, regardless of whether the actor also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

revisions improve the consistency of the revised theft statute with other offenses and the proportionality of penalties.

Fifth, the revised theft offense eliminates the special recidivist theft penalty consistent with other nonviolent revised offenses in the RCC.[38] The current D.C. Code recidivist theft penalty in D.C. Code § 22-3212(c) provides that a defendant convicted of first or second degree theft who has two or more prior convictions for theft not committed on the same occasion shall be sentenced to a term of imprisonment of not more than 15 years and is subject to a mandatory minimum term of imprisonment of one year. In contrast, the revised theft statute is no longer subject to a recidivist penalty enhancement. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statutes.

Beyond these five changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised theft statute eliminates the evidentiary provision for theft of services that is in subsection (c) of the current D.C. Code theft statute.[39] The evidentiary provision states that "proof" of certain facts "shall be prima facie evidence that the person had committed the offense of theft." The provision neither specifies the government's burden of proof for those facts nor states whether the finding of prima facie evidence is a mandatory presumption that the trier of fact must make or a permissive presumption that the trier of fact may, but is not required, to make. There is no District case law concerning the theft of services provision. Resolving this ambiguity, the revised theft statute eliminates this evidentiary provision for theft of services. It appears that the language in the theft of services provision is superfluous[40] and deletion of the provision clarifies the revised theft offense.

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[38] D.C. Code § 22-3212:

> (c) A person convicted of theft in the first or second degree who has 2 or more prior convictions for theft, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 15 years and for a mandatory-minimum term of not less than one year, or both. A person sentenced under this subsection shall not be released from prison, granted probation, or granted suspension of sentence, prior to serving the mandatory-minimum.
>
> (d) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for theft if he or she has been convicted on at least 2 occasions of violations of:
>
> (1) § 22-3211;
>
> (2) A statute in one or more jurisdictions prohibiting theft or larceny; or
>
> (3) Conduct that would constitute a violation of § 22-3211 if committed in the District of Columbia.

[39] D.C. Code § 22-3211(c).

[40] In practice, it is unclear whether there are fact patterns where it could be said the government would satisfy the requirements of the theft of services provision and not also established a prima facie case for theft. Indeed, the theft of services evidentiary provision requires the government to establish additional facts beyond what the theft offense requires—for example that the services were rendered "in circumstances where payment is ordinarily made immediately upon the rendering of services or prior to departure from the place where the services were obtained."

Second, the revised theft offense requires a "knowingly" culpable mental state for whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." The current D.C. Code theft statute does not specify a culpable mental state for these elements and no case law exists directly on point. The current D.C. Code robbery statute does not refer to "property" or "property of another," but the statute and case law support using these elements as they are defined in the RCC,[41] and applying a culpable mental similar to that of theft.[42] Resolving these ambiguities, the revised theft statute requires a "knowingly" culpable mental state whether the accused's conduct constituted taking, obtaining, transferring, or exercising control over the property, and whether the property met the definitions of "property" and "property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[43] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[44]

Third, the revised theft gradations, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property, as to whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, and as to the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. The current D.C. Code theft, robbery, and carjacking statutes are silent as to what culpable mental state applies to these elements and there is no District case law on point. However, District practice does not appear to apply a mental state to the values in the current theft gradations.[45] In addition, the current D.C. Code carjacking statute does not define "motor vehicle" and there is no relevant case law, making the scope of the offense unclear as compared to other offenses in Title 22 that define "motor

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[41] The current robbery statute requires that the defendant "take" "anything of value." D.C. Code § 22-2801. RCC § 22E-701 defines property as "anything of value." In addition, the DCCA has held that the current robbery statute incorporates the elements of "larceny," *Lattimore*, 684 A.2d at 359, which requires that property belong to another person. *See, e.g.*, *Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States,* 235 A.2d 326, 327 (D.C.1967)).
The definition of "property of another" clarifies when property is subject to the theft offense, such as when the accused takes property in which he or she has a joint ownership. The relevant language in the RCC definition of "property of another" is "any property that a person has an interest in that the accused is not privileged to interfere with, regardless of whether the accused also has an interest in that property." The second requirement of the RCC definition of "property of another" is that the definition does not include "any property in the possession of the accused that the other person has only a security interest in." The definition of "property of another" is discussed in the commentary to RCC § 22E-701.

[42] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill,* 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).

[43] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[44] *See, e.g.*, RCC § 22E-2201.

[45] D.C. Crim. Jur. Instr. § 5.300.

vehicle."[46] Resolving these ambiguities, the revised theft offense, by use of the phrase "in fact," applies strict liability to the value of the property, to whether the property is a "motor vehicle," as that term is defined in RCC § 22E-701, and to the fact that the property was taken from the actual possession of another person or from within his or her immediate physical control. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[47] Clarifying that these elements are matters of strict liability in the revised theft gradations clarifies and potentially fills a gap in District law, as does applying the RCC definition of "motor vehicle."

Fourth, third degree of the revised theft statute does not require asportation of the property for the non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. The current D.C. Code robbery statute does not include an asportation element. However, the DCCA has stated that robbery requires that the defendant "possess the item being stolen and move it."[48] Asportation is a minimal requirement under current robbery law that may be satisfied by "the slightest moving of an object from its original location."[49] Resolving this ambiguity, third degree of the revised theft statute eliminates the asportation requirement as redundant to liability for non-violent taking of property from the actual possession of another person or from within his or her immediate physical control. It is unclear how a defendant could "take" property without also slightly moving it and satisfying any asportation requirement. However, to the extent that eliminating an asportation requirement expands the scope of current District law, such expansion reflects the gravamen of the gradation—invading the space of the complainant.[50] Eliminating the asportation requirement is also consistent with the revised robbery statute (RCC § 22E-1201) and revised unauthorized use of property

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[46] *See* D.C. Code §§ 22-3215(a) (defining "motor vehicle" for the unauthorized use of a motor vehicle statute as "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."); D.C. Code § 22-3233(c)(2) (defining "motor vehicle" for the altering or removing motor vehicle identification numbers offense as "any automobile, self-propelled mobile home, motorcycle, motor scooter, truck, truck tractor, truck semi trailer, truck trailer, bus, or other vehicle propelled by an internal-combustion engine, electricity, or steam, including any non-operational vehicle that is being restored or repaired.").

[47] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[48] *Moorer v. United States*, 868 A.2d 137, 142 (D.C. 2005) (discussing *Newman v. United States*, 705 A.2d 246 (D.C. 1997)). *See also* D.C. Crim. Jur. Instr. § 4.300 ("[a]lthough not explicitly required in the statute, the government must prove that the defendant took the property and carried it away[.]").
Current District law does not require asportation for carjacking liability. *Moorer*, 868 A.2d at 141 ("Carjacking simply requires possession or control (or attempted possession or control) of the car. Neither the statute nor the case law requires the government to prove asportation—or, indeed, any movement at all—of the car.").

[49] *See, e.g.*, *Simmons v. United States*, 554 A.2d 1167, 1171 n.9 (D.C. 1989) (citing, *Durphy v. United States*, 235 A.2d 326, 327 (D.C.1967)).

[50] *See, e.g.*, § 19.3(b) Carrying away (asportation), 3 Subst. Crim. L. § 19.3(b) (3d ed.) ("The rationale is that, in any taking from the area [within the victim's presence] 'the rights of the person to inviolability would be encroached upon and his personal security endangered, quite as much as if his watch or purse had been taken from his pocket.'") (quoting *State v. Eno*, 8 Minn. 220 (1963)).

statute (RCC § 22E-2102), neither of which requires asportation. This change improves the clarity and consistency of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised theft offense no longer uses the phrase "wrongfully obtains or uses" that is in the current D.C. Code theft statute,[51] and eliminates superfluous language[52] in the long list of predicate conduct. These changes in wording do not affect the limited District case law interpreting this part of the current D.C. Code definition of "wrongfully obtains or uses," such as *In re D.D.*[53] and *Dobyns v. United States*.[54] No change to the scope of the theft statute is intended by these changes.

Second, the revised theft statute requires that the defendant act "without the consent of an owner." This element is intended to clarify the meaning of the ambiguous phrase "without authority or right" in current theft law. The current D.C. Code theft statute does not distinguish "without authority or right" as a separate element, but "without authority or right" is part of one of the statutorily specified means of committing theft.[55] Regardless of the status of "without authority or right" as a separate element in the theft statute, both the legislative history[56] and current practice as reflected by the Redbook jury instruction[57] acknowledge that theft requires an additional element similar to "without authority or right," although they each use different language to discuss it. The current D.C. Code robbery statute[58] and carjacking statute[59] do not state as an element that the actor lacks the

[51] D.C. Code § 22-3211(a).
[52] Superfluous terms are: "making an unauthorized use" or unauthorized "disposition," and "interest in or possession of property." The remaining terms in the definition of "wrongfully obtains or uses" are included in either the revised theft offense or revised fraud offense (RCC § 22E-2201) takes, obtains, transfers, or exercises control over
[53] 775 A.2d 1096 (D.C. 2001).
[54] 30 A.3d 155 (D.C. 2011).
[55] D.C. Code §§ 22-3211(b)(2) (requiring "with intent to appropriate the property to his or her own use or to the use of a third person."); 22-3201(1) (defining "appropriate" as "to take or make use of without authority or right."). However, in at least one instance the DCCA has suggested that proof that a defendant act "without authority or right" also is required when the defendant committed theft by an "intent to deprive." *Russell v. United States*, 65 A.3d 1177, 1181 (D.C. 2013) ("[W]e are satisfied that appellants 'wrongfully obtained' [Federal Aviation Administration] property, 'without authority or right,' specifically intending at the time to deprive the [Federal Aviation Administration] of property that the evidence shows had value. Accordingly, the statutory elements of second-degree theft have been satisfied.").
[56] Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 16-17 (discussing how "wrongfully" was added to the phrase "obtains or uses" to "insure that purely innocent transactions are excluded from the scope" of the theft offense and is used to "indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property.").
[57] D.C. Crim. Jur. Instr. § 5.300 cmt. 5-33 to 5-34 (discussing why "against the will" and "against the will or interest" were added to parts of the theft jury instruction).
[58] D.C. Code § 22-2801.
[59] D.C. Code § 22-2803.

consent of an owner, but case law[60] and current District practice[61] support requiring such an element.

Resolving these ambiguities, the revised theft statute requires that the defendant lack the "consent" of an "owner," as those terms are defined in RCC § 22E-701. "Consent" has been recognized in DCCA case law as providing a grant of authority or right which negates theft[62] and it seems as though it would similarly negate robbery and carjacking. However, under the RCC a person may have a defense to depriving another of their property without consent of an owner, such as in the case of a police seizure of contraband or other government operations.[63] No change in the scope of liability is intended by requiring that the defendant lack the "consent of an owner." The definitions of "consent" and "owner" are discussed in more detail in the commentary to RCC § 22E-701.

Third, the revised theft statute requires that the defendant act "with intent to deprive the other of the property." The current D.C. Code theft statute requires an "intent to deprive the other of a right to the property or a benefit of the property."[64] The revised theft statute deletes the language "a right to the property or a benefit of the property as surplusage, given that the definition of "deprive" in RCC § 22E-701 refers to the property's "value" and "benefit." The current D.C. Code robbery statute does not specify an intent to deprive, but the DCCA has held that the statute incorporates the elements of "larceny,"[65] which requires an intent to deprive.[66] No change to current District law is intended by this change.

Fourth, the revised theft statute specifies a "knowingly" culpable mental state as to the fact that the accused lacked an owner's consent. Although the current D.C. Code theft statute is silent as to the applicable culpable mental state, DCCA case law has applied a knowledge requirement to a similar element.[67] The current D.C. Code robbery statute does

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[60] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States*, 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill,* 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

[61] D.C. Crim. Jur. Instr. § 4.300 (listing as an element of robbery that the actor "did so against the will" of the complainant); Redbook 4.302 ("S/he took [attempted to take] the [insert type of motor vehicle] without right to it;") ("The 'without right to it' language refers to the defendant's lack of a lawful claim to the motor vehicle, such as ownership.").

[62] *Nowlin v. United States*, 782 A.2d 288, 290, 292-93 (D.C. 2001) (discussing the importance of the fact that there was another individual "authorized" to sign checks on the auto body shop account as it pertains to whether the defendant "knew" he was not "entitled" to cash the check); *Russell*, 65 A.3d at 1777-81, n. 27 (discussing the doctrine of apparent authority).

[63] *See* RCC § 22E-402, Execution of Public Duty.

[64] D.C. Code § 22-3211(b)(1).

[65] *Lattimore*, 684 A.2d at 359 ("In the District of Columbia, robbery retains its common law elements. Thus, the government must prove larceny and assault.") (internal citations omitted).

[66] *See, e.g.*, *Lattimore*, 684 A.2d at 360 ("An individual has committed larceny if that person "without right took and carried away property of another with the intent to permanently deprive the rightful owner thereof.") (quoting *Durphy v. United States,* 235 A.2d 326, 327 (D.C.1967)).

[67] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").

not state as an element that the actor lacks the consent of an owner, but case law supports such a requirement[68] and applying a culpable mental similar to that of theft.[69] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[70]

Fifth, subsection (f) of the revised theft statute codifies an exclusion from liability for fare evasion. This exception codifies recent law.[71]

The DCCA has also stated that the culpable mental state of the current theft offense is one of "specific intent." *See, e.g.*, *Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

[68] The DCCA has stated that robbery requires a "felonious taking" "against the other person's will." *Lattimore v. United States*, 684 A.2d 357, 359-60 (D.C. 1996) (*citing United States v. McGill,* 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)); *see also Lattimore*, 684 A.2d at 327 (examining the elements of larceny, which include taking and carrying away property "without right," because "robbery is [partially] comprised of larceny.") (internal citations and quotations omitted).

[69] The DCCA has stated that robbery consists of larceny and an assault, and requires a "felonious taking," similar to the current and revised theft statutes. *Lattimore v. United States*, 684 A.2d 357, 359 (D.C. 1996) (citing *United States v. McGill,* 487 F.2d 1208, 1209 (U.S.App. D.C. 1973)).

[70] *See, e.g.*, RCC § 22E-2201.

[71] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

RCC § 22E-2102. Unauthorized Use of Property.

Explanatory Note*. This section establishes the unauthorized use of property (UUP) offense in the Revised Criminal Code (RCC). UUP covers conduct that results in the taking, obtaining, transferring, or exercising of control over property of another without an owner's effective consent. UUP criminalizes behavior that does not rise to the level of conduct "with intent to deprive an owner of the property" in the revised theft offense (RCC § 22E- 2101), the revised fraud offense (RCC § 22E-2201), or the revised extortion offense (RCC § 22E-2301). The revised UUP offense replaces the taking property without right (TPWR) statute[1] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—takes, obtains, transfers, or exercises control over the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes goods, services, and cash. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in subsection (a)(1) applies to all of the elements in paragraph (a)(1)—takes, obtains, transfers, or exercises control over the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct takes, obtains, transfers, or exercises control over property that is "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) codifies an exclusion from liability for fare evasion. Conduct that constitutes a violation of D.C. Code § 35-252 is not a violation of UUP. Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state required for the fact that the conduct constitutes a violation of D.C. Code § 35-252.

Subsection (c) codifies a defense to the unauthorized use of property offense when the defendant intends to return the property to a lawful owner. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. There are two requirements for the defense. First, per paragraph (c)(1), the actor

[1] D.C. Code § 22-3216.

must reasonably believe[2] that the property is lost or was stolen by a third party. Per the rule of interpretation in RCC § 22E-207, the "in fact" specified in subsection (c) applies to all elements in paragraph (c)(1). "In fact" is a defined term in term in RCC § 22E-207 that indicates no culpable mental state, as defined in RCC § 22E-205, applies to a given element, here that the actor reasonably believes that the property is lost or was stolen by a third party. It is not necessary to prove that the actor desired or was practically certain that the property is lost or was stolen by a third party. However, the actor must subjectively believe, and that belief must be reasonable, that the property is lost or was stolen by a third party. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[3] There is no defense under paragraph (c)(1) when the actor makes an unreasonable mistake as to the property being lost or stolen by a third party.

The second requirement for the defense is in paragraph (c)(2). The actor must engage in the conduct constituting the offense "with intent" to return the property to a lawful owner. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the actor was returning the property to a lawful owner. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually returned the property to a lawful owner, only that the actor believed to a practical certainty that the actor would do so.

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised unauthorized use of property statute clearly changes current District law in four main ways.*

First, the revised UUP offense eliminates the current D.C. Code taking property without right (TPWR) statute's asportation requirement[4] and extends liability if the defendant merely "takes," "obtains," "transfers," or "exercises control" over the property without carrying it away. The DCCA has never interpreted the scope of the asportation requirement in the current D.C. Code TPWR statute, but in the context of other offenses

[2] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[3] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[4] D.C. Code § 22-3216 (requiring takes and "carries away" the property of another).

has stated it is a minimal requirement.[5] In contrast, the revised UUP statute requires only that the defendant take, obtain, transfer, or exercise control over the property of another. It is unclear why a slight physical movement of property should make the difference between an unauthorized, temporary action being criminal and non-criminal. This revision improves the consistency and proportionality of the revised statute.

Second, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." The current D.C. Code TPWR statute merely requires that the defendant engage in conduct "without right" and does not specify a mental state for this element.[6] Case law interpreting the current D.C. Code TPWR statute has construed the phrase "without right" to mean without the consent of the owner, but has not required a knowledge culpable mental state as to the lack of consent.[7] Similarly, case law suggests that something less than a knowledge culpable mental state is necessary for the element that the property is "property of another."[8] In contrast, the revised UUP statute applies a "knowingly" culpable mental state to the elements "property of another" and "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] Requiring a knowing culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[10]

Third, the revised UUP statute, through the general culpability principles for self-induced intoxication in RCC § 22E-209, allows a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current D.C. Code TPWR statute is a general intent crime,[11] which would preclude a defendant from receiving a jury

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[5] *Simmons v. United States*, 554 A.2d 1167, 1171 & n. 9(D.C. 1989) ("We have made clear in several cases that the slightest moving of an object from its original location may constitute an asportation." (citing *Durphy v. United States,* 235 A.2d 326, 327 (D.C.1967) and *Ray v. United States,* 229 A.2d 161, 162 (D.C.1967)).

[6] The DCCA has stated that the culpable mental state of the current TPWR offense is one of "general intent." *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995). "General intent" is not used in or defined in the statute for TPWR, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[7] *Tibbs v. United States*, 507 A.2d 141, 143 (D.C. 1986) ("Only two legal principles can be distilled from the existing case law. First, we held very recently . . . that '[p]roperty cannot be taken 'without right' if it is taken with the knowledge and consent of the owner, or one authorized to consent on his behalf.' . . . Second, it is established that to convict a person of taking property without right, the government need not prove any specific intent; a general intent to commit the proscribed act is all that the law requires." (internal citations omitted)).

[8] *Schafer v. United States*, 656 A.2d 1185, 1189 (D.C. 1995) ("In other words, in the context of this particular case, we must determine whether substantial evidence in the record demonstrates that in removing the television set appellant actually knew, or had reason to know that it was the property of another, not his own.").

[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[10] *See, e.g.*, RCC § 22E-2201.

[11] *See Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995).

instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[12] At the same time, the DCCA has also interpreted the current statute to incorporate a negligence-like culpable mental state, which is not a form of culpability that is susceptible to being negated by self-induced intoxication.[13] As a result, a defendant charged under the current statute would have no basis for even raising—let alone presenting evidence in support of—a claim that he or she, due to his or her self-induced intoxicated state, lacked the necessary intent. By contrast, per the revised UUP offense, a defendant would both have a basis for, and be allowed to raise, a claim of this nature since the revised UUP offense is subject to a more demanding culpable mental state of knowledge.[14] Likewise, where appropriate, under the revised UUP offense the defendant would be entitled to a jury instruction clarifying that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUP. This change improves the clarity, consistency, and proportionality of the offense.

Fourth, subsection (b) of the revised UUP statute codifies an exception for liability for fare evasion. Such an exception exists in current law for the theft statute,[15] but not TPWR. Conduct that satisfies the current theft statute could also be charged as TPWR.[16] Codifying the same exclusion from liability for fare evasion improves the consistency of the revised UUP statute and further clarifies the lesser included relationship between theft and UUP.

Beyond these four changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised UUP offense is made a lesser included offense[17] of the revised theft (RCC § 22E-2101), fraud (RCC § 22E-2201), and extortion (RCC § 22E-2301)

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[12] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[13] *See Schafer*, 656 A.2d at 1188.

[14] This result is a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[15] Fare Evasion Decriminalization Amendment Act of 2018 (Act 22-592).

[16] The current theft statute can be satisfied with an intent to "appropriate," which is defined as "to take or make use of without authority or right." D.C. Code §§ 22-3211(b)(2); 22-3201. Since the current TPWR statute does not require any intent to interfere with the property, an intent to "appropriate" could satisfy TPWR.

[17] By being a lesser included offense, a person cannot be convicted of both UUP and theft or UUP and fraud, or UUP and extortion for the same act or course of conduct under either the RCC merger provision (RCC § 22E-214) or current District case law. *See, e.g.*, *Mooney v. United States*, 938 A.2d 710, 723 (D.C. 2007) (discussing how multiple punishments that result from convictions of a greater and a lesser-included offense are prohibited by the Double Jeopardy Clause unless there is clear legislative intent that punishment should be imposed for both offenses). In addition, the defendant is on notice from the time of indictment for theft, fraud, or extortion, that he may be convicted of the lesser included offense. *See Woodard v. United States*, 738 A.2d 254, 259 n. 10 (D.C. 1999) ("the law is settled that an indictment on a greater offense puts the indictee on notice that the prosecution might also press a lesser-included charge"); *see also Schmuck v. United States*, 489 U.S. 705, 718, 109 S. Ct. 1443, 1452, 103 L. Ed. 2d 734 (1989) ("The elements test . . . permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge."). Upon a showing of

offenses. The current D.C. Code TPWR statute is silent as to whether it constitutes a lesser included offense of the current D.C. Code theft,[18] fraud,[19] and extortion[20] offenses. Based on legislative history,[21] the DCCA has recognized that the current D.C. Code TPWR statute is a lesser included offense of theft,[22] although the current D.C. Code TPWR statute appears to fail the DCCA's current "elements test" as to whether it is a lesser included offense of theft.[23] There is no case law on point with respect to fraud or extortion and these offenses also appear to fail the DCCA's current "elements test."[24] Resolving this ambiguity, the revised UUP statute is clearly a lesser included offense of the revised theft, fraud, and extortion statutes insofar as it has no elements not included in these offenses.[25] This revision removes an unnecessary gap in liability for temporary takings and improves the overall proportionality of these statutes.

Second, the revised UUP offense requires a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." The current statute does not specify a culpable mental state for the comparable elements[26] and no case law exists directly on point.[27] Resolving this ambiguity, the revised UUP statute requires

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some evidence, the defendant may demand an instruction to the jury on the lesser included offense of UUP to accompany theft, fraud, or extortion charges. *Woodward v. United States*, 738 A.2d at 261 ("Any evidence, however weak, is sufficient to support a lesser-included instruction so long as a jury could rationally convict on the lesser-included offense after crediting the evidence.").

[18] D.C. Code § 22-3211.

[19] D.C. Code § 22-3221.

[20] D.C. Code § 22-3251.

[21] The legislative history for the 1982 Theft Act indicates that the Council of the District of Columbia intended for TPWR to be a lesser included offense of theft. Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 36 ("[I]t is intended that the offense of taking property without right continue to be treated as a lesser included offense of the consolidated theft offense.").

[22] *Moorer v. United States*, 868 A.2d 137, 143 (D.C. 2005).

[23] *Moorer v. United States*, 868 A.2d at 140 ("Under the elements test, one offense is included within another if "(1) the lesser included offense consists of some, but not every element of the greater offense; and (2) the evidence is sufficient to support the lesser charge."). Because the asportation element of the current TPWR statute is not required by the current theft, fraud, or extortion statutes, the current TPWR statute does not appear to be a lesser included offense of the current theft, fraud, or extortion statutes.

[24] See *Byrd v. United States*, 598 A.2d 386, 390 (D.C. 1991) (*en banc*).

[25] The revised UUP statute requires "without the effective consent of the owner." RCC § 22E-701 defines "effective consent" as "consent other than consent induced by the physical force, a coercive threat, or deception." RCC § 22E-701 defines "consent" as "a word or action that indicates, explicitly or implicitly, agreement to particular conduct or a particular result" given by a person generally competent to do so. Thus, in requiring that the defendant lack "effective consent," the revised UUP statute requires either that there is no consent at all, or that there is consent but it is obtained by physical force, coercive threat, or deception, and is not valid. These requirements mirror the requirements in the RCC theft offense ("without the consent of the owner"), fraud ("with the consent of the owner; the consent being obtained by deception), and extortion ("with the consent of the owner; the consent being obtained by a coercive threat.").

[26] D.C. Code § 22-3216 ("A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so.").

[27] Insofar as the current TPWR offense has been held to be a "general intent crime," courts have consistently held that there must be an "intent to commit the proscribed act" which here consists of the taking. *See, e.g.*, *Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975). However, case law provides no greater specificity as to the nature of the required intent for TPWR.

a "knowingly" culpable mental state for "takes, obtains, transfers, or exercises control over the property of another." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[28] A knowingly culpable mental state also makes the revised UUP offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[29] This revision improves the clarity and consistency of the revised statute.

Third, the revised UUP offense requires that the person act "without the effective consent of an owner." The current D.C. Code TPWR statute requires that the defendant act "without right." This phrase has been interpreted by the DCCA to refer to "consent of the owner, or one authorized to consent on his behalf,"[30] and to exclude instances where the consent was "the product of trickery" or where the person had consent to take the item for one purpose but then exceeded the terms of that consent.[31] The revised UUP requirement that the person act "without the effective consent of an owner," uses definitions in RCC § 22E-701 for "consent," "effective consent," and "owner" that are consistent across property offenses and also appears to be consistent with existing case law on the current TPWR statute. The change improves the clarity and consistency of the revised UUP offense.

Fourth, the revised UUP statute codifies a defense for intent to return the property to a lawful owner. The current D.C. Code TPWR statute does not codify any such defense.[32] DCCA case law recognizes Good Samaritan[33] and abandoned property[34] defenses to some offenses, but the requirements of the defenses are unclear and the older case law frames the defense in terms of a reasonable mistake of fact as to ownership, which does not reflect the current D.C. Code definition of "property of another."[35] Resolving this ambiguity, the revised TPWR statute codifies a defense when the actor reasonably believes that the property is lost or stolen by a third party and engages in the conduct constituting the offense with intent to return the property to a lawful owner. Without such a defense, a person that takes, obtains, transfers, or exercises control over the property of another without the owner's effective consent, but with the intent to return the property to its lawful owner, would be guilty of the offense. Under the revised UUP statute, a defendant's belief that property is lost or stolen would generally not be a mistake of fact defense if the defendant "knows" that it is "property of another" and that he or she lacks the "effective

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[28] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[29] *See, e.g.*, RCC § 22E-2101.
[30] *Fussell v. United States,* 505 A.2d 72 (D.C. 1986).
[31] *Baggett v. United States,* 528 A.2d 444 (D.C. 1987).
[32] D.C. Code § 22-3216.
[33] *See, e.g.*, *Lihlakha v. United States*, 89 A.3d 479, 490 (D.C. 2014).
[34] *See, e.g.*, *Hawkins v. United States*, 103 A.3d 199, 201, 202 (D.C. (2014) ; *Simms v. United States*, 612 A.2d 215, 218-220 (D.C. 1992).
[35] D.C. Code § 22-3201(4) (defining "property of another" as "any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term 'property of another' includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term 'property of another' does not include any property in the possession of the accused as to which any other person has only a security interest.").

consent" of the owner. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

Explanatory Note. *This section establishes the unauthorized use of a motor vehicle (UUV) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes the use of a motor vehicle without the effective consent of an owner. The offense has a single penalty gradation. The revised UUV offense replaces portions of the unauthorized use of motor vehicles statute[1] in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—operating a motor vehicle. "Motor vehicle" is a defined term in RCC § 22E-701 that includes any vehicle designed to be propelled only by an internal-combustion engine or electricity. Paragraph (a)(1) also specifies a culpable mental state of "knowingly," a term defined at RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is operating a "motor vehicle," as that term is defined in RCC § 22E-701.

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-207 that means a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires that the accused be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) codifies a defense to the unauthorized use of a motor vehicle offense when the defendant intends to return the motor vehicle to a lawful owner. The general provision in RCC § 22E-201 establishes the burdens of proof and production for all defenses in the RCC. There are two requirements for the defense. First, per paragraph (b)(1), the actor must reasonably believe[2] that the motor vehicle is lost or was stolen by a third party. Per the rule of interpretation in RCC § 22E-207, the "in fact" specified in subsection (b) applies to all elements in paragraph (b)(1). "In fact" is a defined term in term in RCC § 22E-207 that indicates no culpable mental state, as defined in RCC § 22E-205, applies to a given element, here that the actor reasonably believes that the motor vehicle is lost or was stolen by a third party. It is not necessary to prove that the actor desired or was practically certain that the motor vehicle is lost or was stolen by a third party. However, the actor must subjectively believe, and that belief must be reasonable, that the motor vehicle is lost or was stolen by a third party. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[3]

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[1] D.C. Code § 22-3215. Specifically, the revised UUV offense replaces D.C. Code § 22-3215 (b), (d)(1)-(d)(3). The remaining portions of D.C. Code § 22-3215, concerning rented and leased cars under certain conditions, are not part of the RCC and will remain in D.C. Code § 22-3215, subject to conforming amendments as necessary.

[2] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[3] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the

There is no defense under paragraph (b)(1) when the actor makes an unreasonable mistake as to the motor vehicle being lost or stolen by a third party.

The second requirement for the defense is in paragraph (b)(2). The actor must engage in the conduct constituting the offense "with intent" to return the motor vehicle to a lawful owner. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the actor was returning the motor vehicle to a lawful owner. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually returned the motor vehicle to a lawful owner, only that the actor believed to a practical certainty that the actor would do so.

Subsection (c) specifies the penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised unauthorized use of a motor vehicle statute clearly changes current District law in six main ways.*

First, through the revised definition of "motor vehicle" in RCC § 22E-701, the revised UUV offense includes liability with respect to any vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The definition of "motor vehicle" in the current D.C. Code UUV offense, and thus the scope of the current D.C. Code UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus."[4] In contrast, the revised definition of "motor vehicle" in RCC § 22E-701 broadens the revised UUV offense to include any watercraft, aircraft, or land vehicle that is "designed to be propelled only by an internal-combustion engine or electricity." The "designed to be" language includes vehicles that happen to be moved by human exertion in a given case, but are "designed" to be propelled only by an internal-combustion engine or electricity. This revision eliminates possible gaps in the offense and clarifies the statute.

Second, through the revised definition of "motor vehicle" in in RCC § 22E-701, the revised UUV offense no longer includes vehicles like mopeds that are designed to be propelled, in whole or in part, by human exertion. The definition of "motor vehicle" in the current D.C. Code UUV offense, and thus the scope of the current D.C. Code UUV offense, is limited to "any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus,"[5] although the DCCA has held explicitly

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situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

[4] D.C. Code § 22-3215(a).

[5] D.C. Code § 22-3215(a).

held that mopeds[6] fall within the current definition of "motor vehicle." In contrast, the revised definition of "motor vehicle" requires that the vehicle that be "designed to be propelled only by an internal-combustion engine or electricity." These types of vehicles are generally more expensive, heavier, and pose more severe safety risks to others than a vehicle that is designed to be propelled, in whole or in part, by human exertion. Unauthorized use of vehicles such as mopeds,[7] that fall outside the RCC definition of "motor vehicle" and the revised UUV offense, remains criminalized by the RCC unauthorized use of property offense (RCC § 22E-2102). This revision improves the clarity, consistency, and proportionality of the revised definition.

Third, the revised UUV offense eliminates the special recidivist penalty in the current D.C. Code UUV statute, consistent with nonviolent revised statutes in the RCC.[8] The revised UUV statute is no longer subject to a recidivist penalty enhancement. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statutes.

Fourth, the revised UUV offense eliminates the special penalty for committing UUV during a crime of violence or to facilitate a crime of violence that is in the current D.C. Code UUV statute.[9] This enhancement is particularly unusual in current District law

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[6] In *United States v. Stancil*, the DCCA held that "[a]fter considering the language and history of the UUV statute, and the characteristics of the vehicle in question, we hold that a moped is a 'motor vehicle' for the purposes" of the then-current UUV statute." *Stancil v. United States*, 422 A.2d 1285, 1286 (D.C. 1980). *Stancil* was decided under an earlier version of the UUV statute, but the definition of "motor vehicle" in this earlier statute is substantively identical to the current definition of "motor vehicle" and the case is still good law. The jury instruction for UUV adopts the holding in *Stancil* and includes "moped" in the definition of "motor vehicle." D.C. Crim. Jur. Instr. § 5.302 cmt. at 5-42.

[7] Similarly, a bicycle or scooter designed to run on either an electric motor or bodily propulsion would not constitute a "motor vehicle."

[8] D.C. Code § 22-3215(d)(3).

> (3)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who has 2 or more prior convictions for unauthorized use of a motor vehicle or theft in the first degree, not committed on the same occasion, shall be fined not less than $5,000 nor more than $15,000, or imprisoned for not less than 30 months nor more than 15 years, or both.
>
> (B) For the purposes of this paragraph, a person shall be considered as having 2 prior convictions for unauthorized use of a motor vehicle or theft in the first degree if the person has been twice before convicted on separate occasions of:
>
> (i) A prior violation of subsection (b) of this section or theft in the first degree;
>
> (ii) A statute in one or more other jurisdictions prohibiting unauthorized use of a motor vehicle or theft in the first degree;
>
> (iii) Conduct that would constitute a violation of subsection (b) of this section or a violation of theft in the first degree if committed in the District of Columbia; or
>
> (iv) Conduct that is substantially similar to that prosecuted as a violation of subsection (b) of this section or theft in the first degree.

[9] D.C. Code § 22-3215(d)(2):

> (2)(A) A person convicted of unauthorized use of a motor vehicle under subsection (b) of this section who took, used, or operated the motor vehicle, or caused the motor vehicle to be taken, used, or operated, during the course of or to facilitate a crime of violence, shall be:

for requiring consecutive sentencing. In contrast, the RCC deletes this special penalty for committing UUV during a crime of violence or to facilitate a crime of violence. There is no clear basis for singling out UUV for a crime of violence enhancement as compared to other offenses of equal seriousness. The RCC reserves theft of a motor vehicle for the RCC theft statute and limits the RCC UUV statute to temporary unauthorized use of a motor vehicle that is a true "joy ride." If an individual uses the motor vehicle during a crime of violence or to facilitate a crime of violence, the defendant will be liable for either theft or UUV, as well as the crime of violence, ensuring that there is added liability for the use of a motor vehicle in conjunction with a crime of violence. This change improves the proportionality and consistency of the revised UUV and theft offenses.

Fifth, the revised UUV offense eliminates the separate offense of "UUV passenger" that currently is recognized in DCCA case law. The current D.C. Code UUV statute is limited to a single gradation,[10] and does not specifically address whether or in what manner it reaches a passenger in a motor vehicle. However, the DCCA has held that riding in a motor vehicle as a passenger with knowledge of its unlawful operation is sufficient for liability.[11] In contrast, the revised UUV offense penalizes only knowingly *operating* a motor vehicle without the effective consent of an owner. A passenger riding in a motor vehicle, with knowledge of its unlawful operation, is not, without more, sufficient for UUV liability in the RCC. However, a passenger that satisfies the requirements of accomplice liability (RCC § 22E-210) may be liable as an accomplice to UUV and consequently receive the same penalty as the driver of the vehicle. The revised UUV statute does not change District case law establishing that mere presence in the vehicle is insufficient to prove knowledge, such as *In re Davis*[12] and *Stevens v. United States*,[13] nor does it change the requirement in existing case law that a passenger is not liable for aiding and abetting UUV if he or she does not have a reasonable opportunity to exit the vehicle upon gaining knowledge that its operation is unauthorized.[14] To the extent that District case law holds that riding as a passenger in a motor vehicle with knowledge of its unlawful operation is

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(i) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, consecutive to the penalty imposed for the crime of violence; and

(ii) If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.

(B) For the purposes of this paragraph, the term "crime of violence" shall have the same meaning as provided in § 23-1331(4).

[10] D.C. Code § 22-3215(d)(1).

[11] *See, e.g.*, *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016); *In re D.P.*, 996 A.2d 1286, 1288 (D.C. 2010); *In re C.A.P.*, 633 A.2d 787, 792 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006); *see also In re T.T.B.*, 333 A.2d 671 (D.C. 1975) ("To sustain a conviction of a passenger in a stolen vehicle of its unauthorized use, the government must show beyond a reasonable doubt that the passenger rode in the vehicle knowing that it was being used without the consent of the owner.").

[12] *In re Davis*, 264 A.2d 297 (D.C. 1970)

[13] *Stevens v. United States*, 319 F.2d 733 (D.C. Cir. 1963).

[14] *Jones v. United States*, 404 F.2d 212, 216 (D.C. Cir. 1968) ("It scarcely brooks denial that a passenger is not to be convicted of aiding and abetting if he discovers only in the course of a 60 mile per hour chase that the vehicle is being operated without the owner's permission."); *Bynum v. United States*, 133 A.3d 983, 987 (D.C. 2016) ("A passenger is not to be convicted of aiding and abetting if he discovers only in the course of a 60 mile per hour chase that the vehicle is being operated without the owner's permission.") (quoting *Jones v United States*, 404 F.2d 212, 216 (D.C. Cir. 1968)).

sufficient for UUV, the revised UUV statute is a change in law.[15] This revision clarifies current law and improves the proportionality of the revised UUV statute.

Sixth, under the revised UUV statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current statute is a general intent crime,[16] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming the necessary intent for the crime.[17] The DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[18]—the claim that, due to his or her self-induced intoxicated state, the defendant not possess the knowledge required for any element of UUV.[19] In contrast, per the revised UUV offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that voluntary intoxication prevented the defendant from forming the knowledge required to prove UUV. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in UUV.[20] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these six changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised UUV statute requires a "knowingly" culpable mental state for "operat[ing]" a "motor vehicle." The current statute does not clearly specify a culpable mental state for these elements. No case law exists directly on point, although the DCCA does require for UUV that the defendant know he lack the consent of the owner.[21] Instead

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[15] *See, e.g.*, *Kemp v. United States*, 311 F.2d 774 (D.C. Cir. 1962); *Jones v. United States*, 404 F.2d 212 (D.C. Cir. 1968); *In re D.M.L.*, 293 A.2d 277 (D.C. Cir. 1972); *In re T.T.B.*, 333 A.2d 671 (D.C. 1975); *In re C.A.P.*, 633 A.2d 787 (D.C. 1993); *In re R.K.S.*, 905 A.2d 201 (D.C. 2006); *Bynum v. United States*, 133 A.3d 983 (D.C. 2016).

[16] *See Carter v. United States*, 531 A.2d 956, 960 n.13 (D.C. 1987).

[17] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[18] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[19] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of UUV.

[20] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[21] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600

of this ambiguity, the revised UUV statute requires a "knowingly" culpable mental state for operating a motor vehicle. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[22] This revision is consistent with the DCCA requirement of knowledge as to the lack of consent of an owner. It also makes the revised UUV offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[23]

Second, the revised UUV statute codifies a defense for intent to return the motor vehicle to a lawful owner. The current D.C. Code UUV statute does not codify any such defense, but requires that the defendant act "without the consent of the owner" and for the defendant's "own profit, use, or purpose."[24] It is unclear whether the current D.C. Code UUV statute would include an individual that operates a motor vehicle with intent to return it to a lawful owner, such that the individual is liable for the offense. There is no DCCA case law on this issue. DCCA case law recognizes Good Samaritan[25] and abandoned property[26] defenses to some offenses, but the requirements of the defenses are unclear. Resolving this ambiguity, the revised UUV statute codifies a defense when the actor reasonably believes that the motor vehicle is lost or stolen by a third party and engages in the conduct constituting the offense with intent to return the motor vehicle to a lawful owner. Without such a defense, a person that operates a motor vehicle without the owner's effective consent, but with the intent to return the motor vehicle to its lawful owner, would be guilty of the offense. This change improves the clarity, consistency, and proportionality of the revised statute. Under the revised UUV statute, a defendant's belief that the motor vehicle is lost or stolen would generally not be a mistake of fact defense if the defendant "knows" that he or she lacks the "effective consent" of the owner. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, "takes" and "uses" have been deleted from the revised UUV offense. Deleting "takes" does not change the scope of the UUV offense because, practically, a "taking" of a motor vehicle necessarily involves its operation. "Uses" has been deleted because it is unclear exactly what conduct constitutes "use" of a motor vehicle but does not constitute "operating" it. Possible examples of "use"—but not operation—might include passively sitting in or on a motor vehicle, but, to the extent a person can "use" a motor vehicle without also operating it, that conduct is more proportionally penalized as third

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A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

[22] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[23] *See, e.g.*, RCC § 22E-2101.

[24] D.C. Code § 22-3216.

[25] *See, e.g.*, *Lihlakha v. United States*, 89 A.3d 479, 490 (D.C. 2014).

[26] *See, e.g.*, *Hawkins v. United States*, 103 A.3d 199, 201, 202 (D.C. (2014) ; *Simms v. United States*, 612 A.2d 215, 218-220 (D.C. 1992).

degree trespass involving a motor vehicle (RCC § 22E-2601). This change clarifies the revised statute.

Second, the revised UUV offense deletes "for his or her own profit, use, or purpose" that is in the current UUV offense. It appears this language does not actually narrow the scope of the UUV offense, as even a person whose ostensible motive is to benefit another would have as his or her own purpose the unauthorized use of the car to benefit that other person. Deleting "for his or her own profit, use, or purpose" clarifies the scope of the revised UUV offense.

Third, "causes a motor vehicle to be taken, used or operated" has been deleted from the revised statute. It is unclear what this language could mean other than codifying liability for aiding and abetting, conduct addressed generally for all offenses in section RCC § 22E-210. Deleting the language is not intended to change the scope of the revised offense.

Fourth, the revised UUV statute requires that the defendant act without the "effective consent of an owner." The current UUV statute simply requires that the defendant act "without the consent of the owner."[27] However, DCCA case law for UUV expands "consent of the owner" to an "authorized" person" to give consent,[28] and indicates that a person who uses deception to obtain consent to use a motor vehicle commits UUV.[29] Using "effective consent" in the revised UUV statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The change improves the clarity and consistency of definitions throughout property offenses.

Fifth, the revised UUV statute requires a "knowingly" culpable mental state as to the fact that the defendant lacked effective consent of an owner. The current UUV statute requires acting "without the consent of the owner," but does not specify a mental state for the element. DCCA case law, however, requires a "knowing" mental state for this element.[30] This change clarifies the revised statute.

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[27] D.C. Code § 22-3215(b).

[28] *Agnew v. United States*, 813 A.2d 192 (D.C. 2002) (stating as an element "at the time the appellant took, used, operated, or removed the vehicle . . . she knew he that she did so without the consent of the owner or some other authorized person.") (citations omitted); *In re R.K.S.*, 905 A.2d 201, 218 (D.C. 2006).

[29] *Evans v. United States*, 417 A.2d 963, 966 (D.C. 1980) (finding in a general UUV case that the "government's evidence that appellant gave a false identity and false addresses in order to procure the rental agreement was sufficient for a jury to conclude that Hertz did not knowingly consent to appellant's use of the vehicle at the time agreement was signed."). *Evans* is a pre-1982 case relying on statutes concerning unauthorized use of motor vehicles that are substantively similar, but not identical, to the current UUV statute.

[30] *Moore v. United States*, 757 A.2d 78, 82 (D.C. 2000) (stating as an element "at the time the appellant took, used, operated or removed the vehicle he knew he that he did so without the consent of the owner.") (citations omitted); *Mitchell v. United States*, 985 A.2d 1136 (D.C. 2009); *Jackson v. United States*, 600 A.2d 90, 93 (D.C. 1991) ("[T]here is a fourth element of the offense which requires the government to prove at the time the defendant used the vehicle, he *knew* he did so without the consent of the owner." (emphasis in original).

RCC § 22E-2104. Shoplifting.

Explanatory Note. *This section establishes the revised shoplifting offense and penalty for the Revised Criminal Code (RCC). Shoplifting addresses theft-like conduct specific to stores and retail establishments, but does not require an intent to deprive an owner of property. There are no penalty gradations. The revised shoplifting offense replaces the existing shoplifting statute[1] in the current D.C. Code.*

Subparagraph (a)(1)(A), subparagraph (a)(1)(B), and subparagraph (a)(1)(C) specify the prohibited conduct—conduct that conceals, removes, transfers, etc. an item. Paragraph (a)(1) specifies that the culpable mental state for this conduct is "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(a), subparagraph (a)(1)(B), and subparagraph (a)(1)(c). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be aware to a practical certainty that his or her conduct is concealing, removing, transferring, etc. an item.

Paragraph (a)(2) specifies several requirements for the item that the defendant must conceal, remove, transfer, etc. First, the item must be "property," a defined term in RCC § 22E-701 meaning an item of value which includes goods, services, and cash. Second, the property must be "property of another," a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in the property. Third, the item must be the "personal" property of another, which excludes property such as real estate. Fourth, the item must be either "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)). Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the elements in paragraph (a)(2), here requiring the accused to be aware to a practical certainty that the item is personal property of another that is displayed, held, stored, or offered for sale in the required manner.

Paragraph (a)(3) states that the proscribed conduct must be done "with intent to take or make use of without complete payment." This is a lesser intent than "with intent to deprive an owner of the property" that the revised theft offense requires in RCC § 22E-2101. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would take or make use of the property without complete payment. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant actually took or made use of the property without complete payment, only that the defendant believed to a practical certainty that this would occur.

Subsection (b) prohibits charging attempted shoplifting. Conduct constituting attempted shoplifting may be chargeable as attempted theft or attempted unauthorized use of property, however.

Subsection (c) specifies the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

[1] D.C. Code § 22-3213.

Subsection (d) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of shoplifting. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to all the requirements that follow in paragraphs (d)(1) through (d)(4), and there is no culpable mental state for these requirements.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised shoplifting statute clearly changes current District law in one main way*.

The language in subparagraph (a)(1)(C) has been simplified to refer to transfer from any container or package (regardless of the purpose of the container). The current D.C. Code shoplifting statute limits the container involved to those concerning sale or display.[2] There is no case law interpreting the scope of this language. In contrast, the revised language in subparagraph (a)(1)(C), in combination with the requirements that the property be "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)), effectively broadens the revised offense to include transfers between containers that store or otherwise hold property. The nature of the container is irrelevant if the action is done with intent to take or make use of the property without complete payment per paragraph (a)(3). This revision clarifies the statute and reduces possible litigation over whether a given container may be a display or sales container.

Beyond this change to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised shoplifting statute is limited to engaging in the specified conduct "with intent to take or make use of the property without complete payment" and no longer includes with intent to "defraud." The current D.C. Code shoplifting statute requires either "with intent to appropriate without complete payment"[3] or "with intent to defraud an owner of the value of the property."[4] The current D.C. Code defines "appropriate" for theft offenses as "to take or make use without authority or right,"[5] but does not define "defraud." There is no DCCA case law interpreting intent to defraud for shoplifting. As a result, it is unclear in the current D.C. Code shoplifting statute how an intent to defraud differs from an intent to appropriate. Resolving this ambiguity, the revised shoplifting statute replaces "appropriate" with "to take or make use" from the current D.C. Code definition of that term and requires "with intent to take or make use of the property without complete payment." The revised statute also eliminates the intent to defraud alternative. "Defraud" is a common law term with an unclear meaning. In the context of shoplifting, it is unclear what the use

[2] D.C. Code § 22-3216(a)(3) ("knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").
[3] D.C. Code § 22-3213(a).
[4] D.C. Code § 22-3213(a).
[5] D.C. Code § 22-3201(1).

of "defraud" would criminalize that is not already covered by conduct undertaken "with intent to take or make use of the property without complete payment." This change in the revised shoplifting statute clarifies the offense.

Second, the revised shoplifting statute deletes from the qualified immunity provision in paragraph (d)(1) the requirement that the offense be "committed in that person's presence." The qualified immunity provision in the current D.C. Code shoplifting statute requires that the "person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section."[6] There is no case law interpreting the scope of "committed in that person's presence," and it is unclear if it includes the use of technology such as surveillance equipment and anti-theft devices to identify an alleged shoplifter. Resolving this ambiguity, the revised qualified immunity provision deletes the requirement "committed in that person's presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Third, the revised shoplifting statute replaces "within a reasonable time" with "as soon as practicable" in paragraph (d)(3) and paragraph (d)(4) of the qualified immunity provision. The qualified immunity provision in the current D.C. Code shoplifting statute requires that "[l]aw enforcement authorities were notified within a reasonable time"[7] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[8] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Resolving this ambiguity, the revised qualified immunity provision requires "as soon as practicable. This revision improves the clarity of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, paragraph (a)(1) of the revised shoplifting offense applies a culpable mental state of "knowingly" to each type of proscribed conduct in sub paragraph (a)(1)(A), sub paragraph (a)(1)(B), and subparagraph (a)(1)(C) and to whether the property is "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)). The current D.C. Code shoplifting statute[9] requires, in part, a "knowingly" culpable mental state,[10] but it is unclear to which elements the culpable mental state applies. However, it would be difficult for a defendant to satisfy either of the "with intent to" requirements in the current D.C. Code statute without knowing that it was the personal property of another that is offered for sale. The requirement of a "knowingly"

[6] D.C. Code § 22-3213(d)(1).
[7] D.C. Code § 22-3213(d)(3).
[8] D.C. Code § 22-3213(d)(4).
[9] D.C. Code § 22-3216.
[10] D.C. Code § 22-3213(a) ("A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person: (1) Knowingly conceals or takes possession of any such property; (2) Knowingly removes or alters the price tag, serial number, or other identification mark that is imprinted on or attached to such property; or (3) Knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.").

culpable mental state for paragraphs (a)(1) and (a)(2) is not intended to change existing law on shoplifting.

Second, in subparagraph (a)(1)(B), "transfers" has been added so that the subsection prohibits conduct which "removes, alters, or transfers" price tags or other specified marks. The current D.C. Code shoplifting statute is limited to "removes or alters" price tags or other specified marks. There is no case law interpreting the scope of this language. Transferring a price tag is accomplished by removing or altering the price tag, an action already covered in the current statute. Adding "transfers" to the statute merely clarifies the scope of the revised shoplifting offense in a common situation.

Third, the revised shoplifting statute clarifies the type of property at issue by requiring either that the property is "displayed or offered for sale" (subparagraph (a)(2)(A)) or "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)). The current D.C. Code shoplifting statute requires that the property be "offered for sale."[11] However, in *Harris v. United States*, the DCCA held that the current shoplifting statute extended "at least to merchandise held . . . in reasonably close proximity to the customer area and intended for prompt availability to customers when and as needed."[12] The addition of "displayed or offered for sale" (subparagraph (a)(2)(A)) and "held or stored on the premises in reasonably close proximity to the customer sales area for future display or sale" (subparagraph (a)(2)(B)) codifies *Harris* as to the scope of "offered for sale" in the current shoplifting statute and is not intended to change District law on shoplifting. Under the revised element in paragraph (a)(2), the property should be in "reasonably close proximity" to the customer area and readily available to customers as needed. Merchandise on a truck in a loading dock, for example, would not fall within the scope of the revised offense.

Lastly, there are two minor changes to the language in the qualified immunity provision in subsection (d). The current qualified immunity subsection refers to "A person who offers tangible personal property for sale to the public."[13] The term "offers" is not defined in the statute and there is no case law on point. The revised subsection (d) expands "offers" to "displays, holds, stores, or offers for sale" in order to match the scope of the revised elements in subparagraph (a)(2). Similarly, the revised shoplifting statute no longer refers to "tangible personal property." Instead, it refers to "personal property" as specified in subsection (a)(2) so that the qualified immunity provision matches the element.

[11] D.C. Code § 22-3213(a).
[12] *Harris v. United States*, 602 A.2d 1140, 1142 (D.C. 1992). The court further characterized the merchandise at issue in the case as "merchandise contained in a storeroom off the customer sales area, which is used to replenish stock in the sales area or which is available as a source of sizes, colors, or the like not on display in the sales area." *Id.* at 1141.
[13] D.C. Code § 22-3213(d).

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

Explanatory Note. *This section establishes the unlawful creation or possession of a recording (UCPR) offense and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes making, obtaining, or possessing a sound recording that is a copy of an original sound recording fixed before February 15, 1972, or a sound recording or audiovisual recording of a live performance, without the effective consent of an owner and with intent to derive commercial gain or advantage. The revised offense is structured to avoid criminalizing conduct that is preempted by federal legislation protecting copyright. The revised offense is graded based on the number of recordings that the defendant made, obtained, or possessed. The revised UCPR offense replaces the commercial piracy statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct for first degree UCPR—making, obtaining, or possessing an item. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 that here requires the accused be aware to a practical certainty that the actor is making, obtaining, or possessing an item.

Subparagraph (a)(1)(A) and subparagraph (a)(1)(B) state that the accused must make, obtain, or possess either a sound recording that is a copy of an original sound recording that was fixed prior to February 15, 1972, or a sound recording or audiovisual recording of a live performance. "Sound recording," "audiovisual recording," and "live performance" are defined terms in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) also applies to the elements in subparagraph (a)(1)(A) and subparagraph (a)(1)(B), here requiring the accused to be aware to a practical certainty that the item is the specified kind of audiovisual or sound recording.

Paragraph (a)(2) states that the prohibited conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no consent, or the consent was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is defined in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Paragraph (a)(3) requires proof of "with intent to" sell, rent, or otherwise use the recording for commercial gain or advantage. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would sell, rent, or otherwise use the recording for commercial gain or advantage. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this

[1] D.C. Code § 22-3214.

phrase. It is not necessary to prove that such a use actually occurred, only that the defendant believed to a practical certainty that such a use would result.

Paragraph (a)(4) requires that "in fact," the number of recordings made, obtained, or possessed was 100 or more for first degree UCPR. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact the number of recordings made, obtained, or possessed was 100 or more.

Subsection (b) specifies the requirements for second degree UCPR. The requirements in paragraph (b)(1), subparagraphs (b)(1)(A) and (b)(1)(B), paragraph (b)(2), and paragraph (b)(3) are identical to those in paragraph (a)(1), subparagraphs (a)(1)(A) and (a)(1)(B), paragraph (a)(2), and paragraph (a)(3) for first degree unlawful creation or possession of a recording. Paragraph (b)(4) requires that, "in fact," "any number" of recordings were made obtained, or possessed for second degree UCPR. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement for the fact that "any number" of recordings were made, obtained, or possessed.

Subsection (c) contains two exclusions from liability under the revised UCPR statute. Under the exclusion in paragraph (c)(1), the actor does not commit an offense under this section when the actor copies or reproduces a sound recording or audiovisual recording in the manner specifically permitted by Title 17 of the United States Code. Under the exclusion in paragraph (c)(2), the actor does not commit an offense under this section if the actor copies or reproduces a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rule of interpretation in RCC § 22E-207 applies to the elements in paragraphs (c)(1) and (c)(2) and there is no required mental state for these elements.

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) provides judicial discretion to order the forfeiture and destruction or other disposition of all sound recordings, audiovisual recordings, and equipment used, or attempted to be used, in violation of this section.

Subsection (f) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised UCPR offense clearly changes current District law in six main ways.*

First, the revised UCPR offense no longer includes proprietary information within its scope. The current D.C. Code commercial piracy statute concerns not only sound recordings, but "proprietary information" which is broadly defined to include "any [] information, the primary commercial value of which may diminish if its availability is not restricted."[2] In contrast, the revised UCPR offense eliminates the current statute's definition of "proprietary information" as well as references to "proprietary information"

[2] D.C. Code § 22-3214(a)(2) ("'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.").

in the offense elements. This revision improves the clarity of the revised UCPR offense and reduces unnecessary overlap that currently exists between commercial piracy, theft, and other property offenses in the D.C. Code.[3]

Second, the revised UCPR offense applies a "knowingly" mental state to the element that the defendant acted "without the effective consent of an owner." The current commercial piracy statute requires "knowing or having reason to believe" for the "without the consent of the owner" element. There is no case law interpreting "having reason to believe" in the current commercial piracy statute, however legislative history suggests that it may be intended to be a lesser culpable mental state than "knowingly."[4] In contrast, the revised UCPR offense applies a "knowingly" culpable mental state to the element that the defendant acted "without the effective consent of an owner." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[5] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[6] This revision improves the consistency and proportionality of the revised statute.

Third, the revised UCPR offense increases the number and type of grades of the offense. The current commercial piracy offense is a misdemeanor, regardless of the number of recordings the defendant at issue.[7] In contrast, the revised UCPR statute has two gradations, depending on the number of recordings the defendant makes, obtains, or possesses. This revision improves the proportionality of the offense and creates consistency with the gradations in the revised unlawful labeling of a recording statute.[8]

Fourth, subsection (f) of the revised UCPR offense permits the Superior Court for the District of Columbia to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current commercial piracy offense does not contain a forfeiture provision. In contrast, the

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[3] This overlap exists because the current definition of "property" is "anything of value," D.C. Code § 22-3201(3), which would appear to include intellectual property. Per this broad definition of "property," the current theft, taking property without right, and other property offenses create liability for taking proprietary information, independent of the inclusion of "proprietary information" in the current commercial piracy statute. Since the RCC retains the broad definition of "property" as "anything of value" (RCC § 22E-701), multiple property offenses will continue to cover takings of proprietary information without effective consent or consent.
It should also be noted that federal law makes theft or misappropriation of trade secrets a federal offense, but allows for state action. U.S. Economic Espionage Act of 1996, effective January 1, 1997.

[4] The legislative history suggests that a mistake as to whether or not a person has permission must be reasonable. "[I]t is a defense under this section that the defendant honestly and reasonably believed that he or she made the copy with the owner's permission or possessed a copy which was legitimate." Chairperson Clarke of the Judiciary Committee, *Extension of Comments on Bill No. 4-193: The District of Columbia Theft and White Collar Crimes Act of 1982* (July 20, 1982) (hereinafter *Extension of Comments on Bill No. 4-193*) at 28.

[5] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[6] *See, e.g.*, RCC § 22E-2101.

[7] D.C. Code § 22-3214(d) ("Any person convicted of commercial piracy shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 180 days, or both.").

[8] RCC § 22E-2207.

revised statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale prohibited copying. The current[9] and revised[10] unlawful labeling of a recording statute and several other offenses[11] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Fifth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of the number of recordings based on a single scheme or systematic course of conduct to determine the gradation of the revised UCPR offense. The current commercial piracy offense is not part of the current aggregation of value provision for property offenses.[12] This revision improves the proportionality of the revised statute.

Sixth, the revised UCPR offense eliminates any statutory presumption of intent. The current commercial piracy statute states that, "A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance."[13] The legislative history does not clearly state whether the presumption is mandatory or permissive, although some language suggests a mandatory presumption.[14] There is no case law on point. In contrast, the revised UCPR statute eliminates the presumption because it may run afoul of District and Supreme Court case law requiring that even permissive (non-mandatory) inferences be "more likely than not to flow from the proved fact"[15] of possession of 5 or more copies of a recording. While possession of a large number of copies of a recording appears more likely than not to indicate an intent to distribute the copies, the number of recordings alone indicates nothing regarding the purpose of distribution. Without other evidence, such possession also is consistent with a desire to gift or share for purposes other than commercial gain or advantage. This revision improves the proportionality, and perhaps the constitutionality, of the revised statute.

Beyond these six changes to current District law, four other aspects of the revised statute may constitute substantive changes of law.

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[9] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").
[10] RCC § 22E-2207.
[11] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).
[12] D.C. Code § 22-3202. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").
[13] D.C. Code § 22-3214(b) ("A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance.").
[14] *Extension of Comments on Bill No. 4-193* at 29 ("If such a fact is established, the offender will be presumed to have acted with the requisite intent.").
[15] Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969)).

First, the revised UCPR offense explicitly applies to audiovisual recordings for live performances. The current commercial piracy statute, through its definition of "phonorecords,"[16] excludes sound recordings of audiovisual works. However, the current commercial piracy statute separately criminalizes obtaining a copy of "proprietary information"[17] without consent, which may cover illicit audiovisual recordings. State protection of live musical performances is not limited by federal copyright law[18] and the current deceptive labeling statute[19] and the revised deceptive labeling statute[20] extend to audiovisual recordings. RCC § 22E-701 defines "live performance" as a "play, dance, or other visual presentation or exhibition for an audience, including an audience of one person." Including audiovisual recordings for live performances in the revised UCPR statute potentially fills a gap in existing law or, to the extent there is liability in current law, improves the clarity and consistency of the offense.[21]

Second, the revised statute requires a culpable mental state of "knowingly" as to the elements "makes, obtains, or possesses" and to the requirements for the unlawful sound recording (subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B)). No mental state is provided in the current statute regarding these elements, and there is no clear case law on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[22] Requiring a knowing culpable mental state also makes the revised UCPR offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[23] This change improves the clarity, consistency, and proportionality of the revised statutes.

Third, the revised UCPR offense uses a new definition of "owner," the same definition consistently applied to other RCC property offenses.[24] The current D.C. Code

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[16] D.C. Code § 22-3214(a)(3) ("'Phonorecords" means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.").

[17] D.C. Code § 22-3214(a)(2) ("'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.").

[18] 17 USC 1101(d).

[19] D.C. Code § 22-3214.01.

[20] RCC § 22E-2206.

[21] It should be noted that nothing about expanding the unlawful creation or possession of a recording statute to included audiovisual recordings of live performances changes the offense's limited protection of sound recordings. As under the current commercial piracy statute, D.C. Code § 22-3214(e), the unlawful creation or possession of a recording statute is limited to sound recordings fixed prior to February 15, 1972. This limitation exists to avoid preemption by federal copyright law. 17 U.S.C. § 301(c).

[22] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[23] *See, e.g.*, RCC § 22E-2101.

[24] RCC § 22E-701 ("'Owner' means a person holding an interest in property with which the actor is not privileged to interfere without consent.").

commercial piracy offense's definition of "owner"[25] is very specific, referring either to the person who owns the original fixation, the exclusive licensee with reproduction and distribution rights, or in the case of a live performance, the performer. No case law exists construing this definition. However, the definition's rigid categories may lead to unintuitive outcomes in some fact patterns.[26] The revised UCPR statute is intended to more broadly identify the relevant person whose consent must be obtained. Ordinarily, it is expected that the parties specified under the current statute would be the relevant owners, but the revised definition provides flexibility where property rights are not arranged in the manner anticipated by the current statute. The revised UCPR is intended to reduce potential gaps in the offense and improve the consistency of definitions across property offenses.

Fourth, the revised UCPR offense, by use of the phrase "in fact," codifies that no culpable mental state is required as to the number of recordings made, obtained, or possessed. The current statute is silent as to what culpable mental state applies to these circumstances. There is no District case law on what mental state, if any, applies to the current gradations based on the number of recordings. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[27] Clarifying that the number of unlawful recordings is a matter of strict liability in the revised UCPR gradations clarifies District law.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised UCPR statute requires that the defendant "makes, obtains, or possesses." This language, particularly "possesses," is intended to include all the conduct prohibited by "reproduces or otherwise copies, possesses, buys or otherwise obtains" in the current commercial piracy statute. "Possesses" is defined in RCC § 22E-701 and discussed further in the commentary to that statute.

Second, the revised UCPR statute requires that the defendant act without the "effective consent of an owner." The current commercial piracy statute simply requires that the defendant act "without the consent of the owner."[28] There is no legislative history or District case law discussing the scope of "consent" in the current commercial piracy

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[25] D.C. Code § 22-3214(a)(1):

> (1) "Owner", with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.

[26] E.g., a person who has reproduction but not distribution rights (the current statute refers to a licensee with rights to "reproduce and distribute"), or a person who by contractual agreement with someone other than the performer has the rights to reproduce recordings of a live performance, may not be considered an "owner" under the current definition.

[27] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[28] D.C. Code § 22-3214(b).

statute, or how the statute operates when there is more than one owner. The revised statute uses standardized definitions, discussed more fully in RCC § 22E-701, that exclude UCPR liability where consent is improperly gained and extend UCPR liability for unlawful conduct with respect to any owner where there are several. Using "effective consent" and "an owner" in the revised UCPR statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. The change in language improves the clarity and consistency of definitions throughout property offenses.

Third, the revised UCPR statute requires that the actor's conduct be "with intent to sell, rent, or otherwise use the sound recording for commercial gain or advantage." By contrast, the wording in the current commercial piracy statute is "with the intent to sell, to derive commercial gain or advantage, or to allow another person to derive commercial gain or advantage." The revised UCPR statute's addition of "rent" clarifies a common way of gaining commercial advantage. Deletion of the current statute's intent "to allow another person to derive commercial gain or advantage" prong reflects the fact that ordinary aiding and abetting or conspiracy liability applies to the offense. Consistent with prior legislative history,[29] the revised UCPR statute's language "sell, rent, or otherwise use the recording for commercial gain or advantage" is to be broadly construed.

[29] *Extension of Comments on Bill No. 4-193* at 29 ("The phrase 'derive commercial gain or advantage' is intended to encompass any transaction where the person reproducing or possessing the unauthorized phonorecord or copy of proprietary information surrenders ownership and control over it for consideration or any related form of compensation. Consequently, even an individual who does not hold himself or herself out to the public as engaging in a commercial enterprise can be subjected to criminal liability.").

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Movie Theater.

Explanatory Note. *This section establishes the unlawful operation of a recording device in a movie theater offense (revised unlawful recording offense) and penalty gradations for the Revised Criminal Code (RCC). The revised offense proscribes operating a recording device within a movie theater without the effective consent of an owner and with the intent to record a motion picture, or any part of it. The revised offense has a single penalty gradation. The revised unlawful recording offense replaces the unlawful operation of a recording device in a motion picture theater statute*[1] *in the current D.C. Code.*

Paragraph (a)(1) specifies the prohibited conduct—operating a recording device within a movie theater. "Recording device" and "movie theater" are defined terms in RCC § 22E-701. Paragraph (a)(1) specifies that the culpable mental state for this conduct is "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to all the elements in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the accused must be practically certain this his or her conduct will operate a recording device within a movie theater.

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was induced by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 that means a person holding an interest in property with which the accused is not privileged to interfere without consent. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), and here requires that the accused be practically certain that he or she lacks effective consent of an owner of the movie theater.

Paragraph (a)(3) requires "with the intent" to record a motion picture, or any part of it. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would record a motion picture, or any part of it. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that a motion picture, or any part of it, was actually recorded, only that the defendant believed to a practical certainty that a motion picture, or any part of it, would be recorded.

Subsection (b) specifies the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) provides qualified immunity to specified individuals for detention, false imprisonment, malicious prosecution, defamation, and false arrest in any proceedings arising from the detention or arrest of a person suspected of unlawfully operating a recording device within a movie theater. The subsection lists requirements for the detention or arrest that must be met for the immunity to apply. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state

[1] D.C. Code § 22-3214.02.

requirement for a given element. Per the rule of construction in RCC § 22E-207, "in fact" applies to all the requirements that follow in paragraphs (c)(1) through (c)(4), and there is no culpable mental state for these requirements.

Subsection (d) provides judicial discretion to order the forfeiture and destruction or other disposition of any recordings that might be produced in violation of the offense and all equipment used, or attempted to be used, in violation of this section.

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised unlawful operation of a recording device in a movie theater statute clearly changes current District law in two main ways.*

First, the revised unlawful recording statute requires conduct be "with the intent to record a motion picture, or any part of it." The current D.C. Code unlawful recording statute does not have such an intent requirement and broadly prohibits "operat[ing] a recording device" within the premises of a motion picture theater.[2] The current statute would appear to include the use of a recording device (including a cell phone's audio, photo, or video recording features) in a movie theater, even if someone or something other[3] than the motion picture being exhibited is recorded. In contrast, the revised unlawful recording statute requires that the defendant have the intent to record a motion picture, or any part of it. This change improves the clarity and proportionality of the revised statute.

Second, subsection (d) of the revised unlawful recording statute permits the court to order the forfeiture and destruction or other disposition of any recordings and all equipment used, or attempted to be used, in violation of this section. The current D.C. Code unlawful recording offense does not contain a forfeiture provision. In contrast, the revised unlawful recording statute allows judges to order forfeiture in order to destroy illegal copies and potentially deter large-scale prohibited copying. The current D.C. Code[4] and revised[5] unlawful labeling of a recording statutes and several other offenses[6] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Beyond these two changes to current District law, eight other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised unlawful recording statute requires that the defendant operate the recording device "within a movie theater." The current D.C. Code unlawful recording statute requires that the defendant operate a recording device "within *the premises* of a motion picture theater."[7] It is unclear if "within the premises" is meant to include areas of a motion picture theater where a motion picture is not being exhibited—for example, a

[2] D.C. Code § 22-3214.02(b).
[3] For example, taking a photo or video chatting with someone while within a movie theater waiting for a movie to start would appear to satisfy the plain language of the current offense.
[4] D.C. Code § 22-3214.01(e) ("Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section.").
[5] RCC § 22E-2207.
[6] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).
[7] D.C. Code § 22-3214.02(b) (emphasis added).

lobby or a restroom of a motion picture theater. Resolving this ambiguity, the revised unlawful recording statute requires that the defendant operate the recording device within a movie theater. This change improves the clarity and consistency of the revised statute.

Second, through the revised definition of "movie theater" in RCC § 22E-701, the revised unlawful recording statute includes venues they may not qualify as a "theater" or "other auditorium" under the current definition. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[8] It is unclear whether this definition extends to other venues where a movie may be exhibited, such as a drive-in theater or a concert hall. Resolving this ambiguity, the revised definition of "movie theater" in RCC § 22E-701 includes "other venue[s]" that are "being utilized primarily for the exhibition of a motion picture to the public." This change improves the clarity and completeness of the revised statute.

Third, through the revised definition of "movie theater" in RCC § 22E-701, the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is exhibited, but such an exhibition is not the primary purpose of the venue. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium in which a motion picture is exhibited."[9] Due to this definition, it is unclear whether the current D.C. Code unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, incidental to the primary purpose of the venue—such as a salesperson at an electronics store who records portions of a movie being shown to demonstrate the capabilities of a widescreen television. The revised definition of "movie theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[10] and a comparable federal offense.[11] This change improves the clarity and proportionality of the revised offense.

Fourth, through the revised definition of "movie theater" in RCC § 22E-701, the revised unlawful recording statute excludes the use of a recording device in venues where a motion picture is being exhibited, but the exhibition is not open to the public. The current D.C. Code definition of "motion picture theater" is limited to a "theater or other auditorium

[8] D.C. Code § 22-3214.02(a)(1).
[9] D.C. Code § 22-3214.02(a)(1).
[10] The legislative history for the current unlawful recording statute indicates that the statute was part of an effort to combat "film and video piracy" on a "local level." Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[11] A substantively similar federal offense exists in 18 U.S.C. § 2319B, enacted after the District's current statute. The legislative history for the federal statute notes that "the bill is not intended to permit a prosecution of . . . a salesperson at a store who uses a camcorder to record portions of a movie playing to demonstrate the capabilities of a widescreen television" or "a university student who records a short segment of a film being show in film class." Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3. In these instances, the venue is not being used "primarily" to exhibit a motion picture. *Id.* The legislative history for the federal statute notes that it "deals with the very specific problem of illicit 'camcording' of motion pictures in motion picture exhibition facilities. Typically, an offender attends a pre-opening 'screening' or a first-weekend theatric release, and uses sophisticated digital equipment to record the movie. A camcorded version is then sold to a local production factory or to an overseas producer where it is converted into DVDs or similar products and sold on the street for a few dollars per copy." *Id*. at 2.

in which a motion picture is exhibited."[12] Due to this definition, it is unclear whether the current D.C. Code unlawful recording statute extends to the operation of a recording device in venues where a motion picture may be exhibited, but the exhibition is not open to the public—such as a person who records movies off the television screen in his or her home. The revised definition of "movie theater," and, by extension, the revised unlawful recording offense, require that the primary purpose of the venue is to exhibit a motion picture to the public. This change is consistent with the legislative history of the current unlawful recording statute[13] and a comparable federal offense.[14] This change improves the clarity and proportionality of the revised offense.

Fifth, the revised unlawful recording statute requires a "knowingly" culpable mental state for "operating a recording device in a movie theater." The current unlawful recording statute does not have a mental state for these elements, and there is no case law on point. The current D.C. Code statute would appear to criminalize a person with a recording device that is "on" even if the person does not know the device is "on." Resolving this ambiguity, the revised unlawful recording statute requires a "knowingly" culpable mental state for "operating a recording device in a movie theater." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring a knowing culpable mental state also makes the revised unlawful recording offense consistent with the revised theft statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[16] This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the revised unlawful recording statute requires that the defendant act without the "effective consent" of an owner of a movie theater and requires a "knowingly" culpable mental state for this element. The current D.C. Code unlawful recording statute requires that the defendant act "without authority or permission" of the owner.[17] There is no case law interpreting the meaning of "without authority or permission" in the current statute. The revised unlawful recording statute instead requires that the defendant lack the "effective consent" of an owner. "Effective consent" is defined in RCC § 22E-701 and is consistently used in the RCC property offenses. Using "effective consent" in the revised statute ensures that the specialized type of property at issue in the statute has the same protection afforded other property in theft and theft-related offenses in Chapter 21 of the RCC. This change improves the clarity and consistency of definitions throughout property offenses.

Seventh, the revised unlawful recording statute deletes from the qualified immunity provision in paragraph (c)(1) the requirement that the offense be "committed in that

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[12] D.C. Code § 22-3214.02(a)(1).
[13] Committee on the Judiciary, *Report on Bill 11-125, The "Commercial Piracy and Deceptive Labeling Amendment Act of 1995,"* (April 19, 1995) at 1, 2.
[14] Family Entertainment and Copyright Act of 2005, House Committee on the Judiciary, H. Rpt. 109-33 Part I, April 12, 2005, Cong. Session 109-1, at 3
[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[16] *See, e.g.*, RCC § 22E-2101.
[17] D.C. Code § 22-3214.02(b).

person's presence." The current qualified immunity provision requires that the owner had at the time, probable cause to believe that the person detained or arrested had committed "in [the owner's] presence, an offense described in this section."[18] There is no case law interpreting the scope of "committed in [the owner's] presence," and it is unclear if it includes the use of technology such as surveillance equipment. Resolving this ambiguity, the revised qualified immunity provision deletes the requirement "committed in [the owner's] presence" and relies on the probable cause requirement to ensure that that detention or ensuing arrest is reasonable. This revision clarifies the provision and fills a potential gap in current District law.

Eighth, the revised unlawful recording statute replaces "within a reasonable time" with "as soon as practicable" in paragraph (c)(3) and paragraph (c)(4) of the qualified immunity provision. The current qualified immunity provision requires that "[l]aw enforcement authorities were notified within a reasonable time"[19] and "[t]he person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time."[20] The scope of "within a reasonable time" is unclear and there is no DCCA case law on point. Instead of this ambiguity, the revised qualified immunity provision requires "as soon as practicable." This revision improves the clarity of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised unlawful recording statute uses the definition of "owner" in RCC § 22E-701, the same definition that is consistently applied to other RCC property offenses. The current recording statute does not define the term "owner"[21] and there is no DCCA case law on the issue. "Owner" is defined in RCC § 22E-701 as a person holding an interest in property with which the actor is not privileged to interfere without consent. The definition establishes that there may be multiple owners of property, in this case, a movie theater. This change clarifies the revised statute.

Second, the revised unlawful recording statute deletes the reference to "or his or her agent" in the offense definition.[22] The RCC relies on civil law for determining agency and it is unnecessary to specify that consent may be given by authorized persons. The definitions of "effective consent" and "owner" are discussed in the commentary to RCC § 22E-701. This change improves the clarity of the revised statute.

[18] D.C. Code § 22-3214.02(d)(1).
[19] D.C. Code § 22-3213(d)(3).
[20] D.C. Code § 22-3214.02(d)(4).
[21] D.C. Code § 22-3214.02(b).
[22] D.C. Code § 22-3213(b).

RCC § 22E-2201. Fraud.

Explanatory Note. *This section establishes the fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes a broad range of conduct in which a person obtains property of another by means of deception. The penalty gradations are based on the value of the property involved in the crime. The revised fraud offense is closely related to the revised theft and extortion offenses.[1] It differs from theft because theft requires the lack of the owner's consent to take, obtain, transfer or exercise control over the property. It differs from extortion because extortion requires obtaining the owner's consent by use of a coercive threat, instead of deception. The revised fraud offense replaces both the general fraud statute[2] and, to the extent it criminalizes deceptive forms of theft, the theft statute,[3] as well as the statute specifying penalties for fraud[4] in the current D.C. Code.*

Subsection (a) specifies the elements of first degree fraud. Paragraph (a)(1) specifies alternative elements that a person must engage in—conduct that takes, obtains, transfers, or exercises control over property of another.[5] "Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the proscribed conduct must be done with "consent" of an owner. The term consent requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[6] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(2) also codifies the element that distinguishes fraud from the revised theft and extortion offenses—that the consent of an owner be obtained by deception, a term defined in RCC § 22E-701. Deception includes a variety of ways of creating or reinforcing false impressions as to material information. Per the rule of interpretation in 22E-207, the

[1] RCC § 22E-2101 and RCC § 22E-2301, respectively.
[2] D.C. Code § 22-3221. The statute also replaces the jurisdictional provision under D.C. Code § 22-3224.01.
[3] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[4] D.C. Code §22-3222.
[5] This conduct includes "causing" the taking, obtaining, transfer, etc. of property by indirect means, that meets the RCC § 22E-204 provisions regarding causation.
[6] The determination of who an owner is depends on civil law, including agency law regarding which persons are authorized to act on behalf of another. Thus, for example, a store employee who is authorized to sell merchandise may be an "owner" for purposes of the statute although the merchandise is in fact owned by the store company itself.

"knowingly" mental state in paragraph (a)(1) also applies to the element, which here requires that the accused was practically certain that the misimpression was actually false. In addition, fraud requires reliance; the deception must have caused the owner to provide consent, and the accused must have known that the deception caused the owner to provide consent. If the deception does not cause the owner to provide consent, there is no fraud.[7]

Paragraph (a)(3) requires that the defendant act "with intent to" deprive an owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(4) requires that the property other than labor or services was, in fact, valued at $500,000 or more; or that the property, in fact, was more than 2080 hours of labor or services. When fraud involves taking labor or services, the market value of the labor or services is not used to determine the property penalty grade. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property, or the number of hours of labor or services.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree fraud. The elements of each grade of fraud are identical to the elements of first degree fraud, except for the value of the property. Each subsection specifies a minimum required property value or number of hours of labor or services, except for fifth degree fraud, which has no specific minimum value.[8] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies penalties for each grade of the fraud offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised fraud statute changes current District law in five main ways.*

First, the revised fraud statute requires that the accused "takes, obtains, transfers, or exercises control over" the property of another. The current D.C. Code fraud statute requires proof that the accused "obtains property of another or causes another to lose property"[9] and the current theft statute refers to "obtaining property by trick, false pretense,

[7] For example, if a person sells a watch falsely claiming that the watch is made of gold, but the buyer did not care at all what the watch was made of, and would have purchased it regardless, the seller has not committed fraud.

[8] However, as defined in RCC § 22E-701, "property" means "anything of value" and includes services. Therefore, although fifth degree fraud does not specify any minimum value or number of hours of labor or services, as defined in the RCC, the "property" (including labor or services) must have *some* value.

[9] D.C. Code § 22-3221.

false token . . . or deception[.]"[10] These terms are not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised statute lists conduct that is consistent with the revised theft and extortion offenses. The revised statute is broader insofar as the accused is liable for many actions besides actually gaining the property himself, the typical meaning of "obtain."[11] The phrase "takes, obtains, transfers, or exercises control over" is identical to language in the revised theft statute, which is to be construed broadly to include any unauthorized use or disposition of property.[12] Less clear is whether the revised statute's various alternate elements cover all the possibilities covered by the current "causes another to lose property." For instance, the revised statute would reach conduct that causes the transfer of the victim's property (and otherwise satisfies the elements of the offense), whether or not the transfer is to the accused or received by the accused.[13] The breadth of the new language in practice may cover all or nearly all fact patterns covered under the prior "causes another to lose" language. This change improves the clarity and consistency of the revised statute.

Second, the revised offense defines and punishes attempted fraud consistent with attempt liability and penalties in other revised offenses. The current D.C. Code first degree fraud statute requires that the accused either obtains property or causes another to lose property, but second degree fraud, identical in every other element, requires neither.[14] In other words, second degree fraud in the current D.C. Code is akin to an attempt to commit first degree fraud. In contrast, under the revised fraud statute, if a person fails to obtain property, that person cannot be convicted of the completed offense but still may be convicted of an attempt under the RCC general attempt statute.[15] The elimination of the inchoate version of fraud does not decriminalize any behavior. Rather the change makes the revised fraud offense consistent with other property offenses in how attempt liability affects the scope and punishment for the offense. This change improves the completeness, consistency, and proportionality of the revised statute.

Third, the revised offense provides liability for a single fraudulent act. The current D.C. Code statute refers to a "scheme or systematic course of conduct,"[16] but does not define these terms. Construing this language, the D.C. Court of Appeals (DCCA) has held that a scheme or systematic course of conduct requires "at least two acts calculated to deceive, cheat or falsely obtain property."[17] There is no case law as to what minimal conduct would satisfy the current "two acts" requirement. In contrast, the revised fraud statute does not require proof of two or more acts constituting a scheme or systematic course of conduct. The practical effect of this change is unclear given the possibility that the two acts referred to in the current statute might be robustly construed to require what

[10] *Id*. Conduct in the current theft statute that constitutes "obtaining property by trick, false pretense [] or deception" is replaced by the revised fraud offense.
[11] https://www.merriam-webster.com/dictionary/obtain.
[12] As described in the commentary to the revised theft statute, language such as "unauthorized use" or "disposition" were not used in the current theft statute as duplicative and unnecessary, not to substantively change the broad scope of the offense.
[13] For example, a door-to-door salesman who uses deception to induce a customer to purchase items from the company the salesman works for not only has caused a loss to the homeowner, but has knowingly engaged in conduct that causes the transfer of funds from the homeowner to the company.
[14] D.C. Code § 22-3221.
[15] RCC § 22E-301.
[16] D.C. Code § 22-3221.
[17] *Youssef v. United States*, 27 A.3d 1202, 1207-08 (D.C. 2011).

would amount to two separate instances of theft by deception,[18] or could be minimally construed so as to constitute separate acts only in the most technical sense.[19] In either case, because the revised fraud statute is replacing theft by deception, the revised offense preserves the theft offense's requirement that only one act is sufficient to establish liability for fraud. This is not to say that each act that satisfies the requirements for fraud liability, however slight in distinction, must be charged separately, but they may be so charged if the harms are distinct.[20] This change improves the clarity and consistency of the revised statute.

Fourth, the revised fraud statute increases the number and type of gradations based on the value of the property or number of hours of labor or services lost. The current D.C. Code fraud offense is divided into two grades, with first degree fraud requiring that the accused actually obtained property or caused another to lose property.[21] Each grade of fraud is then divided into felony and misdemeanor versions. Felony first degree fraud requires that the accused obtained property, or caused another to lose property, valued at $1,000 or more. Felony second degree fraud requires that the object of the fraud is $1,000 or more, and there is no requirement that the accused actually obtained the property, or caused anyone to lose property. Misdemeanor versions of first and second degree fraud require that the property gained, property lost, or the object of fraud had any value, and have identical maximum allowable sentences.[22] In contrast, the revised fraud offense has a total of five gradations which span a much greater range in value or loss of labor or services, with a value of $250,000 or more, or 2080 hours of labor, required for the most

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[18] Notably, in *Warner v. United States,* 124 A.3d 79, 86 (D.C. 2015) the DCCA held that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." The implication is that every fraud charge could, in the alternative, be charged as theft by deception. Lending support to this notion that fraud may be viewed as two instances of theft by deception, the legislative history of the current fraud statute states that, "[t]he gravamen of the offense of fraud which distinguishes it from theft, is that fraud involves a scheme or systematic course of conduct to defraud or obtain property of another." Committee Report to the Theft and White Collar Crime Act of 1982 at 40.

[19] Under a longstanding fork-in-the-road test, a defendant's momentary, entirely subjective consideration of another matter may be sufficient to break the defendant's conduct into two acts, cognizable as fraud. For example, a defendant convincing a victim to purchase unneeded home repair services (based on defendant's lie about the condition of the home) who pauses momentarily to mention the hot weather before resuming the conversation may be deemed to have engaged in a fresh, second act by continuing the conversation, thereby incurring liability for a "scheme."

[20] The holding in *Youssef v. United States*, to the extent it relied on the requirement of a scheme to determine the relevant unit of prosecution, is no longer compelled under the revised fraud statute. In *Youssef,* the defendant deposited several checks into his Chevy Chase bank account at several locations throughout the city. The accounts he drew on had insufficient funds to cover the checks. However, before the checks cleared, Chevy Chase still allowed him to draw funds from his Chevy Chase account. The defendant ultimately made twenty-nine withdrawals from his Chevy Chase account over a one week period. This scheme was prosecuted as a single count of first degree fraud, as it constituted a single scheme or systematic course of conduct. Under the revised fraud statute, it is possible that these distinct withdrawals could be prosecuted as separate counts. However, if these incidents were prosecuted as separate counts, the *Youssef* holding as to a special unanimity instruction would also no longer apply. On appeal, the defendant argued that because the single count of fraud was premised on allegations of several withdrawals, the trial judge should have instructed the jury that in order to convict, it must be unanimous as to which particular fraudulent transactions it believed occurred. The DCCA rejected this argument, holding that he jury need not be unanimous as to which facts satisfy the elements of the offense. *Youssef*, 27 A.3d at 1207.

[21] D.C. Code § 22-3221.

[22] D.C. Code § 22-3222.

serious grade. In addition, by eliminating the inchoate version of fraud criminalized currently in the D.C. Code as second degree fraud, the penalty gradations for the revised offense will penalize attempted fraud more consistently under the general attempt penalty provision,[23] the same as in other offenses. The change improves the proportionality of the revised offense.

Fifth, the revised fraud statute's grades conduct that involves taking labor or services by the number of hours of labor or services taken. The current D.C. Code fraud offense is graded on the market value of property, not on the number of hours of labor or services. In contrast, the revised statute's separate calculation for the fraudulent taking of labor or services does not distinguish between the harm to persons with different hourly income levels.[24] Grading fraud based on market value risks disproportionately severe penalties in cases involving the fraudulent taking of high cost labor, and disproportionately lenient penalties in cases involving the fraudulent taking of minimum wage or near minimum wage labor. This change improves the proportionality of the revised criminal code.

Beyond these five main changes to current District law, five other aspects of the revised fraud statute may constitute substantive changes to current District law.

First, the revised fraud offense eliminates the "intent to defraud" means of proving fraud, and therefore requires that the accused obtain property of another for liability as a completed[25] fraud offense. The current D.C. Code fraud statute criminalizes engaging in a scheme "with intent to defraud *or* to obtain property of another[.]"[26] The use of the word "or" suggests that "intent to defraud" could include conduct other than obtaining property by deception. However, neither District statutory nor case law provides a definition of "defraud" and the DCCA has not determined whether the current fraud statute criminalizes conduct beyond obtaining property by deception.[27] Federal courts and courts in other jurisdictions have interpreted fraud statutes with "intent to defraud" elements to include conduct that arguably goes beyond the scope of the revised fraud offense.[28] However, it is unclear if these types of cases would be covered under current District law. Moreover,

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[23] RCC § 22E-301(c).

[24] For example, if a person defrauds a person of 10 hours of labor, this constitutes fourth degree fraud, even if the market value of the labor would be sufficient for a higher grade of fraud.

[25] Attempted fraud liability may exist, per RCC § 22E-301, where the actor does not succeed in obtaining property of another.

[26] D.C. Code § 22-3221.

[27] *But see*, *United States v. Lewis*, 716 F.2d 16 (D.C. Cir. 1983) (affirming convictions under prior version of D.C. Code § 22-1805a for conspiracy to defraud the District of Columbia, on theory that the defendants deprived the District of Columbia of right to "faithful services").

[28] So-called "honest services frauds" do not involve deceptive taking of property, but involve a public official, executive, or other person with a fiduciary duty, depriving another person of a right to honest services. For example, if a public official awards a government contract to a bidder, in exchange for a kickback, the official would have deprived the public to its right to honest services, but did not obtain property by deception. *See Skilling v. United States*, 561 U.S. 358 (2010) (holding that honest services frauds are limited to kick back or bribery schemes); *see generally* Judge Pamela Mathy, *Honest Services Fraud After Skilling*, 42 St. Mary's L.J. 645, 704 (2011). Second, obtaining property by means that do not involve deception as defined under the statute would also not constitute fraud. *See e.g., People v. Reynolds*, 667 N.Y.S.2d 591 (Sup. Ct. 1997) (defendants convicted of fraud had engaged in a scheme in which plaintiffs' attorneys who had won personal injury judgments paid kickbacks to expedite payment of the judgments by an insurance adjustor).

some DCCA fraud case law indicates that the current fraud offense should be construed to cover only deceptive thefts.[29] To resolve these ambiguities, the revised fraud statute eliminates separate liability for "intent to defraud," focusing the statute on conduct to obtain property of another by deception. This change improves the clarity of the revised statute.

Second, by reference to the term "deception," the revised fraud statute specifies particular means of committing fraud. The current D.C. Code fraud statute generally refers to conduct that obtains property "by means of a false or fraudulent pretense, representation, or promise" in the current fraud statute. The phrase is undefined in current District statutory or case law, however there is scant District case law applying the phrase.[30] To resolve these ambiguities, the revised statute refers to a standardized statutory definition of "deception," defined under RCC § 22E-701[31] and broadly provides fraud liability to cover conduct that historically was criminalized at common law as "larceny by trick . . . , and false pretenses."[32] The revised definition of "deception" is consistent with the limited case law applying the fraud statute's requirement that conduct be "by means of a false or fraudulent pretense, representation, or promise," and is consistent with numerous other revised statutes.[33] This change improves the clarity and consistency of the revised statute.

Third, the revised fraud statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1)-(a)(2), (b)(1)-(b)(2), (c)(1)-(c)(2), (d)(1)-(d)(2), and (e)(1)-(e)(2). The current D.C. Code fraud statute requires the conduct be committed "with intent to defraud or to obtain property of another" and explicitly references knowledge or intent in a separate provision in the fraud statute explaining liability for a false promise as to future performance.[34]

However, the fraud statute is silent as to the applicable culpable mental state requirements for other elements of the offense. The DCCA has recognized a knowledge

[29] See *Warner v. United States,* 124 A.3d 79, 86 (D.C. 2015) holding that "one cannot commit second degree fraud without also committing attempted second degree theft by deception." Although the DCCA was not considering the outer bounds of the current fraud statute, the *Warner* holding implies that schemes to deprive others of honest services or to obtain property by wrongful, but not deceptive conduct, are not covered by the current fraud statute.

[30] For example *Youssef v. United States*, 27 A.3d 1202, 1207 (D.C. 2011) (noting that fraud requires acts "calculated to deceive, cheat, or falsely obtain property"; *Cf. Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (holding that elements of common law civil fraud are "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation"); *see also*, Committee Report for the Theft and White Collar Crime Act of 1982 at 40 (The language 'intent to defraud' expresses the concept of an intent to deceive or cheat someone.").

[31] For a detailed description of the definition of "deception," see the commentary entry to RCC § 22E-701.

[32] Conduct previously known as larceny by trust or embezzlement remains part of theft, except insofar as such conduct operates by means of deception and is therefore part of the revised fraud statute (22E-2201).

[33] *See, e.g.,* RCC § 22E-1401 (kidnapping, including as one form an interference with another's freedom of movement by deception, under specified circumstances) and the many revised offenses that use a definition of "effective consent" in RCC § 22E-701, which in relevant part refers to consent other than consent obtained by deception.

[34] D.C. Code 22-3221(c) ("Fraud may be committed by means of false promise as to future performance which the accused does not intend to perform or knows will not be performed. An intent or knowledge shall not be established by the fact alone that one such promise was not performed").

requirement in the context of a false promise,[35] but there is no other case law on point. Current practice in the District may apply a less stringent culpable mental state of recklessness, based on case law in other jurisdictions.[36] To resolve these ambiguities, the revised statute requires knowing culpable mental states as to the elements of "takes, obtains, transfers, or exercises control over property of another" and acting "with the consent of an owner obtained by deception." Requiring knowing culpable mental states for these fraud elements is consistent with the current theft statute, which requires that the accused knew he or she lacked consent to take property of another,[37] and the revised theft and other property offenses. This change improves the clarity, consistency, and completeness of the revised statute.

Fourth, the gradations of the revised statute use the term "in fact," to specify that no culpable mental state is required as to the value of the property or number of hours of labor or services. The current statute is silent as to what culpable mental state, if any, applies to the value of property. There is no DCCA case law on point, although District practice does not appear to require a culpable mental state as to the monetary values in the current gradations.[38] To resolve these ambiguities, the revised statute specifies that strict liability applies to the elements regarding the value of the property or the number of hours of labor or services. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[39] This change improves the clarity, consistency, and completeness of the revised statute.

Fifth, the revised statute extends jurisdiction for fraud only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3224.01 states that jurisdiction extends to cases in which "[t]he person who was defrauded is a resident of, or located in, the District of Columbia at the time of the fraud;" or "[t]he loss occurred in the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District

[35] *See Warner v. United States*, 124 A.3d 79 (D.C. 2015) (the trial judge noted that whether a promise is fraudulent or not depended on "whether or not at the time the defendant made the promise, he knew he was going to [fail to perform the promise.]"

[36] *See*, D.C. Crim. Jur. Instr. § 5-200 ("A showing of reckless indifference for the truth will support a charge of fraud. *See U.S. v. Frick*, 588 F.2d 531 (5th Cir. 1979); *U.S. v. Amrep Corp.*, 560 F.2d 539 (2d Cir. 1977); *U.S. v. Love*, 535 F.2d 1152 (9th Cir. 1976).").

[37] *Russell v. United States*, 65 A.3d 1177 (D.C. 2013) ("Thus, to be clear, in order to show that the accused took the property 'without authority or right,' the government must present evidence sufficient for a finding that 'at the time he obtained it,' he 'knew that he was without the authority to do so.'") (citations omitted); *Nowlin v. United States*, 782 A.2d 288, 291-293 (D.C. 2001); *Peery v. United States*, 849 A.2d 999, 1001 (D.C. 2004) (listing the elements of second degree theft and then stating that "The question we address is whether the government presented sufficient evidence to prove that, at the time *Peery* used the AMEX card for personal purchases, he knew that he was without the authority to do so.").

[38] D.C. Crim. Jur. Instr. § 5.200.

[39] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

resident, or was located in the District at the time of the fraud.[40] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[41] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[42] and such an extension, if intended, may be unconstitutional.[43] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised fraud statute eliminates the special fine enhancement which provides an alternative fine of "twice the value of the property obtained or lost, whichever is greater" for first and second degree fraud of property worth $1,000 or more does not affect available punishments. An equivalent provision in RCC § 22E-604(c) provides an alternate maximum fine of not more than twice the pecuniary gain or loss caused.

[40] For example, a District resident while on vacation in Florida is deceived into buying a fake gold watch. Under the revised statute, District courts would not have jurisdiction in this case since the relevant conduct occurred entirely outside the District.
[41] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[42] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[43] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

RCC § 22E-2202. Payment Card Fraud.

Explanatory Note. *This section establishes the payment card fraud offense and penalty gradations for the Revised Criminal Code (RCC). This offense criminalizes the use of a payment card, typically a credit card, to pay for or obtain property without the consent of the person to whom the card was issued, or the use of a payment card with knowledge that the card has already been canceled or revoked, or that the card had never actually been issued. It is also payment card fraud if the person uses for his or her own purposes a card that was issued to that person by an employer or contractor for the employer's purposes. The penalty gradations are determined by the value of the property obtained or amount paid using the payment card. The revised offense replaces the current credit card fraud[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements for first degree payment card fraud. Paragraph (a)(1) specifies the element that the accused must obtain or pay for property by using a payment card. The term "property" is a defined in RCC § 22E-701 to mean "something of value," including goods and services. "Payment card" is a defined in § 22E-701 as an instrument of any kind issued for use of the cardholder for obtaining or paying for property, or the number inscribed on such a card.[2] Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would obtain or pay for property by using a payment card.

Paragraph (a)(1) also specifies four additional alternate elements, at least one of which must be proven beyond a reasonable doubt. Subparagraph (a)(1)(A) states that the accused must use the payment card "without the effective consent of the owner." The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. "Owner" is defined in § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with, without consent. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(A), here requiring the accused to be aware to a practical certainty that he or she lacked effective consent of the owner to use the payment card.

Subparagraph (a)(1)(B) states that the accused must use the payment card after the card was revoked or canceled. The term "revoked or canceled" is defined in RCC § 22E-701, to means that notice, in writing, of revocation or cancellation either was received by the named holder, as shown on the payment card, or was recorded by the issuer. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(2)(B), here requiring the accused to be aware to a practical certainty that the card had been revoked or canceled.

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[1] D.C. Code § 22-3223. The statute also replaces the jurisdictional provision under D.C. Code § 22-3224.01.

[2] The definition includes not only credit and debit cards, but common items such as gift cards, membership cards, and metro cards used to obtain or pay for goods, services, or any kind of property.

Subparagraph (a)(1)(C) states that the accused must use a payment card that had never actually been issued. Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subsection (a)(1)(C), here requiring the accused to be aware to a practical certainty that the card had never actually been issued.

Subparagraph (a)(1)(D) states that the accused must use the payment card for his or her own purposes, when the person is an employee or contractor, and the payment card was issued to the accused for the employer's purposes.[3] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to subparagraph (a)(1)(D), here requiring the accused to be aware to a practical certainty that the card had been issued to or provided for the employer's purposes, and that the accused was using the card for his or her own purposes.

Paragraph (a)(2) specifies that the property a person pays for or obtains was, in fact, valued at $500,000 or more. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree payment card fraud. The elements of each grade of fraud are identical to the elements of first degree payment card fraud, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree fraud, which has no specific minimum value.[4] As with first degree fraud, strict liability applies to value of the property other than labor or services, or the hours of labor or services in each grade of fraud.

Subsection (f) specifies relevant penalties for each grade of payment card fraud. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised payment card fraud statute changes current District law in one main way.*

The revised payment card fraud statute increases the number of grade distinctions and dollar value cutoffs. Under the current D.C. Code statute, first degree payment card fraud involves property with a value of $1,000 or more and is punished as a serious felony; second degree payment card fraud involves property valued at less than $1,000 and is a misdemeanor.[5] By contrast, the revised payment card fraud offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade. The revised offense's gradations are consistent with other revised property offense gradations. This change improves the consistency and proportionality of the revised offense.

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[3] For example, if a payment card is issued to an employee and that employee is authorized to use the card for the employer's purposes, if that employee uses the card to purchase goods or services for his own personal use, that employee may be found guilty of payment card fraud.

[4] However, as defined in RCC § 22E-701, "property" means "anything of value."

[5] D.C. Code § 22-3223(d) ("(1) Except as provided in paragraph (2) of this subsection, any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (2) Any person convicted of credit card fraud shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, if the value of the property or services obtained or paid for is $1,000 or more.").

Beyond this one main change to current District law, five other aspects of the revised payment card fraud statute may constitute substantive changes to current District law.

First, the revised statute eliminates the current statute's requirement that the accused act "with intent to defraud."[6] The current statute does not define the term "defraud," and the D.C. Court of Appeals (DCCA) has never defined the meaning of the language in the credit card fraud statute. Current District practice does not appear to include an "intent to defraud" element.[7] To resolve this ambiguity, the revised statute eliminates the term. An additional "intent to defraud" element is not necessary to distinguish innocent from criminal conduct in the revised offense because the revised statute requires the accused actually pay for the property, and the accused must know one of the elements in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs were satisfied. This change clarifies the revised statute.

Second, the revised statute requires that the accused act knowingly with respect to the elements in paragraphs (a)(1), (b)(1), (c)(1), (d)(1), and (e)(1). The current statute itself is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] Requiring a knowing culpable mental state also makes the elements of payment card fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[9] This change clarifies the revised statute.

Third, the revised statute does not expressly criminalize using a "falsified, mutilated or altered" card as provided in the current D.C. Code statute.[10] The current statute does not define these terms, and there is no case law interpreting the provision. To clarify the revised statute, specific reference to use of a "falsified, mutilated or altered" card is removed. The other provisions of the revised offense in subparagraphs (a)(1)(A)-(D) and comparable provisions in other paragraphs cover many instances apparently criminalized under the eliminated "falsified, mutilated or altered" provision. Knowing uses of a "falsified mutilated or altered" card may also be criminalized under the revised forgery offense, RCC § 22E-2204. This change clarifies and reduces unnecessary overlap between revised offenses.

Fourth, subsections (a)-(e), by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property obtained or paid for by using the payment card. The current D.C. Code statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the current payment card fraud value gradations, although District practice does not

[6] D.C. Code § 22-3223 ("A person commits the offense of credit card fraud if, with intent to defraud, that person.").
[7] D.C. Crim. Jur. Instr. § 5.201.
[8] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[9] *See, e.g.*, RCC § 22E-2201.
[10] D.C. Code § 22-3223 (3).

appear to apply a mental state to the monetary values in the current gradations.[11] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[12] This change improves the clarity and completeness of the revised statute.

Fifth, the revised statute extends jurisdiction for payment card fraud only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3224.01 states that jurisdiction extends to cases in which "1) The person to whom a credit card was issued or in whose name the credit card was issued is a resident of, or located in, the District of Columbia; (2) The person who was defrauded is a resident of, or located in, the District of Columbia at the time of the fraud; (3) The loss occurred in the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time of the fraud.[13] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[14] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[15] and such an extension, if intended, may be unconstitutional.[16] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

[11] D.C. Crim. Jur. Instr. § 5.201.
[12] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").
[13] For example, person A resides in Florida, and while on vacation in the District, a person in Florida uses A's credit card to fraudulently purchase items from a store in Florida without A's permission. Under the revised statute, District courts would not have jurisdiction in this case.
[14] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[15] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[16] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

RCC § 22E-2203. Check Fraud.

Explanatory Note. *This section establishes the check fraud offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes using a check to obtain or pay for property, with intent that the check will not be honored in full. The penalty gradations are determined by the value of the loss to the check holder. The revised offense replaces the current making, drawing, or uttering check, draft, or order with intent to defraud*[1] *statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree check fraud. Paragraph (a)(1) specifies that a person must obtain or pay for "property," a defined term in RCC § 22E-701 meaning anything of value.[2] The accused must obtain or pay for the property by using a check. "Check" is a defined term in RCC § 22E-701, and includes any written instrument for payment of money by a financial institution. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she obtains or pays for property by a check.

Paragraph (a)(2) specifies that the use of the check must be "with intent that" the check not be honored in full upon presentation to the bank or depository institution. "Intent" is a defined term in RCC § 22E-206 meaning here that the defendant was practically certain that a bank or depository institution would not honor the check in full. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the bank or financial institution did not actually honor the check in full, just that the defendant believed to a practical certainty, or desired, that the check would not be honored in full. The specific basis for why a person believes the bank or depository institution will not honor the check is not specified in the offense, and all that must be proven is the actor's belief at the time that the check will not be honored, whatever the basis.[3] This element requires that the accused believe to a practical certainty that the bank or depository institution will not honor the check *when it is presented* to the bank or depository institution, which may occur after the check is actually used to pay for property.[4]

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[1] D.C. Code § 22-1510.

[2] E.g., the property received may be cash, goods, or services.

[3] For example, a person may believe that their check will not be honored because they have insufficient funds or credit, but other bases for expecting a check will not be honored may include having a hold on an account.

[4] For example a person who knowingly tries to cash a check at his bank that draws upon his overdrawn account would be simultaneously "presenting" the check at the same time as he uses it to obtain property (cash). However, perhaps more typically, the accused would use the check to obtain property (goods) at a business which only later would present the check to the bank for deposit. The possibility of a time lapse between the time of using the check and it being presented to the financial institution may be important to proving the offense, because it may indicate the defendant did not have a culpable mental state. For example, a person would not be liable when that person presents a check to a business owner that draws upon his overdrawn account, but lacks knowledge that the check will not be honored upon presentation to the financial institution because he or she plans to immediately go make a deposit in the account to cover the check. Similarly, a person who spoke with a merchant and was told her check wouldn't be deposited for two weeks would not be liable for check fraud if she then used a check that she knew would not be

Paragraph (a)(3) specifies that there must be a loss to the check holder that is, in fact, $5,000 or more. Paragraph (a)(3) uses the term "in fact," which is defined in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the amount of loss to the check holder. The amount of the loss to the check holder may differ from the face value of the check.[5] A person who pays for or obtains property with the necessary intent need not be aware that the check holder actually experienced a loss, or the amount of the loss. Practically, very high value checks are unlikely to be accepted by a person without bank verification, resulting in few or no completed instances of very high value check fraud.[6]

Subsection (b) specifies the elements of second degree check fraud. The elements of second degree check fraud are identical to the elements of first degree check fraud, except that that there must be a loss to the check holder that is, in fact, $500 or more.

Subsection (c) specifies the elements of third degree check fraud. The elements of third degree check fraud are identical to the elements of first degree check fraud, except that that there is no minimum required amount of loss to the check holder. Any amount of loss to a check holder is sufficient for third degree check fraud.

Subsection (d) specifies penalties for each grade of the check fraud offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised check fraud statute changes current District law in five main ways*.

First, the revised statute requires that the accused obtain or pay for property or services with a check. Under the current D.C. Code statute, merely making, drawing, uttering, or delivering a bad check is sufficient.[7] Such language is not defined by the current statute,[8] and case law provides no precise definition either. However, the plain language of the current statute appears to include a broad range of conduct that ordinarily would be considered inchoate in most property offenses because no actual harm to anyone is required.[9] In contrast, the revised check fraud statute requires that the accused actually

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honored by the financial institution if presented that day, but she planned to take action to ensure the check would be honored in two weeks.

[5] *E.g.*, if a person writes a check to a merchant for $2500 dollars, but upon presentation to the financial institution the bank honors the check for a value of $1000 and there is a $20 fee by the bank on the check holder based on the fact that the account drawn upon was insufficient, the loss for purposes of grading would be $1520.

When a check is not honored in full, typically the amount of loss to the check holder will be equal to the sale price, or the face value of the check.

[6] However, a person may be liable for attempt check fraud per RCC § 22E-301 even when there is no loss to the check holder.

[7] D.C. Code § 22-1510 ("Any person within the District of Columbia who…shall make, draw, utter, or deliver…").

[8] However, "utter" is statutorily defined in the District's forgery statute. See D.C. CODE § 22-1510 ("Utter" means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify.").

[9] *E.g.,* the ordinary meaning of "drawing" a check is to "create and sign" a check. Black's Law Dictionary (10th ed. 2014). Such conduct, when done with intent to defraud, knowing that insufficient funds are

obtains or pays for property by using a check. By requiring that the accused actually obtain or pay for property or services, the revised offense significantly narrows liability for the completed offense to situations where the harm has been completed (i.e. the bad check has been used to obtain something of value) or is very nearly completed (i.e. payment is made, whether or not the property is obtained). Additional liability for *attempted* check fraud would continue to exist, potentially covering much of the conduct criminalized under the current statute.[10] This change improves the consistency and proportionality of the revised statute.

Second, the revised check fraud statute does not provide an evidentiary inference regarding the check user's bad intent based on their failure to timely repay a bounced check. The current D.C. Code statute specifies that, "it shall be prima facie evidence of the intent to defraud . . . [if the accused] shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within 5 days after receiving notice in person, or writing, that such check, draft, order, or other instrument has not been paid."[11] There is no DCCA case law interpreting this provision.[12] In contrast, the RCC omits this statutory inference of intent because it appears to be unconstitutional.[13] However, even with this language omitted, the government may still present evidence of the accused's failure to pay the check holder after receiving notice that the check was not honored, and a fact finder may consider this evidence in determining whether the accused knew at the time the check was used that it would not be honored in full. This change improves the proportionality of the revised statute.

Third, the revised check fraud statute increases the number of penalty gradations, changes the dollar value cutoffs, and specifies that it is the value of the loss to the check

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available to cover the check would complete the existing offense—even if the accused did it while at home alone one evening, communicating the drawn check to no one.

[10] *E.g.*, Drawing a check, with intent to defraud, knowing that insufficient funds are available to cover the check may well constitute attempted check fraud if the accused did so at the counter of a check cashing business while waiting for the clerk. *See*, generally, RCC § 22E-301 Criminal Attempt.

[11] D.C. Code § 22-1510.

[12] However, the D.C. Court of Municipal Appeals, the pre-cursor to the DCCA, has held that the "the presumption of fraudulent intent created by the statute" may still apply even when the check was used to "in payment of an antecedent debt." *Clarke v. United States*, 140 A.2d 181, 182 (D.C. 1958), *aff'd*, 263 F.2d 269 (D.C. Cir. 1959).

[13] In *Reid v. United States,* 466 A.2d 433 (D.C. 1983), the DCCA considered whether part of a statute criminalizing obliterating identifying marks on a pistol was constitutional. The statute in part, read "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia[.]" D.C. Code § 22-4512. The DCCA stated that "Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases 'must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Although the issue has not been litigated before the DCCA, it appears that the portion of the current uttering statute which allows an inference of "intent to defraud" would similarly fail. It does not seem that it can be said "with substantial assurance" that it is "more likely than not" that a person who fails to pay back the check holder within 5 days of learning that the check was not honored had "intent to defraud" at the time the check was used. For example, a person may use a check to pay for property, genuinely believing that the check would be honored, and simply not have enough money to pay the check holder in full within 5 days of learning that the check was not honored.

holder that should be used to determine gradations. The current D.C. Code check fraud offense is divided into two penalty grades, and turns on the amount of the check, being a three-year felony if the offense is $1,000 or more, otherwise a misdemeanor.[14] The current statute's grading based on the amount of the check may lead to counterintuitive liability in instances where there are nearly, but not fully, sufficient funds to cover a large value check.[15] By contrast, the revised check fraud offense is divided into three penalty grades based on the actual loss to the check holder, and the threshold values are set at $500 and $5,000. The $5.000 threshold for first degree check fraud is consistent with other revised property offenses, which generally adopt a $5,000 threshold for property offenses to be subject to felony penalties. This change improves the consistency and proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised check fraud offense based on a single scheme or systematic course of conduct. In the current D.C. Code, the statutory provision that allows for aggregation of value across many property offenses[16] does not include the current check fraud offense, which is located in another chapter of the D.C. Code. In contrast, the revised check fraud statute permits aggregation for determining the appropriate grade of check fraud to ensure penalties are proportional to the accused's actual conduct. This change improves the consistency, and proportionality of the revised offense.

Fifth, the revised statute makes liability turn on a person's belief that his or her check will not be honored by the bank or depository institution. The current D.C. Code statute requires, more narrowly, that the accused know that he or she has insufficient funds or credit to cover the check.[17] There is no case law interpreting the scope of this element. In contrast, the revised statute provides liability in instances where the accused knows of other reasons[18]—besides insufficient funds or credit—why the bank or depository institution will deny payment and cause a loss to the check holder. This change may fill a gap in existing law.

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[14] D.C. Code § 22-1510 ("Any person…shall, if the amount of such check, draft, order, or other instrument is $1,000 or more, be guilty of a felony and fined not more than the amount set forth in § 22-3571.01 or imprisoned for not less than 1 year nor more than 3 years, or both; or if the amount of such check, draft, order, or other instrument has some value, be guilty of a misdemeanor and fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").

[15] E.g., a person who writes a check for $1,001, knowing there is only $1,000 available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a three year felony under current law. By contrast, a person who writes a check for $999, knowing there is no money available to cover the check (and otherwise satisfying the elements of the offense) would be subject to a 180-day misdemeanor under current law.

[16] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[17] D.C. Code § 22-1510 ("…knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument….").

[18] E.g., if an account is frozen for legal or investigatory reasons, or the accused has closed the type of account the check purports to draw upon.

Beyond these five main changes to current District law, three other aspects of the revised check fraud statute may constitute substantive changes to current District law.

First, the revised statute requires that the accused act knowingly with respect to obtaining or paying for property by using a check. The current statute is silent as to the culpable mental state requirements applicable to the clause "make, draw, utter, or deliver any check, draft, order, of other instrument for the payment of money upon any bank or other depository,"[19] and no case law exists on point.[20] To resolve this ambiguity, the revised statute applies a knowledge culpable mental state requirement. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[21] Requiring a knowing culpable mental state also makes check fraud consistent with the revised fraud statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[22] The change improves the clarity and completeness of the revised offense.

Second, the revised statute requires that the accused acted with intent that the check not be honored in full upon presentation to the bank or depository institution drawn upon. The current statute requires that the actor "with intent to defraud,"[23] and that the person act "knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation."[24] The current statute does not define the terms "defraud" or "knowing" and the DCCA has never defined the meaning of the language in the uttering a check, draft, or order with intent to defraud statute. To resolve these ambiguities, the revised statute applies a "with intent" culpable mental state requirement to the element that the check not be honored in full. A person who believes to that the check they are using to gain property will not be honored in full has an intent to deceive the recipient, and belief to a practical certainty appears to be equivalent to the level of certainty ordinarily associated with knowledge. The revised statute's "with intent" requirement is consistent with the revised fraud[25] statute and other property offenses, using the RCC's standardized definition. This change improves the clarity and consistency of the revised statute.

Third, first degree check fraud uses the phrase "in fact," to codify that no culpable mental state is required as to the value of the loss to the check holder. The current statute is silent as to what culpable mental state, if any, applies to this element. There is no District case law on what mental state, if any, applies to the current check fraud value gradations, although District practice does not appear to apply a mental state to the monetary values in

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[19] D.C. Code § 22-1510.

[20] There is a DCCA case suggesting that the culpable mental state of the current uttering offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565–66 (D.C. 1996). However, in that case, the DCCA quoted the Redbook Jury Instructions, and did not make a ruling based on the offense being a specific intent crime.

[21] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[22] *See, e.g.*, RCC § 22E-2201.

[23] D.C. Code § 22-1510.

[24] D.C. Code § 22-1510.

[25] RCC § 22E-2201.

the current gradations.[26] To resolve this ambiguity, the revised statute applies strict liability as to the amount of loss. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[27] This change clarifies and potentially fills a gap in the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

[26] D.C. Crim. Jur. Instr. § 5.211.
[27] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

RCC § 22E-2204. Forgery.

Explanatory Note. *This section establishes the forgery offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes making, completing, altering, using, or transmitting falsified written instruments, when the accused has intent to use the written instrument to obtain property by deception, or to otherwise harm another person. The revised offense replaces the current forgery[1] statutes and the recordation of deed, contract, or conveyance with intent to extort money[2] in the current D.C. Code.*

Subsection (a) specifies the elements of first degree forgery. First degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in subparagraphs (a)(2)(A)-(E). These subparagraphs describe various public records or documents of legal import, such as wills and contracts, as well as any written instrument with a value of more than $50,000. Paragraph (a)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicate that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (b) specifies the elements of second degree forgery. Second degree forgery requires that the accused commits third degree forgery, and in addition the written instrument falls into one of the categories specified in subparagraphs (b)(2)(A)-(C). These subparagraphs describe various prescriptions and tokens, fair cards, public transportation transfer certificates, or other articles intended as symbols of value for use as payment for goods and services, as well as any written instrument with a value of more than $5,000. Paragraph (b)(2) uses the term "in fact," a defined term in RCC § 22E-207, which indicates that there is no culpable mental state requirement as to the type or value of written instrument.

Subsection (c) specifies three alternate means of committing third degree forgery. Paragraph (c)(1) specifies that the accused knowingly does any of the acts described in subparagraphs (c)(1)(A)-(C). Subparagraph (c)(1)(A) provides that the accused alters a written instrument without authorization, and the written instrument is reasonably adapted to deceive a person into believing it is genuine. Subsection (c)(1) specifies that a knowingly culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she altered was a written instrument, that he or she lacked authority to do so, and that the alteration was reasonably adapted to deceive a person into believing it is genuine. This subsection covers unauthorized alterations to written instruments even if they were originally genuine.

Subparagraph (c)(1)(B) requires that that the accused make or complete a written instrument. In addition, when making or completing the item, the written instrument must appear: to be the act of someone who did not authorize the making or creating; to have been made or completed at a time or place or in a numbered sequence other than was in fact the case; or to be a copy of an original when no such original existed. Further, under subparagraph (c)(1)(B)(ii), the written instrument must be reasonably adapted to deceive a person into believing the written instrument is genuine. Per the rule of interpretation in

[1] D.C. Code §§ 22-3241 - 22-3242.
[2] D.C. Code §22-1402.

RCC § 22E-207, the "knowingly" mental state in paragraph (c)(1) also applies to all of the elements in subparagraph (c)(1)(B).

Subparagraph (c)(1)(C) requires that that the accused transmits or uses a written instrument that was made, signed, or altered as described in subparagraphs (c)(1)(A) or (c)(1)(B). The accused must have known he was transmitting or using the instrument, and known that the instrument was altered, made, or completed in a manner listed under subparagraphs (c)(1)(A) or (c)(1)(B). Subparagraph (c)(1)(C) codifies conduct previously known as "uttering."[3]

Paragraph (c)(2) further requires that, whichever alternative means of committing forgery occurs, the accused also must act "with intent to" obtain property of another by deception, or to otherwise harm another person. "Intent" is a defined term in RCC § 22E-206 that here means the accused was practically certain he or she would obtain property by deception or harm another person. The word harm does not require bodily injury and should be construed more broadly to include causing an array of adverse outcomes.[4] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually obtained property or harmed another, only that the accused believed to a practical certainty that he or she would do so. In a forgery prosecution predicated on intent to obtain property by deception, the deception must relate to the *genuineness* of the written instrument, not false information contained within the instrument.[5]

Subsection (d) specifies penalties for each grade of the forgery offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised forgery statute changes current District law in four main ways.*

First, the revised offense makes forgery, by any means, one offense. Despite the fact that its text makes no indication of the matter, the current forgery statute has been recognized by the D.C. Court of Appeals (DCCA) as codifying two separate legal offenses—forgery and uttering a forged document.[6] Under current law, a person can be convicted of both forgery and uttering, based on forging and then using a single written instrument.[7] In contrast, although multiple forgery convictions with respect to a single

[3] D.C. Code § 22-3241(a)(2).

[4] For example, forging business documents with intent to harm the business reputation of a business rival would constitute forgery.

[5] *See* Lafave, Wayne, 3 Subst. Crim. L. § 19.7 (2d ed.) ("Though forgery, like false pretenses, requires a lie, it must be a lie about the document itself: the lie must relate to the genuineness of the document."); Commentary to MPC § 224.1 at 289 ("Where the falsity lies in the representation of facts, not in the genuineness of the execution, it is not forgery.)

[6] *White v. United States*, 582 A.2d 774, 778 (D.C. 1990) ("it should be noted that forgery and uttering constitute two distinct offenses, albeit contained in a single statutory provision") *aff'd* 613 A.2d 869, 872 (D.C. 1992) (en banc). The DCCA ruling on this point follows apparent legislative intent. See COMMENTARY TO THEFT AND WHITE COLLAR CRIME ACT of 1982 at 60.

[7] *Id. at* 872 n.4 (D.C. 1992) (rejecting claim that uttering and forgery convictions should merge); *see also, Driver v. United States*, 521 A.2d 254, 256 (D.C. 1987) (defendant convicted of both forgery and uttering based on forging, and attempting to cash a single check).

written instrument may still occur under the revised statute,[8] the revised statute would change current law by barring convictions for both creating and using a forged document as part of the same act or course of conduct. The combined, revised offense eliminates unnecessary overlap in the revised statute.

Second, the revised statute replaces the "intent to defraud" element in the current statute with "intent to obtain property of another by deception." The current statute does not define the term "defraud," and DCCA has never defined the meaning of the language in forgery.[9] Consequently, the precise effect of the revision is unclear. In contrast, the revised statute requires that the accused act with intent to obtain property by deception. This revised language is intended to be broad enough to cover all, or nearly all, [10] the wrongful intentions that currently fall under the "intent to defraud" language in the current statute. Moreover, there remains the alternative element of committing the offense "with intent to harm another person," which broadly criminalizes forgery with ill-intent. The revised offense improves the clarity and consistency of the revised statute.

Third, the revised statute no longer grades forgery of payroll checks as first degree forgery. Under current law, forging payroll checks is subject to the highest maximum penalties allowed for forgery.[11] By contrast, under the revised statute, if a person commits forgery involving a payroll check, or an instrument that appears to be a payroll check, the gradation would be determined by the value of that instrument. This revision treats the forgery of payroll checks the same as forgeries of any other kinds of checks. This change improves the consistency and proportionality of the revised offense.

Fourth, the provision in RCC § 22E-2001, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised forgery offense based on a single scheme or systematic course of conduct. The current forgery offense is not part of the current D.C. Code aggregation of value provision for property offenses.[12] In contrast, the revised forgery statute permits aggregation for determining the appropriate grade of forgery. This change improves the proportionality of the revised statute.

Beyond these four main changes to current District law, two other aspects of the revised forgery statute may constitute substantive changes to current District law.

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[8] *E.g.*, If a person forges a written instrument, and uses it to obtain property from another, then as part of a different act or course of conduct, uses the same forged written instrument to obtain different property, then multiple convictions might be warranted. Multiple convictions with respect to a single forged instrument may or may not be appropriate depending on the facts of a particular case.

[9] Note though that other jurisdictions have held that intent to defraud includes "the purpose of causing financial loss to another," and to "prejudice . . . the rights of another[.]" People v. Lawson, 28 N.E.3d 210, 215–16 (Ill. Ct. App. 2015); *State v. Bourgeois*, 113 So. 3d 225, 230 (La. Ct. App. 2013).

[10] For example, a person could conceivably commit an "honest services fraud" by using forged documents. "Honest services fraud" does not involve obtaining property by deception, but instead involves depriving another of a right to honest or fair services. For example, if a public official used a forged document in an act of nepotism, this could constitute an honest services fraud, but would not involve obtaining property by deception. It is unclear if this type of conduct is covered by the current statute, but it would be excluded under the revised statute, except to the extent that it constituted an "intent to harm" another person.

[11] D.C. Code § 22-3242 (5).

[12] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

First, the revised statute requires that the accused act knowingly with respect to the elements in subparagraphs (c)(1)(A)-(C).[13] The current D.C. Code forgery statute is silent as to the applicable culpable mental state requirements, and no case law exists on point.[14] To resolve this ambiguity, the revised statute applies a culpable mental state requirement of knowledge. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Requiring knowing culpable mental states also makes forgery consistent with the fraud statute, which requires that the accused knew that he or she used deception to obtain consent to take property.[16]

Second, the revised statute clarifies that a person is strictly liable as to the type or value of written instrument for purposes of grading forgery. Under the current D.C. Code statute and case law it is unclear what culpable mental state, if any, is required as to the type or value of written instrument involved in the forgery, and no case law exists on point. To resolve this ambiguity, the revised statute specifies that there is no culpable mental state required as to the type or value of written instrument. While applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[17] the presumption that the accused must have a subjective intent has not typically been applied to facts that merely distinguish the degree of wrongdoing.[18] The particular type of written instrument that has been forged does not distinguish innocent from criminal conduct, so no culpable mental state is assumed to apply to that fact. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[19]

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[13] There is some DCCA case law suggesting that the culpable mental state of the current forgery offense is one of "specific intent." *Zanders v. United States*, 678 A.2d 556, 565 (D.C. 1996). However, in this case, the DCCA was quoting the Redbook Jury Instructions, and not making an actual holding.

[14] There is one possible exception. In *Ashby v. United States*, 363 A.2d 685 (D.C. 1976), the defendant was convicted of forgery for signing a false name to a check. On appeal, the defendant argued that there was insufficient to find that he had the requisite "intent to defraud." Although the D.C. Court of Appeals did not specifically define what is required for "intent to defraud," it noted that the defendant's "*awareness* that the name he affixed to the check for the purpose of cashing it was not his own" served as evidence of his "intent to defraud." *Ashby*, 363 A.2d at 687. At least in regards to the element under subsection (a)(1)(B)(i), there is some case law suggesting that a culpable mental state of "knowing" is appropriate.

[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[16] RCC § 22E-2201.

[17] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[18] *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 325 (2012) ("State and federal courts frequently cite the U.S. Supreme Court for this point. Relying on United States v. X-Citement Video, Inc., courts emphasize 'the presumption in favor of a scienter requirement should apply to each of the statutory elements [of an offense] that criminalize otherwise innocent conduct'--but no elements beyond those.").

[19] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

Other changes to the revised forgery statute are clarificatory and are not intended to substantively change District law.

First, the revised forgery statute deletes the definition of "forged written instrument" and instead separately specifies conditions in which altering, making, completing, transmitting, or using a written instrument constitutes forgery. The current statute defines "forged written instrument" to include written instruments that have "been *falsely* made, altered, signed, or endorsed[.]"[20] The DCCA has clarified however that an instrument is falsely made, altered, or signed, when the person making, altering, or signing the instrument lacked authority to do so.[21] The revised statute includes this requirement; when a forgery prosecution is premised on altering an instrument, the accused must have lacked authority to do so. The current definition of "forged written instrument" also includes instruments that "contain[] a false addition or insertion."[22] Again, the revised statute's reference to altering a written instrument without authorization is intended to cover all instruments that "contain a false addition or insertion" under the current statute. Finally, the current definition of "forged written instrument" also includes instruments that are a "combination of parts of 2 or more genuine written instruments."[23] Correspondingly, the revised statute's reference to making or completing a written instrument that appears to have been made or completed at a time or place or in a numbered sequence other than was in fact the case, is intended to cover cases in which two otherwise genuine instruments are combined. The DCCA has not precisely defined when an instrument has been falsely made, altered, signed, or endorsed, or when an addition or insertion is false. The direct integration into the revised offense of elements in the current definition of "forged written instrument," and the clarification of those requirements, is not intended to substantively alter the scope of the offense.

Second, the revised statute requires that the accused "alters," "makes," "completes," "transmits," or "uses" a written instrument. These verbs are intended to encompass the words "makes, draws," or "utters"—the last being a term defined to mean, "to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify."[24] The verbs "draws," and "issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, [], or certify," appear to be duplicative[25] and their elimination is intended only to clarify, not change, current law.

Third, the revised statute requires that the forged instruments be "reasonably adapted to deceive a person into believing it is genuine." Although the current forgery statute does not include this language, the requirement is based on current DCCA case law.

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[20] D.C. Code § 22-3241 (a)(1)(A) (emphasis added).

[21] *See*, *Martin v. United States*, 435 A.2d 395, 398 (D.C. 1981) (noting that "It is the unauthorized completion of the stolen money orders which renders the instruments "falsely made or altered"); *Hall v. United States*, 383 A.2d 1086, 1089–90 (D.C. 1978) ("to establish falsity in a forgery charge it must be made to appear not only that the person whose name is signed to the instrument did not sign it, but also it must be established by competent evidence that the name was signed by defendant without authority") (quoting Owen v. People, 195 P.2d 953 (Colo. 1948)).

[22] D.C. Code § 22-3241 (a)(1)(B).

[23] D.C. Code § 22-3241 (a)(1)(C).

[24] D.C. Code § 22-3241.

[25] *E.g.*, anytime a person "endorses," a written instrument, that person would also have necessarily either altered, made, completed, transmitted, or otherwise used the written instrument.

The DCCA has held that forgery requires that the forged written instrument "must be apparently capable of effecting a fraud."[26] The "reasonably adapted" language in the revised statute is intended to codify this element recognized in case law.

Fourth, the revised statute eliminates as a separate offense the current offense of recordation of deed, contract, or conveyance with intent to extort money under D.C. Code § 22-1402.[27] Under that statute, it is a crime for a person to cause any instrument purporting to convey or relate to land in the District to be recorded in the office of the Recorder of Deeds, when that person has no title or color of title to the land, and with intent to extort money or anything of value from the true owner. Insofar as it involves use of a forged instrument with intent to harm another, the conduct constituting an offense under D.C. Code § 22-1402 would necessarily satisfy the elements under the revised forgery statute. Due to the complete overlap between D.C. Code § 22-1402 and the revised forgery statute, D.C. Code § 22-1402 is deleted as redundant.

[26] *Martin*, 435 A.2d at 398 (D.C. 1981); *Hall*, 383 A.2dat 1089–90 (D.C. 1978). *See also*, Commentary to 1982 Theft and White Collar Crime Act. ("The final element which must be proven is that the falsely made or altered writing was apparently capable of effecting a fraud.").
[27] D.C. Code §22-1402.

RCC § 22E-2205. Identity Theft.

Explanatory Note. *This section establishes the identity theft offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing, using, or creating a wide array of personal identifying information, without consent of the owner, for specified wrongful ends. The penalty gradations are based on the value of property obtained, payment avoided, or the financial loss caused, by the identity theft. The revised identity theft offense replaces the criminal identity theft*[1] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree identity theft. First degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property intended to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $500,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury.

Subsection (b) specifies the elements of second degree identity theft. Second degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property intended to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $50,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (b) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury.

Subsection (c) specifies the elements of third degree identity theft. Third degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property intended to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greatest, in fact, is $5,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (c) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury.

Subsection (d) specifies the elements of fourth degree identity theft. Fourth degree identity theft requires that the accused commits fifth degree identity theft, and in addition, the value of the property intended to be obtained or the amount of the payment intended to be avoided or the financial injury, whichever is greater, in fact, is $500 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs,

[1] D.C. Code §§ 22-3227.01 - § 22-3227.04; D.C. Code §§ 22-3227.06 - § 22-3227.08. Provisions relating to record corrections due to identity theft are codified in RCC § 22E-2006 (Identity Theft Civil Provisions).
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

debts, or obligations incurred as a result of a criminal act.[5] Subsection (d) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property intended to be obtained or the amount of the payment intended to be avoided, or the financial injury.

Subsection (e) specifies the elements of fifth degree identity theft. Paragraph (e)(1) requires that the accused knowingly created, possessed, or used "personal identifying information" belonging to or pertaining to another person. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "personal identifying information" is defined in RCC § 22E-701. This subsection specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would create, possess, or use personal identifying information belonging or pertaining to another person.

Paragraph (e)(2) requires that the accused must have created, possessed, or used personal identifying information belonging to or pertaining to another person without that person's effective consent. The term "consent," as defined in RCC § 22E-701, requires some indication (by word or action) of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, a coercive threat, or deception. Per the rule of interpretation in § 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to paragraph (e)(2), here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of the other person.

Paragraph (e)(3) requires that the accused acted "with intent to" use the identifying information accomplish one of three goals: obtain property of another by deception; avoid payment due for any property, fines, or fees by deception; or give, sell, transmit, or transfer the information to a third person to facilitate the use of the identifying information by that third person to obtain property by deception and without that victim's consent. "Intent" is a defined term in RCC § 22E-206 meaning the accused was practically certain that he or she would achieve one of the goals listed in (e)(3)(A)-(C). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually achieved any of the goals listed in (e)(3)(A)-(C), just that the accused consciously desired, or was practical certain, that he or she would achieve one of them.

Subsection (f) clarifies jurisdictional rules for prosecution of identity theft.

Subsection (g) clarifies that obtaining, creating, or possessing a single person's identifying information constitutes a single violation of this statute. A person who possesses multiple pieces of identifying information pertaining to a single person, with a required criminal purpose, is still only liable for one count of identity theft. Subsection (g) also specifies for purposes of the statute of limitations under D.C. Code § 23-113 that an identity theft offense is deemed to have been committed after the course of conduct has been completed or terminated.

[5] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

Subsection (h) specifies penalties for each grade of the identity theft statute. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (i) specifically requires the Metropolitan Police Department to report each complaint of identity theft and provide copies of such reports.

Subsection (j) cross references other terms defined elsewhere in the RCC.

Relation to Current District Law. *The revised identity theft statute changes current District law in three main ways.*

First, the revised statute eliminates reference to use of another person's identifying information to falsely identify himself at an arrest, to facilitate or conceal his commission of a crime, or to avoid detection, apprehension or prosecution for a crime—conduct included in the current identity theft statute.[6] The current identity theft statute includes using identifying information to avoid detection, apprehension or prosecution for a crime. In contrast, the revised identity theft statute does not criminalize this conduct. Most such conduct already is criminalized under other offenses, including the obstructing justice,[7] false or fictitious reports to Metropolitan Police,[8] and false statements.[9] All such conduct is criminalized under other offenses in the RCC, including the revised obstructing justice[10] and revised false statements offenses.[11] This change eliminates unnecessary overlap, and improves the proportionality of the revised statute.

Second, the revised statute criminalizes creating, possessing, or using another person's identifying information, without effective consent, with intent to avoid payment due for any property, fines, or fees by deception. The current D.C. Code identity theft statute does not criminalize use of identifying information with intent to avoid payments. In contrast, the revised statute explicitly criminalizes possessing, creating, possessing, or using identifying information with intent to avoid payments. This change improves the proportionality of the revised statute and fills a possible gap in offense liability.

Third, the revised statute increases the number of penalty grades. The current identity theft offense is limited to two gradations based solely on value of the property obtained, attempted to be obtained, or amount of the financial injury. The current first degree identity theft offense involves property with a value, or a financial injury, of $1,000 or more and is punished as a serious felony; second degree identity theft offense involves property with a value, or a financial injury, of less than $1,000 and is a misdemeanor. In contrast, the revised identity theft offense has a total of five gradations which span a much greater range in value, with a value or financial injury of $500,000 or more being the most serious grade. This change improves the proportionality of the revised offense.

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[6] D.C. Code § 22-3227.02(3). Notably, while the current identity theft statute purports to criminalize use of another's personal identifying information without consent to identify himself at arrest, conceal a crime, etc., current D.C. Code § 22-3227.03(b) only provides a penalty for such conduct in the limited circumstance where it results in a false accusation or arrest of another person.

[7] D.C. Code § 22-722(6).

[8] D.C. Code § 5-117.05.

[9] D.C. Code § 22-2405. Further supporting treating this offense as more akin to false statements is the fact that under current law penalty for 22-3227.02(3) versions of identity theft is just 180 days.

[10] RCC § 22E-XXXX.

[11] RCC § 22E-XXXX.

Beyond these three main changes to current District law, three other aspect of the revised identity theft statute may constitute substantive changes to current District law.

First, the revised identity theft offense specifies that there is no culpable mental state required as to the value of property obtained or intended to be obtained, amount of payment intended to be avoided, or the amount of financial injury. The current D.C. Code statute is silent as to what culpable mental state applies to these elements. There is no District case law on what mental state, if any, applies to the value of property of financial injury caused, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[12] To resolve this ambiguity, the revised statute specifies that the value of the property is a matter of strict liability. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[13] This change improves the clarity and completeness of the revised statute.

Second, by referencing the RCC's "financial injury" definition, the revised identity theft may change how the offense is graded. Under current law, "financial injury" is defined as "*all* monetary costs, debts, or obligations incurred by a person [as a result of violation of the identity theft statute.]"[14] It is unclear if the current definition of financial injury would include truly unreasonable costs incurred, or costs incurred by a non-natural person. To resolve this ambiguity, the revised statute defines financial injury as the "*reasonable* monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"[15] The RCC's definition improves the clarity and proportionality of the revised offense.

Third, the revised statute extends jurisdiction for identity theft only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3227.06 states that jurisdiction extends to cases in which "The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia[.]" The revised statute does not extend jurisdiction to cases in which all relevant conduct occurs outside the District, even though the complainant is a District resident, or was located in the District at the time the identity theft occurred.[16] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[17] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[18] and such an extension, if intended, may be unconstitutional.[19] This change improves the clarity and perhaps the constitutionality of the revised statutes.

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[12] D.C. Crim. Jur. Instr. § 5.220.

[13] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X–Citement Video*, 513 U.S. 64 at 72 (1994)).

[14] D.C. Code § 22-3227.01.

[15] RCC § 22E-701.

[16] For example, person A resides in Florida, and while on vacation in the District, a person in Florida uses A's personal identifying information to fraudulently purchase items from a store in Florida without A's permission. Under the revised statute, District courts would not have jurisdiction in this case.

[17] *See, Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

[18] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).

[19] WAYNE R. LAFAVE, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute no longer explicitly refers to "obtaining" identifying information of another. "Obtaining" is not defined in the current statute or case law. Instead the revised statute requires that the accused "creates, possesses, or uses" identifying information. "Obtaining" appears to be superfluous,[20] and no change in the scope of the statute is intended by omitting the word from the revised statute.

Second, the revised statute no longer explicitly refers to using identifying information to obtain property "fraudulently." "Fraudulently" is not defined in the statute or, for this offense, in case law. Instead the revised statute refers only to intent to obtain property by deception, avoid payment due fine by deception, or facilitate another person in obtaining property by deception. "Fraudulently" appears to be unnecessarily ambiguous and superfluous. No change in the scope of the statute is intended by that word's elimination from the revised statute.

Third, the revised statute does not explicitly criminalize using identifying information to obtain property of another.[21] The current statute criminalizes using identifying information to "obtain, or attempt to obtain, property[.]"[22] This provision of the current statute is duplicative given that it provides as an alternative basis of liability merely using identifying information to attempt to obtain property of another. There is no penalty difference in the current statute between actually obtaining or attempting to obtain property of another in this manner.

Fourth, the revised statute eliminates references in the current identity theft statutes to restitution[23] and fines at twice the amount of the financial injury.[24] Both provisions are superfluous under both current law[25] and the RCC.[26] No change in the scope of the statute is intended by elimination of these provisions.

[20] E.g., person who obtains information would, at least temporarily, possess such information.
[21] D.C. Code § 22-3227.02(1).
[22] D.C. Code § 22-3227.02 (2).
[23] D.C. Code § 22-3227.04.
[24] D.C. Code § 22-3227.03(a).
[25] D.C. Code § 16-711 (Restitution or reparation); § 22–3571.02(b). (Applicability of fine proportionality provision).
[26] RCC § 22E-604(c).

RCC § 22E-2206. Identity Theft Civil Provisions.

Explanatory Note. *This section establishes the identity theft offense civil provisions concerning record correction for the Revised Criminal Code (RCC). The revised identity theft civil provisions are nearly identical to the identity theft corrections of police records*[1] *statute in the current D.C. Code. The only change to the statute is to refer to the mental disability affirmative defense, instead of being found not guilty "by reason of insanity."*

[1] D.C. Code § 22-3227.05.

RCC §22E-2207. Unlawful Labeling of a Recording.

Explanatory Note. *This section establishes the unlawful labeling of a recording (ULR) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of a recording with a label that fails to identify the true manufacturer, with intent to sell or rent the recording. The penalty gradations are based on the number of recordings that the accused possessed. The revised unlawful labeling of a recording offense replaces the deceptive labeling offense in the current D.C. Code.*[1]

Subsection (a) specifies the elements of first degree ULR. Paragraph (a)(1) requires that the accused knowingly possesses 100 or more sound recordings or audiovisual recordings that do not clearly and conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. This subsection specifies that a "knowingly" culpable mental state applies to most elements, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she possessed sound recordings or audiovisual recordings, and that those recordings did not conspicuously disclose the true name and address of the manufacturer on their labels, covers, or jackets. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The terms "sound recording" and "audiovisual recording" are defined in RCC § 22E-701. Sound and audiovisual recordings are discrete physical objects upon which sounds or images are fixed. The term "manufacturer" is defined for the purposes of this section to mean the person or entity who actually affixed the sounds or images to the sound or audiovisual recording. The term "manufacturer" does not refer to the original artist, or person who holds the copyrights to the sound or audiovisual work. This paragraph uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state required as to the total number of sound or audiovisual recordings being 100 or more.

Paragraph (a)(2) requires that the accused possessed the recordings "with intent to" sell or rent the recordings. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that he would sell or rent the recordings. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually sold or rented the recordings, only that the accused was practically certain that he or she would sell or rent them.

Subsection (b) specifies the elements of second degree ULR. The elements of second degree ULR are identical to the elements of first degree ULR, except that there is no requirement as to the number of sound or audiovisual recordings. Possession of just a single sound or audiovisual recording is sufficient for second degree ULR.

Subsection (c) provides an exception from liability if a person transfers a recording as part of a broadcast transmission or for the purposes of archival preservation, or transfers recordings at home for personal use.[2] Subsection (c) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state required as to

[1] D.C. Code § 22-3214.01.

[2] The exclusion regarding a person at home acting for personal use improves the notice of the statute, but is not otherwise necessary. As described below, any person who acts for his or her personal use rather than with intent to sell or rent the recording, would not satisfy the offense's elements.

whether the recordings were transferred for as part of a radio or television broadcast transmission, or for the purposes of archival preservation, or in their home for personal use.

Subsection (d) specifies penalties for both grades of ULR. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) provides that courts may order forfeiture of certain assets related to violation of this statute in addition to penalties otherwise authorized.

Subsection (f) cross reference definitions found elsewhere in the RCC, and defines the term "manufacturer" as used in this section.

Relation to Current District Law. *The unlawful labeling of a recording statute changes current District law in five main ways.*

First, ULR requires that the accused had intent to rent or sell the recordings. Any other intended uses of the recordings do not constitute ULR. The current statute uses broader language, covering conduct committed for "commercial advantage or private financial gain[.]"[3] The statute does not define these terms and there is no relevant D.C. Court of Appeals (DCCA) case law. However, the current statute's language could arguably include possessing a sound recording for commercial advantage or financial gain by means that do not involve selling or renting the recording.[4] In contrast, the revised statute requires intent to sell or rent the recordings, and intent to use the recordings for other purposes are not covered. To the extent that the current statute is broad enough to cover these uses of recordings, the revised statute is narrower than the current statute. The revision improves the proportionality of the revised offense.

Second, the revised ULR statute changes the penalty structure to equate penalties for ULR with respect to sound or audiovisual recordings. Under the current statute, a person commits a felony if he or she possessed 1,000 or more sound recordings, or 100 or more audiovisual recordings; and the person commits a misdemeanor if he or she possessed fewer than 1,000 sound recordings, or fewer than 100 audiovisual recordings. In contrast, under the revised statute, sound recordings and audiovisual recordings are no longer treated differently, either for determining the unit of prosecution or for the penalty. A person who possesses 100 improperly labeled sound recordings is subject the same penalties as a person who possesses 100 improperly labeled audiovisual recordings. In addition, the revised statute does not permit multiple convictions simply because the accused possessed two different types of recordings, contrary to the DCCA's holding in *Plummer v. United States*, [5] which allowed for two convictions based on the accused's possession of both sound and audiovisual recordings. Also, penalties are the same whether the recordings are sound or audiovisual recordings. The revision improves the consistency and proportionality of the revised statute.

Third, the penalty provisions of the revised ULR do not allow the number of recordings to be aggregated across a 180 day period. Under the current statute, the penalty gradations are based on the number of sound or audiovisual recordings possessed "during

[3] D.C. Code § 22-3214.01(b).

[4] *E.g.*, conduct covered under the current statute might include possession of improperly labeled recordings with intent to play them in a store to entertain customers.

[5] 43 A.3d 260 (D.C. 2012). In *Plummer*, the DCCA reasoned that two convictions were warranted because the statute "explicitly treats audiovisual works as different from sound recordings" for sentencing purposes. *Id.* at 274.

any 180 day period."[6] There is no case law regarding how the 180 day period is to be determined, and there is no legislative history on the provision. In contrast, under the revised statute, the penalty gradations are based solely on the number of recordings possessed at a single point in time, or as described immediately below, where the government aggregates the number of recordings involved in a single scheme or systematic course of conduct per RCC § 22E-2002, Aggregation To Determine Property Offense Grades. This revision improves the proportionality of the revised statute.

Fourth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised ULR offense based on a single scheme or systematic course of conduct. The current ULR offense is not part of the current aggregation of value provision for property offenses,[7] however, as discussed immediately above, the current ULR statute has a special provision allowing the number of recordings to be aggregated across a 180 day period. In contrast, the revised ULR statute permits aggregation for determining the appropriate grade of ULR to ensure penalties are proportional to the accused's actual conduct. This change improves the proportionality of the revised statute.

Fifth, subsection (e) of the revised ULR offense permits a court to order the forfeiture and destruction or other disposition of all recordings, equipment used, or attempted to be used, in violation of this section. The current D.C. Code deceptive labeling offense contains a forfeiture provision that is mandatory.[8] In contrast, the revised statute allows, but does not require, judges to order forfeiture in order to destroy illegally labeled copies and potentially deter large-scale prohibited copying. The revised unlawful creation or possession of a recording statute[9] and several other offenses[10] under current District law contain similar forfeiture provisions. This revision improves the consistency and proportionality of the offense.

Beyond these five main changes to current District law, one other aspect of the revised ULR statute may constitute a substantive change of law.

The revised statute eliminates the phrase "that person knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes, or transports" a sound or audiovisual recording. The verbs in this phrase are not statutorily defined and there is no relevant DCCA case law. Nonetheless, this language appears to be redundant, given that the revised statute requires that the accused possesses a recording, with intent to sell or rent it. However, insofar as the current language creates liability for knowingly advertising or offering recordings for sale, but without actually possessing them, a person engaged in such conduct could likely be prosecuted for ULR as an accomplice or for attempted ULR. It is also possible that a person who advertises or offers for sale such recordings will have

[6] D.C. Code § 22-3214.01.
[7] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")
[8] D.C. Code § 22-3214.01.
[9] RCC § 22E-2105.
[10] *See, e.g.*, D.C. Code § 22-2723 (seizure and forfeiture for certain prostitution offenses); § 22-1838 (forfeiture requirement for human trafficking offenses).

committed a conspiracy to commit ULR. Practically, there appears to be little or no change to current law in relying solely on conduct that results in possession of an improperly labeled recording. This revision improves the clarity of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised statute simplifies the definition of manufacturer to refer to "the person who affixes, or authorizes the affixation of, sounds or images to a sound recording or audiovisual recording." The current statute refers to "the person who authorizes or causes the copying, fixation, or transfer of sounds or images to sound recordings or audiovisual works subject to this section."[11] The elimination of "copying" and "transfer" is not intended to change the definition. Since a recording, as defined in the statute, is a material object, any copying or transfer that is relevant to the statute is necessarily a form of affixation.

[11] D.C. Code § 22-3214.01(a)(2).

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult or Elderly Person.

Explanatory Note. *This section establishes the financial exploitation of vulnerable adults or elderly person offense (FEVA) and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes acquisition or use of the property of a vulnerable adult by means of undue influence and with intent to deprive the person of the property, with recklessness as to the complainant being a vulnerable adult or elderly person. The offense also includes committing theft, extortion, forgery, fraud, or identity theft with recklessness as to the complainant being a vulnerable adult or elderly person. The penalty gradations are based on the value of the property involved in the crime, or by the amount of financial injury inflicted. The revised FEVA offense replaces the financial exploitation of a vulnerable adult offense in the current D.C. Code.*[1]

Subsection (a) specifies the elements of first degree FEVA. First degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $500,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[2] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (b) specifies the elements of second degree FEVA. Second degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $50,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[3] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (c) specifies the elements of third degree FEVA. Third degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $5,000 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[4] Subsection (a) uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (d) specifies the elements of fourth degree FEVA. Fourth degree FEVA requires that the accused commits fifth degree FEVA, and in addition, the value of the property or the amount of financial injury, whichever is greater, in fact, is $500 or more. The term "financial injury" is defined in RCC § 22E-701, which includes a variety of monetary costs, debts, or obligations incurred as a result of a criminal act.[5] Subsection (a)

[1] D.C. Code § 22-933.01.
[2] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[3] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[4] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.
[5] For further discussion of the definition of "financial injury," see Commentary to RCC § 22E-701.

uses the term "in fact," a defined term in RCC § 22E-207, which specifies that there is no culpable mental state requirement as to the value of the property or the amount of the payment intended to be avoided or the financial injury.

Subsection (e) specifies the elements of fifth degree FEVA. Paragraph (e)(1) requires that the accused knowingly takes, obtains, transfers, or exercises control over property of another. The term "property" is defined in RCC § 22E-701, and means anything of value. Further, the property must be "property of another," a term defined in in RCC § 22E-701, which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon. Paragraph (e)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-207, which here requires that the accused was practically certain that he or she would take, obtain, transfer, or exercise control over property of another.

Subparagraph (e)(1)(A) requires that the accused act with consent of an owner. The term "consent" is defined in RCC § 22E-791, and requires some indication (by words or actions) of an owner's agreement to allow the accused to take the property. The term "owner" is also defined in RCC § 22E-701, and means a person holding an interest in property that the accused is not privileged to interfere with, and it specifically includes those persons who are authorized to act on behalf of another.[6] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (e)(1)(A), which requires that the accused be practical certain that he or she had the consent of an owner.

Subparagraph (e)(1)(A) also requires that the consent of the owner was obtained by "undue influence." "Undue influence" is defined subsection (h) to mean "mental, emotional, or physical coercion that overcomes the free will or judgment of a vulnerable adult or elderly person and causes the vulnerable adult or elderly person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (e)(1) also applies to subparagraph (a)(1)(A), which here requires that the accused was practically certainty or owner's consent is obtained by undue influence.

Subparagraph (e)(1)(B) specifies that the owner must be to a "vulnerable adult or elderly person", terms defined in RCC § 22E-701 to mean a person who is either 18 years of age or older and has one or more substantial physical or mental impairments, or 65 years of age or older. This subparagraph specifies that a "recklessness" mental state applies a term defined in RCC § 22E-206, which here requires the accused consciously disregarded a substantial risk that the owner was a "vulnerable adult or elderly person."

Subparagraph (e)(1)(C) requires that the accused act "with intent to" deprive an owner of the property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" the other person of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such

[6] The definition of "owner" specifically includes specifically includes those persons who are authorized to act on behalf of another. For example, a store employee who is authorized to sell merchandise is an "owner," although the merchandise is in fact owned by the store company itself.

a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Subparagraph (e)(1)(D) requires that, in fact, the property has any value. The term "in fact" specifies that there is no culpable mental state required as to whether the property has any value.

Paragraph (e)(2) defines FEVA to include committing one or more of the offenses listed in subparagraphs (e)(2)(A)-(G). This paragraph specifies that a "reckless" mental state applies a term defined in RCC § 22E-207, which here requires the accused consciously disregarded a substantial risk that the complainant was a "vulnerable adult or elderly person." Paragraph (e)(2) also uses the term "in fact" which specifies that there is no culpable mental state as to whether the actor's conduct constitutes one or more of the offenses under subparagraphs (e)(2)(A)-(G).

Subsection (f) specifies penalties for each grade of FEVA [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) specifies that if any restitution is ordered, the accused must pay the restitution before paying any criminal or civil fines imposed for violation of this section.

Subsection (h) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised FEVA statute changes current District law in six main ways.*

First, the revised FEVA statute applies a "reckless" culpable mental state as to the complainant being a vulnerable adult or elderly person. The current statute does not specify any required mental state as to whether the person was an elderly or vulnerable adult, and there is no case law on point. However, the current statute provides an affirmative defense if the accused "knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed."[7] Further, the statute states that "[t]his defense shall be established by a preponderance of the evidence."[8] In contrast, under the revised statute, the government would bear the burden of proving that the accused was reckless as to the complainant being a vulnerable adult or elderly person. This requires that the accused consciously disregarded a substantial risk that the complainant was 65 years or older, or was at least 18 years of age, and had one or more physical or mental limitations that substantially impair his or her ability to independently provide for his or her daily needs or safeguard his or her person, property, or legal interests. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] However, a reckless culpable mental state requirement is consistent with other circumstances regarding victims that are aggravators in the RCC.[10] This change improves the clarity and completeness of the revised statute.

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[7] D.C. Code § 22-933.01 (b).
[8] *Id.*
[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[10] *See, e.g.*, RCC § 22E-1202 Assault.

Second, the revised FEVA statute increases the number of penalty grade distinctions. The current FEVA statute is limited to two gradations based on the value of the property or legal obligation.[11] In contrast, the revised FEVA offense has a total of five gradations which span a much greater range in value, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense. In addition, the revised FEVA statute also grades penalties based on the value of the property involved, or the amount of financial injury caused, whichever is greater. This change improves the proportionality of the revised offense.

Third, the revised FEVA statute includes committing payment card fraud and check fraud, with recklessness that the complainant is a vulnerable adult or elderly person. The current FEVA statute includes committing other property and fraud-related offenses, but does not include payment card fraud or check fraud. In contrast, the revised FEVA statute includes these offenses as vulnerable adults and elderly persons may be particularly vulnerable to these types of fraudulent offenses. This change improves the proportionality of the revised offense.

Fourth, the revised FEVA statute eliminates the special recidivist penalty authorized under current law, consistent with other nonviolent revised offenses in the RCC. Under current law,[12] if a person with two prior FEVA convictions is convicted of FEVA, the maximum allowable sentence is 15 years, regardless of the value of property involved in either of the convictions. In contrast, the revised FEVA statute is no longer subject to a recidivist penalty enhancement. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statutes.

Fifth, by referencing the RCC's "financial injury" definition, the revised FEVA statute changes how the offense is graded. Under current law, FEVA is graded based on the value of the property obtained, or the legal obligation incurred by the complainant. In contrast, by referencing the RCC's "financial injury" definition,[13] FEVA may be graded based on *reasonable* costs incurred as a result of the offense.[14] The RCC's definition improves the proportionality of the revised offense by excluding unreasonable costs incurred from affecting penalty gradations.

Sixth, the provision in RCC § 22E-2002, "Aggregation To Determine Property Offense Grades," allows aggregation of value for the revised FEVA offense based on a single scheme or systematic course of conduct. The current FEVA offense is not part of the current aggregation of value provision for property offenses.[15] In contrast, the revised

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[11] D.C. Code § 22-936.01. Felony FEVA involves property or legal obligations with a value of $1,000 or more and is punished as a serious felony; misdemeanor FEVA involves property or legal obligations valued at less than $1,000 and subject to a 180 day maximum sentence

[12] D.C. Code § 22-936.01

[13] RCC § 22E-701. The RCC defines financial injury as the "reasonable monetary costs, debts, or obligations incurred by a natural person as a result of a criminal act[.]"

[14] For example, if a complainant incurred reasonable legal expenses as a result of a violation of this section, those costs could be used to determine the appropriate penalty gradation.

[15] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231

FEVA statute permits aggregation for determining the appropriate grade of FEVA to ensure penalties are proportional to the accused's actual conduct.

Beyond these six substantive changes to current District law, five other aspects of the revised FEVA statute may constitute substantive changes to current District law.

First, paragraph (e)(1) specifies a culpable mental state of "knowingly" for all offense elements other than value of the property involved or the amount of financial loss, or the complainant's status as an elderly person or vulnerable adult. The current statute requires that the accused acted "intentionally and knowingly[.]"[16] The current statute does not define "intentionally" or "knowingly," and there is no case law on point. By applying a culpable mental state of "knowingly," the revised FEVA statute requires that the accused was practically certain that he or she would take, obtain, or exercise control over property of another, with consent obtained by undue influence. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[17] Requiring a knowing culpable mental state also makes the revised theft offense consistent with the revised fraud and extortion statutes, and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[18] This change improves the clarity and completeness of the revised offense.

Second, the revised statute provides liability only for conduct with intent to deprive the vulnerable adult or elderly person of property. The current D.C. Code statute provides liability for conduct with intent to use the property "for the advantage of anyone other than the vulnerable adult or elderly person[.]"[19] There is no case law regarding this phrase. However, the revised statute refers to an intent to deprive where the term "deprive" is defined in the RCC to include withholding property permanently for "so extended a period or under such circumstances that a substantial portion of its value or a substantial portion of its benefit is lost" or "to dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it."[20] Consequently, taking property with intent to benefit another person is already within the scope of the RCC's definition of "deprive" if doing so would deny the owner a substantial benefit of the property. The primary effect of the revised FEVA offense eliminating liability for acting with intent to use property "for the advantage of anyone other than the vulnerable adult or elderly person" is to bar prosecution for temporary unauthorized uses of the property. However, the revised unauthorized use of property[21] criminalizes even temporary uses of a person's property without effective consent. This change clarifies the revised statute and reduces unnecessary overlap among offenses.

(Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[16] D.C. Code § 22-933.01.

[17] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[18] See, e.g., RCC § 22E-2201.

[19] D.C. Code § 22-933.01.

[20] RCC § 22E-701.

[21] RCC § 22E-2102.

Third, the revised offense no longer specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation. The current D.C. Code statute specifically criminalizes causing a vulnerable adult or elderly person to assume a legal obligation on behalf of, or for the benefit of, anyone other than the vulnerable adult or elderly person.[22] However, the revised FEVA statute already provides liability for engaging in conduct (with consent obtained by undue influence) that causes a transfer of property or involves exercising control over property with intent to deprive the owner. And the term "property" as defined in RCC § 22E-701 includes anything of value, including real property and interests in real property, as well as credit.[23] Consequently, it appears that most, if not all, instances of causing a vulnerable adult or elderly person to assume a detrimental legal obligation (with consent obtained by undue influence) are criminalized under the currents statute are also covered by the revised FEVA statute.[24] This change clarifies and reduces unnecessary overlap in provisions of the revised offense.

Fourth, subsections (a)-(d) of the revised offense, by use of the phrase "in fact," codify that no culpable mental state is required as to the value of the property or the amount of financial loss. The current statute is silent as to what culpable mental state applies to these elements, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity the revised statute makes the amount of loss or value of property a matter of strict liability. Requiring no culpable mental state to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[25] This change clarifies the revised offense.

Fifth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[26] Resolving this ambiguity, the revised statute uses

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[22] D.C. Code § 22-933.01.

[23] Commentary to definition of "property" in RCC § 22E-701.

[24] For example, a person who knowingly uses undue influence to cause an elderly person to take out a second mortgage and give over the proceeds may well be guilty under the revised FEVA statute. Such a defendant would have caused the transfer (subsection (a)(1)) of an interest in real property (subsection (a)(2)) with the consent of the owner (subsection (a)(3)), who is elderly (subsection (a)(4)), using undue influence (subsection (a)(5)), believing that in doing so he or she will cause the owner to lose a substantial portion of the property's value (subsection (a)(6)).

[25] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" " Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting X–Citement Video, 513 U.S., at 72, 115 S.Ct. 464).").

[26] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be

the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute requires that the accused use "undue influence" to obtain, take, transfer, or exercise control over property, but does not separately include use of "deception" or "intimidation" as does the current statute.[27] However, omitting these words is not intended to change current law. Obtaining property of a vulnerable adult or elderly person by use of deception or intimidation will still be covered by the revised FEVA statute. First, the definition of "undue influence" includes "mental, emotional, or physical coercion[.]"[28] This definition is broad enough to cover any use of "intimidation." Second, FEVA is also defined as committing theft, extortion, forgery, fraud, or identity theft, with recklessness that the complainant is a vulnerable adult or elderly person. Under the RCC, fraud is defined as taking, obtaining, transferring, or exercising control over property, with consent of the owner obtained by deception.[29] Taking property of a vulnerable adult or elderly person by deception is therefore still criminalized under the revised FEVA statute. Second, the term "undue influence," which is defined under RCC § 22E-701 does not require that the other person be a vulnerable adult or elderly person. This change to the definition of undue influence does not alter the scope of the FEVA statute, which still requires that the complainant was a vulnerable adult or elderly person.

held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[27] D.C. Code § 22-933.01.

[28] RCC § 22E-2208 (h).

[29] RCC § 22E-2201.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult or Elderly Person Civil Provisions

Explanatory Note. *RCC § 22E-2209 is a combination of two current statutes, D.C. Code §§ 22-937 and 22-938. The text from the two current D.C. Code statutes has been copied verbatim, with the exception of technical changes to update cross-references, and to add headings to some subsections. RCC § 22E-2209 also omits a requirement that restitution under RCC § 22E-2208 shall be paid before payment of any fines or civil penalties. This requirement is separately included in § 22E-2208, and is unnecessary in § 22E-2209. These changes are purely technical, and do not substantively alter current District law.*

RCC § 22E-2210. Trademark Counterfeiting.

Explanatory Note. *The section establishes the trademark counterfeiting offense for the Revised Criminal Code (RCC). The offense criminalizes manufacturing, possessing with intent to sell, or offering for sale property bearing or identified by a counterfeit mark. The term "counterfeit mark" is defined in the statute. The revised trademark counterfeiting statute replaces the trademark counterfeiting statute,[1] definitions for the trademark counterfeiting statute[2], and forging or imitating brands or packaging of goods[3] statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree trademark counterfeiting. Paragraph (a)(1) specifies that first degree trademark counterfeiting requires that the accused knowingly manufactures for sale, possesses with intent to sell, or offers for sale, property. "Sell" is an undefined term, intended to include any exchange of property for anything of value. "Knowingly" is a defined term[4] and applied here means that the person must be practically certain that he or she is manufacturing, possessing with intent to sell, or offering for sale. The term "property" is defined in RCC § 22E-701, to mean "anything of value" and can include tangible or intangible property, and services. Paragraph (a)(1) also requires that the property bears, or is identified by, a counterfeit mark. The term "counterfeit mark" is defined in RCC § 22E-701. It is not necessary that the counterfeit mark is on the property, as long as the property is identified by the counterfeit mark.[5] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that what is being manufactured, sold, etc. is something of value and that it bears a counterfeit mark.

Paragraph (a)(2) requires that the property, in fact, consists of 100 or more items, or has a total retail value of $5,000 or more.[6] The term "retail value" is defined in RCC § 22E-701. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the number of items or value of the property involved in the offense.

Subsection (b) specifies the elements of second degree trademark counterfeiting. The elements of second degree trademark counterfeiting are identical to the elements of first degree trademark counterfeiting, except that there is no quantity or value requirement as to the property involved in the offense.

Subsection (c) provides an exclusion to liability under this section if the use of the counterfeit mark would be legal under civil law.[7] There are numerous uses of valid trademarks without the permission of the owner of the trademark, service mark, trade

[1] D.C. Code § 22-902.
[2] D.C. Code § 22-901.
[3] D.C. Code § 22-1502.
[4] "Knowingly" is defined in RCC § 22E-206.
[5] For example, if a person places a counterfeit mark on a storefront and sells goods within that do not bear the counterfeit mark, the person may still be guilty of trademark counterfeiting if the goods are identified by the counterfeit mark on the storefront.
[6] The relevant value is of the property *bearing* the counterfeit mark. For example, if an item is contained in packaging that includes a counterfeit mark, the value of the item shall be used to determine the appropriate penalty grade, not the value of the packaging.
[7] *See generally*, 74 Am. Jur. 2d Trademarks and Tradenames § 134; William McGeveran, *Rethinking Trademark Fair Use*, 94 Iowa L. Rev. 49 (2008).

name, label, term, picture, seal, word, or advertisement that meet the definition of a "counterfeit mark" but do not constitute trademark infringement.[8] Any use of a valid trademark that does not constitute trademark infringement is not criminalized under this section.[9] This subsection uses the term "in fact," which is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement for this exclusion to liability.

Subsection (d) specifies rules for seizure and disposal of items seized that bear counterfeit marks, and property used in conjunction with violation of this section. Under this provision, items that bear counterfeit marks must be seized, and must be released to the owner of the trademark upon request. If the trademark owner does not request that the items be destroyed, the items must be destroyed or disposed of in a manner requested by the owner. Seizure of other items employed or used in conjunction with violation of this section is discretionary. These items may be seized in accordance with the rules set forth in D.C. Code § 48-905.02.

Subsection (e) specifies that any state or federal certificate of registration of any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement shall be prima facie evidence of the facts stated therein.

Subsection (f) specifies penalties for each grade of the trademark counterfeiting offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised trademark counterfeiting statute changes current District law in six main ways.*

First, the revised statute only includes two penalty gradations based on whether the property, in fact, has a total retail value of $5,000 or more. The current D.C. Code statute includes three penalty grades, with each penalty grade applicable depending on the number of items, the aggregate value of the items, and the number of prior convictions for trademark counterfeiting.[10] By contrast, the revised statute only includes two penalty gradations, eliminating the top gradation and making a $5,000 value the threshold for first degree liability. This change distinguishes between low and high volume conduct and aligns the number of gradations with other current D.C. Code and RCC offenses

[8] For example, using a trademark for satirical purposes constitutes fair use. *E.g.*, *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 807 (9th Cir. 2003) (affirming grant of summary judgment denying trademark infringement claim against photographer who produced and sold images of Barbie dolls in absurd positions and situations).

[9] In addition to non-infringing uses recognized under trademark law, this exclusion to liability applies to any uses of trademarks that are legal under civil law. For example, if a trademark owner authorizes another party to use the trademark under terms of a contract, but the owner disputes the validity of the contract, if the contract is upheld, use of the trademark would not constitute an offense under this section.

[10] Under the current statute, the lowest penalty grade has no minimum number or value of items or services bearing or identified by a counterfeit mark. The second penalty grade requires that the offense involved at least 100, but fewer than 1,000, items bearing a counterfeit mark; items with a total retail value of more than $1,000, but less than $10,000; or that the defendant has one prior conviction for trademark counterfeiting. The highest penalty grade requires that the offense involved at least 1,000 or more items bearing a counterfeit mark; items with a retail value of $10,000 or more; or that the defendant has two or more prior convictions for trademark counterfeiting.

criminalizing the creation and possession of illicit copies of an item.[11] A $5,000 threshold is consistent with other RCC property offense gradations. This change improves the clarity, consistency, and proportionality of the revised criminal code.

Second, the revised statute does not codify an evidentiary presumption regarding intent to sell or distribute. The current D.C. Code statute contains a "rebuttable presumption" in subsection (a) that a person having possession, custody, or control of more than fifteen items bearing a counterfeit mark had intent to sell or distribute the items. There is no D.C. Court of Appeals (DCCA) case law on point. By contrast, the RCC omits this statutory inference of intent because it is of questionable constitutionality.[12] However, even with this language omitted, the government may still present evidence of the accused's intent to sell or distribute where there are more than fifteen items and, depending on the nature of the items at issue and other circumstances, an inference of an intent to sell or distribute may well be warranted. This change improves the clarity and proportionality of the revised statute.

Third, the revised statute eliminates the special recidivist penalty for the offense, consistent with other nonviolent revised offenses in the RCC. The current D.C. Code statute is divided into three penalty grades determined, in part, by the total number of items, or the aggregate value of the property. However, regardless of the number or value of the items, a person may be liable under the second highest penalty grade if the actor has one prior conviction for trademark counterfeiting, and the highest penalty grade if the actor has two or more prior convictions for trademark counterfeiting.[13] In contrast, the revised statute is no longer subject to a recidivist penalty enhancement. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statutes.

Fourth the revised statute does not specify a minimum fine for this offense. The current D.C. Code statute requires that criminal fines imposed "shall be no less than twice the value of the retail value of the items bearing, or services identified by, a counterfeit mark, unless extenuating circumstances are shown by the defendant."[14] The meaning of "extenuating circumstances" in this provision is unclear, and there is no DCCA case law

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[11] RCC § 22E-2105, Unlawful Creation or Possession of a Recording; RCC § 22E-220. Unlawful Labeling of a Recording.

[12] In *Reid v. United States,* 466 A.2d 433 (D.C. 1983), the DCCA considered whether part of a statute criminalizing obliterating identifying marks on a pistol was constitutional. The statute in part, read "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia[.]" D.C. Code § 22-4512. The DCCA stated that "Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases 'must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'" *Id.* (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)).

Although the issue has not been litigated before the DCCA, it may be that the portion of the current trademark counterfeiting statute which allows an inference of "intent to sell or distribute" would similarly fail. It is questionable whether it can be said "with substantial assurance" that it is "more likely than not" that a person who possesses more than 15 items had "intent to sell or distribute" them. For example, a person may have a box of more than 15 superhero toy figurines, a set of dinnerware, or t-shirts bearing the counterfeit marking of a brand name for their own personal use.

[13] D.C. Code § 22-902 (b).

[14] D.C. Code §22-902 (d).

on point. By contrast, the revised statute provides for possible fines in a manner consistent with other offenses, using the standard RCC penalty classifications. This change improves the clarity, consistency, and proportionality of the revised criminal code.

Fifth, the revised statute does not include a mandatory seizure and forfeiture provision regarding all personal property used in conjunction with violation of this section. The current D.C. Code statute states that any items bearing a counterfeit mark and all personal property used in connection with a violation of this chapter shall be seized and be subject to forfeiture.[15] There is no DCCA case law on point. By contrast, the revised statute does not mandate that personal property used in connection with violations of this section be seized or subject to forfeiture.[16] However, omitting this language does not preclude such items from being seized or subject to forfeiture. Omitting this language improves the proportionality of the revised criminal code.[17]

Sixth, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, eliminates liability for mere use of a counterfeit mark. The forging or imitating brands offense makes it a crime to "forge[], or counterfeit[], or make[] use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such[.]"[18] There is no DCCA case law interpreting the current forging or imitating brands or packaging of goods statute. By contrast, under the RCC, conduct constituting forging or imitating brands or packaging is only criminalized if it falls under the revised trademark counterfeiting statute. By contrast, the revised statute clarifies that merely using a counterfeit mark, without intent to sell property bearing or identified by a counterfeit mark, is not criminalized. Omitting this conduct from the revised statute improves the clarity and proportionality of the revised criminal code.

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[15] D.C. Code §22-902 (e) ("Any items bearing a counterfeit mark and all personal property, including any items, objects, tools, machines, equipment, instrumentalities, or vehicles of any kind, employed or used in connection with a violation of this chapter shall be seized by any law enforcement officer, including any designated civilian employee of the Metropolitan Police Department, in accordance with the procedures established by § 48-905.02. (1) All seized personal property shall be subject to forfeiture pursuant to the standards and procedures set forth in D.C. Law 20-278.").

[16] In the revised offense items bearing a counterfeit mark still must be seized.

[17] The DCCA has recognized that under the excessive fines clause of the 8th Amendment, asset forfeiture must be proportional. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-561 (D.C. 1998) (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)). The DCCA noted that under the proportionality requires that "the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 565. Given that many offenses more serious than trademark counterfeiting do not have mandatory forfeiture provisions, it is unnecessary to include one in this statute.

[18] The statute reads in its entirety: "Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

Beyond these six substantive changes to current District law, six other aspects of the revised trademark counterfeiting statute may constitute substantive changes to current District law.

First, the revised trademark counterfeiting statute specifies that the actor must "knowingly" manufacture, possess, or offer property for sale. Both the current trademark counterfeiting and forging or imitating brands statutes require that the actor must act "willfully."[19] The term "willfully" is not defined in either statute, and there is no DCCA case law on point with respect to either statute. To resolve this ambiguity, the revised statute requires the actor engage in conduct "knowingly," a defined term in the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[20] This change improves the clarity and consistency of the revised criminal code.

Second, under the revised trademark counterfeiting statute, prosecutions based on manufacturing property bearing or identified with a counterfeit mark require that the property be for commercial sale. The current D.C. Code statutory language clearly covers manufacturing property bearing or identified by a counterfeit mark, but it is unclear whether manufacturing property not for commercial sale constitutes a violation of the statute.[21] There is no relevant DCCA case law. To resolve this ambiguity, the revised statute clarifies that manufacturing that is not for commercial sale is not prohibited. The property loss to the rightful holder of a trademark appears to be extremely low or negligible for an actor's misuse of the trademark in making property not offered for sale. This change improves the proportionality of the revised criminal code.

Third, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, does not specifically include reference to imitations of a "wrapper," "bottle," or "package." The current forging or imitating brands or packaging of goods statute refers to the use of a wrapper, bottle, or package,[22] although it is unclear whether the current forging or imitating brands or packaging of goods covers the use of wrappers, bottles, or packages that do not include any trademarks, trade names, labels, or other information that would constitute a "counterfeit mark." There is no relevant DCCA case law. To resolve this ambiguity, the definition of "counterfeit mark" does not specifically include wrappers, bottles or packages. Use of wrappers, bottles, or packaging may be covered by the revised

[19] D.C. Code §§ 22-902, 22-1502.

[20] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[21] For example, if a person makes a handbag or t-shirt with a counterfeit trademark drawn on it, for his or her own personal use, it is unclear if that constitutes a violation of the current statute.

[22] The statute reads in its entirety: "Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

statute only if they constitute a "counterfeit mark."[23] Omitting reference to wrappers, bottles, or packages improves the clarity, consistency, and proportionality of the revised criminal code.

Fourth, the revised trademark counterfeiting statute replaces the separate forging or imitating brands or packaging of goods offense under D.C. Code § 22-1502 and, in doing so, does not specify that it includes counterfeits with "colorable difference or deviation" from the original. The forging or imitating brands or packaging of goods statute specifies that it covers "any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package…." It is unclear what constitutes a "colorable difference or deviation," and whether it is possible that use of a mark that significantly differs from a valid trademark is covered by the forging or imitating brands statute. There is no DCCA case law on point. To resolve this ambiguity, the revised statute extends liability only for a "counterfeit mark" and does not define "counterfeit mark" as including (or excluding) items with a colorable difference or deviation from the original. Omitting this language improves the clarity and proportionality of the revised criminal code.

Fifth, the revised statute codifies an exclusion from liability if the use of a trademark does not constitute infringement under civil law. The current statute does not include any reference to non-infringing uses of trademarks. However, under current civil law, in certain circumstances a person may copy or use a valid trademark without permission, even for commercial purposes.[24] There is no DCCA case law on point. To resolve this ambiguity, the revised statute clarifies that uses of trademarks that are legal under civil law are not criminalized. This change improves the clarity and proportionality of the revised criminal code.

Sixth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[25] Resolving this ambiguity, the

[23] Many wrappers, bottles or packages have trademarks, trade names, or labels affixed to them. Use of such wrappers, bottles, or packages could constitute trademark counterfeiting.

[24] *E.g.*, *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 807 (9th Cir. 2003) (affirming grant of summary judgment denying trademark infringement claim against photographer who produced and sold images of a Barbie doll in absurd positions and situations).

[25] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22,

revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, under the revised statute, the definition of the term "counterfeit mark" replaces the current definitions for both "counterfeit mark" and "intellectual property." However, the revised definition is not intended to substantively change current District law. The current definition of "counterfeit mark" includes "any *unauthorized* reproduction or copy of intellectual property" or "intellectual property affixed to any item knowingly sold, offered for sale, manufactured, or distributed, or identifying services offered or rendered *without the authority* of the owner of the intellectual property[.]"[26] In turn, "intellectual property" is defined as "any trademark, service mark, trade name, label, term, picture, seal, word, or advertisement or any combination of these adopted or used by a person to identify such person's goods or services and which is lawfully filed for record in the Office of the Secretary of State of any state or which the exclusive right to reproduce is guaranteed under the laws of the United States or the District of Columbia."[27] The revised definition of "counterfeit mark" incorporates the current definition of "intellectual property," and requires that the mark be used "without the permission of the owner[.]" The term "without the permission" is intended to have the same meaning as "without authority" or "unauthorized." The revised definition of "counterfeit mark" is not intended to substantively change current District law.

Second, the revised statute does not specify that the value of the items involved in the offense be determined by the aggregate value of the items or services bearing or identified by a counterfeit mark. This change is not intended to change current District law. The general aggregation of value statute[28] will apply to the revised trademark counterfeiting statute.

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the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[26] D.C. Code § 22-901 (emphasis added).

[27] D.C. Code § 22-901.

[28] RCC § 22E-2001.

RCC § 22E-2301. Extortion.

Explanatory Note. *This section establishes the extortion offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes taking another person's property by inducing their consent by means of coercive threat. The penalty gradations are based on the value of the property involved in the crime. The revised extortion offense is closely related to the revised theft and fraud offenses.*[1] *It differs from theft because in extortion the defendant has the owner's consent obtained by using a coercive threat. It differs from fraud because in fraud the defendant uses deception, rather than a coercive threat, to obtain the owner's consent. The revised extortion offense replaces the extortion;*[2] *recordation of deed, contract, or conveyance with intent to extort money;*[3] *and to the extent that it involves conduct with intent to obtain property, blackmail*[4] *statutes in the current D.C. Code.*

Subsection (a) specifies the elements of first degree extortion. Paragraph (a)(1) requires that the defendant takes, obtains, transfers, or exercises control over property of another. "Property," a term defined in RCC § 22E-701, means something of value and includes goods, services, and cash. Further, the property must be "property of another," a term defined in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the accused cannot infringe upon without consent. Paragraph (a)(1) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would take, obtain, transfer, or exercise control over property of another.

Paragraph (a)(2) states that the must take, obtain, transfer, or exercise control over property with "consent" of an owner. The term consent is defined in RCC § 22E-701, and chiefly requires some words or actions that indicate an owner's agreement to allow the accused to take, obtain, transfer, or exercise control over the property. "Owner" is also defined to mean a person holding an interest in property that the accused is not privileged to interfere with without consent.[9] Per the rule of interpretation in 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to the element "with the consent of an owner" in paragraph (a)(2), which requires that the accused was practically certain that he or she had an owner's consent.

Paragraph (a)(2) also codifies the element that distinguishes extortion from the revised theft and fraud offenses—that the consent in paragraph (a)(2) be obtained by an explicit or implicit coercive threat, a term defined in RCC § 22E-701.[5] Coercive threats a variety of threats that pressure a person to agree to give the defendant the property.[6] The definition of "coercive threat" prohibits "communicat[ing]" specified harms such as

[1] RCC § 22E-2101 and RCC § 22E-2201, respectively.
[2] D.C. Code § 22-3251.
[3] D.C. Code § 22-1402.
[4] D.C. Code § 22-3252.
[5] A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, depending on the context, saying "it would be a shame if anything happened to your store," may constitute an implicit threat of property damage.
[6] *See*, Commentary to definition of "coercive threat" accompanying RCC § 22E-701.

accusing someone of a criminal offense, as well as sufficiently serious harms that would cause a reasonable person to comply. The verb "communicates" is intended to be broadly construed, encompassing all speech[7] and other messages,[8] which includes gestures or other conduct,[9] that are received and understood by another person. Per the rule of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), requiring the defendant to be aware to a practical certainty that victim's consent is obtained by coercive threat.

Paragraph (a)(3) requires that the defendant acted "with intent to" deprive an owner of property. "Deprive" is a defined term meaning that the other person is unlikely to recover the property, or that it will be withheld permanently or long enough to lose a substantial portion of its value or benefit. "Intent" is a defined term in RCC § 22E-206 that here means the defendant was practically certain that he or she would "deprive" an owner of the property. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such a deprivation actually occurred, only that the defendant believed to a practical certainty that a deprivation would result.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $500,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree extortion. The elements of each grade of extortion are identical to the elements of first degree extortion, except for the value of the property. Each subsection specifies a minimum value required for the property, except for fifth degree extortion, which has no specific minimum value.[10] As with first degree extortion, strict liability applies to value of the property in each grade of extortion.

Subsection (f) specifies penalties for each grade of the extortion offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross references definitions found elsewhere in the RCC.

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[7] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures.

[8] A person may communicate through non-verbal conduct such as displaying a weapon. *See State v. Murphy*, 545 N.W.2d 909, 915 (Minn. 1996) ("Many physical acts considered in context communicate a terroristic threat. We may find our examples in the case law, such as drawing a finger across one's throat or discharging a firearm over the telephone; in the movies, such as boiling a rabbit on the stove in the tranquil setting of former paramour's new family home, or placing a severed horse's head in a bed; or as here, depositing dead animals at a residence or planting a fake bomb. Life is replete with such examples, and whatever the source, the principle is the same: physical acts communicate a threat that its originator will act according to its tenor." (Internal quotations omitted.)).

[9] For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition ongoing infliction of harm may constitute communication, if it communicates that harm will continue in the future.

[10] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree extortion does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

Relation to Current District Law. *The revised extortion statute changes current District law in five main ways.*

First, the revised extortion statute no longer specially punishes attempts to commit the offense the same as the completed offense. The current extortion statute[11] states that it is an offense if the person "obtains or *attempts* to obtain" property, and the current blackmail statute[12] is an inchoate offense that does not require the defendant to actually obtain property. There is no clear rationale for such a special attempt provision for extortion as compared to other offenses. Under the revised extortion statute, the General Part's attempt provisions[13] will establish liability for attempted extortion consistent with other offenses. Differentiating conduct that does and does not result in depriving someone of property improves the proportionality of the offense.

Second, by its use of the new definition of coercive threat in RCC § 22E-701 the revised extortion statute makes several changes to the means by which the defendant induces the owner's consent. The current extortion statute prohibits four means of obtaining consent: (1) the use of actual force or violence, (2) the threatened use of force or violence, (3) a wrongful threat of economic injury, and (4) under color or pretense of official right.[14] The current blackmail offense[15] prohibits additional means of obtaining consent, including threats "to accuse any person of a crime; to expose a secret or publicize an asserted fact, whether or true or false, tending to subject any person to hatred, contempt, or ridicule; or to impair the reputation of any person, including a deceased person."[16] In contrast, the revised extortion statute is somewhat narrower than the current extortion and blackmail offenses insofar as actual use of force has been eliminated from the statute as a means of obtaining property to reduce overlap with robbery.[17] However, the revised extortion offense also is broader than either the current extortion or blackmail statutes by including new conduct—threatening to "[n]otify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status" or to "[c]ause harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."[18] Otherwise, the means by which the defendant induces the victim's consent in revised extortion offense is generally the same as the current extortion and blackmail offenses. The current "threatened use of force or violence" prong is covered by the revised offense's inclusion of threats to engage in conduct constituting an "offense against persons" or a "property offense."[19] And the final alternative in the current statute,

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[11] D.C. Code § 22-3251.
[12] *Id.* ("A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens….").
[13] RCC § 22E-301.
[14] D.C. Code § 22-3251. It is unclear what difference, if any, exists between "force" and "violence;" neither term is defined in the statute, and no DCCA case law has provided definitions.
[15] D.C. Code § 22-3252.
[16] *Id.*
[17] RCC § 22E-1201.
[18] RCC § 22E-701.
[19] RCC § 22E-701. *See also* Committee on the Judiciary, Report on Bill 4-193 at 69 ("The threat of force or violence may be against any person and is intended to cover threats that anyone will cause physical injury to or kidnapping of any person. The threat of force or violence also covers a threat of property damage or destruction.").

involving obtaining property under color or pretense of right, also remains in the revised statute.[20] The revised extortion includes each of these forms of conduct via the definition of coercive threat. These changes reduce unnecessary gaps and overlap among revised offenses.

Third, the revised extortion statute requires that the defendant has intent to deprive an owner of the property. Neither the current extortion statute nor the current blackmail statute has comparable provisions;[21] and there is no relevant D.C. Court of Appeals (DCCA) case law. Instances where the defendant extorts property for temporary use or causes the owner to lose a slight benefit are covered by the revised unauthorized use of property offense,[22] which is a lesser-included offense of extortion. Inclusion of the "intent to deprive" element reduces unnecessary overlap between offenses, creates consistent offense definitions across extortion, theft,[23] and fraud,[24] and improves the proportionality of the revised offense.

Fourth, the revised extortion statute increases the number and type of grade distinctions, grading based on the value of the property extorted. The current extortion and blackmail offenses are not graded at all, and give a flat penalty that does not vary based on whether the offender obtains expensive property or merely attempts to obtain or intends to obtain an item of trivial value.[25] By contrast, the revised extortion offense has a total of five gradations based on the value of the property involved, with a value of $250,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.[26] The gradations in the revised offense also create consistency with the dollar-value distinctions in related theft[27] and fraud[28] offenses.

Fifth, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised extortion offense based on a single scheme or systematic course of conduct. The current extortion and blackmail offenses are not part of the current aggregation of value provision for property offenses.[29]

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[20] RCC § 22E-701. A "coercive threat" includes threatening to "take or withhold action as a public official, or cause a public official to take or withhold action."
[21] D.C. Code § 22-3251; D.C. Code § 22-3252.
[22] RCC § 22E-2102.
[23] RCC § 22E-2101.
[24] RCC § 22E-2201.
[25] D.C. Code § 22-3251(b) ("Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.); D.C. Code § 22-3252(b) ("Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.")
[26] Under the revised extortion statute and both the current extortion and blackmail statutes, a wide range of behavior is punished equally. E.g., threats of both a trivial amount of property damage and threats of serious bodily harm equally satisfy the current and revised extortion statutes. However, grading based on the value of property involved may not only improve proportionality with respect to the property loss, but, indirectly, the seriousness of the coercion. Relatively minor forms of coercion would seem inherently unlikely to be successful in causing a person to consent to giving up very high value property.
[27] RCC § 22E-2101.
[28] RCC § 22E-2201.
[29] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231

As noted above, the current extortion and blackmail offenses are not graded based on value of the property involved. The revised extortion statute permits aggregation for determining the appropriate grade of extortion to ensure penalties are proportional.

Beyond these five main changes to current District law, four other aspects of the revised extortion statute may constitute substantive changes to current District law.

First, the revised extortion offense requires a culpable mental state of knowledge for paragraphs (a)(1)-(a)(3), (b)(1)-(b)(3), etc. The current extortion statute does not specify a culpable mental state and the blackmail statute only refers to an "intent to obtain property of another or to cause another to do or refrain from doing any act."[30] No case law exists on point, although legislative history suggests that the Council expected some mental state would apply via the use of the term "wrongful" in the current extortion statute's text.[31] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[32] Requiring a knowing culpable mental state also makes the revised extortion offense consistent with the revised fraud statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[33]

Second, the revised extortion offense uses the phrase "takes, obtains, transfers, or exercises control over property of another[.]"[34] The current extortion[35] and blackmail[36] statutes require proof of an attempt to, or intent to, "obtain" the property of another. The term "obtain" is not statutorily defined, nor is there any relevant DCCA case law. It is possible that the current term "obtain" does not include all conduct that constitutes transferring or exercising control over property.[37] Using the revised language of "takes, obtains, transfers, or exercises control over" improves the clarity of the statute, reduces possible unnecessary gaps, and makes the revised extortion offense consistent with the revised fraud statute and other property offenses.

Third, the revised extortion statute does not explicitly include making a "wrongful threat of economic injury." The current extortion statute[38] includes the phrase "wrongful threat of economic injury," but the phrase is not defined in the statute, and there is no

(Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[30] D.C. Code § 22-3252(a).

[31] The Judiciary Committee's report, which accompanied the bill creating the current extortion offense, states that the threat in extortion "must be 'wrongful,'" and that "the term 'wrongful' when used in criminal statutes implies an evil state of mind." Committee on the Judiciary, Report on Bill 4-164 at 69 citing *Masters v. United States*, 42 App. D.C. 350, 358 (D.C. Cir. 1914).

[32] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[33] *See, e.g.,* RCC § 22E-2201.

[34] RCC § 22E-2301(a)(1).

[35] D.C. Code § 22-3251.

[36] D.C. Code § 22-3252.

[37] For example, if a defendant uses a coercive threat to compel another person to transfer funds to a bank account that the defendant does not control, under the current statute it is unclear whether the defendant has "obtained" those funds.

[38] D.C. Code § 22-3251.

relevant DCCA case law. The legislative history notes that this language was "not intended to cover the threat of labor strikes or other labor activities," or "consumer boycotts,"[39] but is intended to cover "a leader of an organization [who] threatens to strike or boycott in order to extort anything of value for his personal benefit, unrelated to the interest of the group he represents."[40] However, the RCC's definition of "coercive threats" does not specifically include a "wrongful threat of economic injury." While the revised extortion statute is not intended to criminalize threats of labor strikes or consumer boycotts, certain types of threats of economic injury may still satisfy the catch-all provision in the "coercive threat" definition.[41] However, because it is not clear exactly what constitutes a "wrongful threat of economic injury under current law," it is unclear whether the catch-all provision would necessarily cover all such threats. This change clarifies and improves the consistency of the revised statute.

Fourth, by reference to the RCC's definition of coercive threat, the revised extortion statute includes threats to "distribute a photograph, video or audio recording . . . that tends to subject another person to, or perpetuate: Hatred, contempt, ridicule, or other significant injury to personal reputation; [or] significant injury to credit or business reputation."[42] The current blackmail statute covers threatening to "expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, ridicule, embarrassment, or other injury to reputation[.]"[43] The current blackmail statute does not specify whether distributing photographs, videos, or audio recordings, constitutes "expos[ing] a secret or publiciz[ing] an asserted fact[.]"[44] The current blackmail statute also does not specify whether threatening to expose secrets or assert facts that *perpetuate* hatred, contempt, or ridicule[45] are covered. There is no relevant DCCA case law addressing either issue. By contrast, through reference to the definition of "coercive threat," the revised extortion statute clarifies that the revised offense includes threats to distribute photographs, videos, or audio recordings, and to expose or publicize information that would subject a person to, or *perpetuate,* hatred, contempt, ridicule, or other significant injury to personal reputation, or significant injury to credit or business reputation. This change improves the clarity of the revised offense and may close gaps in current law.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised extortion offense uses the phrase "consent of an owner". The phrase "the other's consent" is used in the current extortion statute,[46] and is implicit in the blackmail statute insofar as it supposes the threat will cause a person to engage in conduct

[39] Judiciary Committee, Report on Bill No. 4-193, the D.C. Theft and White Collar Crime Act of 1982, at 69 (hereinafter, "Judiciary Committee Report").
[40] *Id.* at 70.
[41] RCC § 22E-701 (A "coercive threat" includes threatening to "[c]ause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."
[42] RCC § 22E-701.
[43] D.C. Code § 22-3252. The words "embarrassment, or other injury to reputation" were added as part of the Sexual Blackmail Elimination and Immigration Protection Amendment Act of 2018.
[44] For example, a nude photo arguably does not necessarily expose secrets or expose facts.
[45] For example, if it is already publicly known that a person is habitually unfaithful to his spouse, it is unclear if the current blackmail statute covers threats to expose an additional act of infidelity.
[46] D.C. Code § 22-3251(a).

that results in the defendant obtaining property.[47] The term "consent" is not defined in the current statute. Per RCC § 22E-701, "consent" is a defined term, here chiefly meaning that the owner of the property gives words or actions that indicate a preference for particular conduct. Reference to this definition is not intended to change current District law.

[47] D.C. Code § 22-3252(a).

RCC § 22E-2401. Possession of Stolen Property.

Explanatory Note. *This section establishes the possession of stolen property (PSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly buying or possessing property, believing the property to be stolen, with intent to deprive an owner of the property. The five penalty gradations vary based on the value of the property. The revised PSP offense replaces the receiving stolen property[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree PSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property is a term defined in RCC § 22E-701, to mean something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused was practically certain that he or she would buy or possess property.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused acted with intent to deprive an owner of property. "Deprive" is a defined term in RCC § 22E-701 meaning an owner is unlikely to recover the object or it is withheld permanently or long enough to lose a substantial part of its value or benefit. "Intent" also is a defined term in RCC § 22E-701 meaning the accused was practically certain he or she would "deprive" an owner of the property. It is not necessary to prove that such a deprivation actually occurred, just that the accused was practically certain that a deprivation would result. If a person only intends to temporarily possess the stolen property, or to return it to its rightful owner or to law enforcement, he has not committed PSP.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $500,000. "Value" is a defined elsewhere in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree PSP. The elements of each grade of PSP are identical to the elements of first degree PSP, except for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree PSP, which has no specific minimum value.[2] As with first degree PSP, strict liability applies to value in each grade of PSP.

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[1] D.C. Code § 22-3232.

[2] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree PSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

Subsection (f) specifies penalties for each grade of the PSP offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross references definitions found elsewhere in the RCC.

Relation to Current District Law. *The revised PSP statute changes current District law in two main ways.*

First, the revised PSP statute requires that the defendant have "intent to deprive" an owner of the property. The current D.C. Code statute does not require intent to deprive.[3] Consequently, appears that a person commits a crime even if he or she only intends to temporarily possess the stolen property, or intends to return the stolen property to its rightful owner. Case law has not directly addressed the matter.[4] In contrast, by including intent to deprive as a statutory element, the revised offense ensures that a person who possesses stolen property with intent to return it to its rightful owner is not liable for PSP and places the burden of proof as to the element of intent on the government.[5] Under the RCC definition of "deprive,"[6] the PSP offense's intent to deprive element requires that the accused possessed or bought the property intending to permanently deprive an owner of the property or of a substantial benefit of the property. This change clarifies and improves the proportionality of the revised offense.

Second, the revised statute increases the number of penalty gradations. The current D.C. Code receiving stolen property offense is limited to two gradations based solely on value—first degree receiving stolen property involves property with a value of $1,000 or more and is punished as a felony; second degree receiving stolen property involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised PSP offense has a total of five gradations which span a much greater range in value, with a value of $500,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

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[3] Although requiring intent to deprive is a departure from current District law, it is worth noting that up until 2012, the District's receiving stolen property offense included an intent to deprive element. RECEIVING STOLEN PROPERTY AND PUBLIC SAFETY AMENDMENT ACT of 2011. D.C. Law 19-120. D.C. Act 19-262.

[4] The D.C. Court of Appeals, in interpreting the prior version of the statute, had held that receiving stolen property is a "specific intent" crime. *Lihlakha v. United States*, 89 A.3d 479, 489 n.26 (D.C. 2014). In *Lihlakha*, the DCCA discussed whether there was sufficient evidence for "finding that, at the time appellant acted in receiving the stolen property, she intended to deprive Banks of the right to her computer or a related benefit." 89 A.3d at 484. The Court noted that although the "intent to deprive" element had been deleted from the receiving stolen property statute after the defendant's alleged conduct at issue, under the Ex Post Facto Clause, the prior statute's "intent to deprive" element was still required. This suggests that under the current statute, which does not include an intent to deprive element, a person could be convicted of receiving stolen property, even if he possesses the stolen property with intent to return it. However, the DCCA has never squarely addressed this issue for the current statute, since its holding in *Lihlakha*.

[5] Including an intent to deprive element is also intended to codify the return-for-reward defense recognized by the DCCA in *Lihlakha v. United States*, 89 A.3d 479, 786-87 (D.C. 2014) (Four conditions must be satisfied for the accused to have a valid defense that he or she intended to return the property for a reward: (1) The reward had been announced, or was believed to have been announced, before the property was possessed or agreed to be possessed; (2) the person claiming the reward had nothing to do with the theft; (3) the possessor returned the property without unreasonable delay to the rightful owner or to a law enforcement officer; and (4) the possessor imposed no condition on return of the property.).

[6] RCC § 22E-701.

Beyond these two main changes to current District law, one other aspect of the revised PSP statute may constitute a substantive change of law.

The revised PSP offense requires that the accused knowingly buys or possesses property. The current receiving stolen property statute does not specify a culpable mental state for these elements and there is no D.C. Court of Appeals (DCCA) case law on point. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised PSP offense consistent with the revised trafficking stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute criminalizes buying or possessing stolen property, but omits the words "receives" or "obtains control over." Omission of these words is not intended to change the scope of the offense. The words "buys" and "possesses" are intended to be broad enough to cover every instance in which a person receives or obtains control over property.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[8] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation. Instead, the DCCA has held that this language requires that the accused had an actual subjective belief, even if erroneous, that the property was stolen.[9] Using the "with intent" inchoate mental state is consistent with this case law. The current statute's subsection (b) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[10] The elimination of the current offense's subsection (b) is consistent with the revised definition's use of "intent" to indicate that the property need not actually be stolen so long as the accused was practically certain that it was stolen.

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[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3232.
[9] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[10] D.C. Code § 22-3231(b).

RCC § 22E-2402. Trafficking of Stolen Property.

Explanatory Note. *This section establishes the trafficking in stolen property (TSP) offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly buying or possessing stolen property, on two or more occasions, with intent to sell, trade, or pledge the property in exchange for anything of value. The five penalty gradations are based on the aggregate value of the property involved in the crime. The revised TSP offense replaces the trafficking stolen property[1] statute in the current D.C. Code.*

Subsection (a) specifies the elements of first degree TSP. Paragraph (a)(1) requires that the accused knowingly buys or possesses property. Possess is a term defined in RCC § 22E-701 to mean "to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Property," is a term defined in RCC § 22E-701, means something of value which includes goods, services, and cash. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would buy or possess property.

Paragraph (a)(1) also specifies that the accused must have bought or possessed property on two or more occasions, an element that distinguishes TSP from the possession of stolen property (PSP) revised offense. TSP is directed at the conduct of habitual fences, who provide a market for stolen goods and thereby create further incentive for theft. An isolated incident of possessing stolen property with intent to sell, trade, or pledge it does not constitute a violation of this section. Even if a person sells multiple pieces of stolen property in a single transaction, this does not constitute two separate occasions required under the revised statute. The two occasions must be based on possession of different pieces of property at different points in time.[2] The "knowingly" mental state also applies to the "two or more separate occasions" element.

Paragraph (a)(2) requires that the accused acted "with intent that" the property be stolen. "Intent" is a defined term in RCC § 22E-206, here meaning that the accused was practically certain that the property was stolen. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the property was actually stolen, just that the accused believed to a practical certainty that the property was stolen.

Paragraph (a)(3) requires that the accused possessed the property with intent to sell, pledge as consideration, or trade the property. It is not required that the accused actually sells, pledges, or trades the property, but he or she must have consciously desired, or been practically certain that he or she would do so. If the accused possesses or buys stolen property on two separate occasions, but in only one of those occasions had intent to sell, pledge, or trade the property, that is insufficient for a TSP conviction.

Paragraph (a)(4) requires that the property, in fact, has a value of more than $250,000. "Value" is a defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the property.

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[1] D.C. Code § 22-3231.

[2] *See also* D.C. Crim. Jur. Instr. § 5-305.

Subsections (b)-(e) specify the elements for second, third, fourth, and fifth degree TSP. The elements of each grade of TSP are identical to the elements of first degree TSP, expect for the value of the property. Each subsection specifies a minimum required property value, except for fifth degree TSP, which has no specific minimum value.[3] As with first degree TSP, strict liability applies to value in each grade of TSP.

Subsection (f) specifies the penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Subsection (f) grades TSP according to the value of the total property trafficked.[4] The value of the property that the defendant bought or possessed with intent to sell or trade may be aggregated to determine the appropriate grade of the offense.[5] The words "in fact" are a defined term in the RCC, and are used in every penalty gradation to specify that there is no culpable mental state as to the aggregated value of the property. The defendant is strictly liable as to the aggregated value of the property.

Subsection (g) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised TSP statute changes current District law in one main way.*

The revised statute increases the number and type of grade distinctions. The current TSP offense is limited to one penalty grade, irrespective of the value of the property involved.[6] In contrast, the revised TSP offense has a total of five gradations which span the same range in value as the possession of stolen property offense and other property offenses, with a value of $500,000 or more being the most serious grade. The increase in gradations, differentiated by offense seriousness, improves the proportionality of the offense.

Beyond this main change to current District law, one other aspect of the revised TSP statute may constitute a substantive change of law.

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[3] However, as defined in RCC § 22E-701, "property" means "anything of value[.]" Therefore, although fifth degree TSP does not specify any minimum value, as defined in the RCC, "property" must have *some* value.

[4] For example, if the value of the property is less than $250, it is fifth degree TSP; if the value of the property is $250,000 or more, it is first degree TSP.

[5] RCC § 22E-2001. The revised TSP statute allows for considerable prosecutorial discretion in determining how many counts to charge if the defendant has trafficked in stolen property on several occasions. For example, if a person traffics in stolen property on four separate occasions, and the value of the stolen property in each occasion is $525, the defendant could be charged with a single count of fourth degree TSP, since the aggregate value of the property is $2100, which falls within the value threshold for fourth degree TSP. This person at most could be convicted of a single count with a maximum [] sentence. However, the defendant could also be charged with *two* counts of fourth degree TSP, with each count relying on two occasions of trafficking stolen property with an aggregate value of $1050, which also falls within the value threshold for fourth degree TSP. Due to charging decisions, the person could face two convictions, and a maximum allowable sentence of six years. In these cases, even if the government could prove each occasion of trafficking and obtain two convictions, the sentencing judge would still retain discretion to merge the convictions if a single conviction were sufficient given the severity of the defendant's conduct. Alternatively, even if the defendant were convicted and sentenced on multiple counts, the sentencing judge could also order that the sentences be served concurrently.

[6] D.C. Code § 22-3231(d). Whether a person traffics in $1 stolen pens, or $1000 stolen watches, the current statute authorizes a ten year maximum sentence.

The revised TSP offense requires that the accused knowingly buys or possesses property on two or more separate occasions. The current statute does not specify a culpable mental state for these elements and there is no relevant D.C. Court of Appeals (DCCA) case law. However, given the current and revised offenses' requirements that the accused at least believe the property to be stolen, a knowing culpable mental state as to buying or possessing property appears appropriate. Requiring a knowing culpable mental state also makes the revised TSP offense consistent with the revised possession of stolen property statute and other property offenses, which generally require that the accused act knowingly with respect to the elements of the offense.[7] This change improves the clarity, completeness, and consistency of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute requires that the accused either possess or buy property, with intent to sell, pledge as consideration, or trade the property. This is in contrast to the current statute, which, in part, defines "traffics" as "to buy, receive, possess, or obtain control of property with intent to [sell, pledge, transfer, distribute, dispense, or otherwise dispose of property to another]."[8] The revised offense eliminates redundant wording. The words "sell, pledge as consideration, or trade" in the revised statute are intended to be broad enough to cover conduct covered by "transfer, distribute, dispense, or otherwise dispose of property" as used in the current statute. Similarly, "buys" and "possesses" in the revised offense are intended to be broad enough to cover every instance in which a person receives or obtains control over property. The RCC's definition of possession requires that the person exercises control over property, whether or not the property is on one's person, for a period of time sufficient to allow the actor to terminate his or her control of the property. However, reference to this definition does not change the scope of the offense. Any time a person engages in conduct to "transfer, distribute, dispense, or otherwise dispose of property" that person necessarily exercises control over property for a period of time sufficient to allow the actor to terminate his or her control of the property.[9] The revised offense makes no change to the statute's scope by only requiring proof the accused buys or possesses property with intent to sell, pledge as consideration, or trade it.

Second, using the inchoate "with intent" mental state with respect to whether the property is stolen is intended to clarify that the accused must have had an actual subjective belief that the property was stolen, but that the property need not have actually been stolen. The current statute requires that the accused either knew, or "[had] reason to believe that the property has been stolen[.]"[10] Although this language could be interpreted to mean that the accused *should* have known that the property was stolen, and a negligence mental state could suffice, the DCCA has rejected this interpretation for identical language in the current receiving stolen property statute.[11] The DCCA held that such language requires that the accused had an actual subjective belief, even if erroneous, that the property was

[7] *See, e.g.*, RCC § 22E-2101.
[8] D.C. Code § 22-3231.
[9] RCC § 22E-202.
[10] D.C. Code § 22-3231.
[11] D.C. Code § 22-3232.

stolen.[12] Using the "with intent" inchoate mental state is consistent with this case law. The current TSP statute's subsection (c) also specifies that the "stolen property" need not be actually stolen if the accused otherwise committed the elements of the crime and he or she "believed" the property to be stolen.[13] The elimination of the current statute's subsection (c) is consistent with the revised statute's use of "intent" to indicate that the property need not actually be stolen so long as the accused believed it was stolen.

[12] *Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").
[13] D.C. Code § 22-3231(c).

RCC § 22E-2403. Alteration of a Motor Vehicle Identification Number.

Explanatory Note. *This section establishes the alteration of a vehicle identification number (AVIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a vehicle identification number (VIN) with intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. The revised AVIN offense replaces the existing offense of altering or removing motor vehicle identification numbers[1] in the current D.C. Code.*

Subsection (a) specifies the elements of first degree AVIN. Paragraph (a)(1) requires that the accused knowingly alters an identification number of a motor vehicle or motor vehicle part. "Alters" is an undefined term, intended to be broadly construed. "Motor vehicle" is a defined term in RCC § 22E-701, and includes any vehicle designed to be propelled only by an internal-combustion engine or electricity.[2] The term "vehicle identification number" is also a defined term in RCC § 22E-701, and means "a number or symbol that is originally inscribed or affixed by the manufacturer to a motor vehicle or motor vehicle part for purposes of identification." Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be aware to a practical certainty that he or she would alter an identification number of a motor vehicle or motor vehicle part.

Paragraph (a)(2) further specifies that the accused must alter a VIN "with intent to" conceal or misrepresent the identity of the motor vehicle or motor vehicle part. "Intent" is a defined term in RCC § 22E-206, which here means the accused was practically certain that he or she would conceal or misrepresent the identity of the motor vehicle or motor vehicle part. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not required that the accused actually conceals or misrepresents the identity of the motor vehicle or motor vehicle part, only that the accused was practically certain that he or she would do so.

Paragraph (a)(3) requires that the value of such motor vehicle or motor vehicle part, in fact, is $5,000 or more. The reference in paragraph (a)(3) to "such" motor vehicle or motor vehicle part refers to paragraph (a)(2) and the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. When the accused acts with intent to conceal or misrepresent the identity of a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine if this element is satisfied.[3] The term "in fact" is a defined term in RCC § 22E-207, and indicates that there is no culpable mental state requirement as to the value of the motor vehicle or part.

Subsection (b) specifies the elements of second degree AVIN. The elements of second degree AVIN are identical to the elements of first degree AVIN, expect that there is no value requirement for the motor vehicle or motor vehicle part.

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[1] D.C. Code § 22-3233.

[2] RCC § 22E-701. For example, an electric bicycle that is designed to be propelled both by electricity and human effort does not constitute a "motor vehicle."

[3] For example, if a person alters a VIN, with intent to conceal the identity of that part, the value of the motor vehicle is irrelevant—it is the value of the part that determines whether the conduct can be charged as first degree AVIN.

Subsection (c) specifies penalties for each grade of the AVIN offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross references penalties found elsewhere in the RCC.

Relation to Current District Law. *The revised AVIN statute changes current District law in four main ways.*

First, the revised AVIN statute requires that the accused have intent to conceal or misrepresent the identity of the motor vehicle or motor vehicle part. Under the current D.C. Code statute, it appears that a person commits an offense by knowingly altering a VIN, regardless of the purpose for doing so.[4] No case law exists as to whether a person would be guilty under the current statute for altering a VIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[5] a VIN for purposes besides concealing or misrepresenting identity. The change improves the proportionality of the revised offense.

Second, the provision in RCC § 22E-2001, "Aggregation to Determine Property Offense Grades," allows aggregation of value for the revised AVIN offense based on a single scheme or systematic course of conduct. The current AVIN offense is not part of the current aggregation of value provision for property offenses.[6] The revised AVIN statute permits aggregation for determining the appropriate grade of AVIN to ensure penalties are proportional to the accused's actual conduct.[7]

Third, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute changes the scope of the offense. The term "motor vehicle" as used in the current AVIN statute is defined to include a "vehicle propelled by an internal-combustion engine, electricity, or steam[.]"[8] In contrast, the RCC's definition of "motor vehicle" requires that the vehicle be "designed to be propelled only by an internal-combustion engine or electricity."[9] This language excludes vehicles like mopeds that are designed to be propelled, in part, by human exertion, as well as steam powered vehicles. Vehicles that are designed to be propelled in part by human exertion are generally not as expensive and do not pose the same safety risks to others that a "motor vehicle" does. Steam powered vehicles have fallen out of use, and it is unnecessary to include them in the definition of "motor vehicle." This change improves the clarity and proportionality of the revised statute.

Fourth, the threshold value of the motor vehicle or motor vehicle part that determines liability for first degree AVIN is $2,500. The current statute sets the value

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[4] D.C. Code § 22-3233.

[5] *E.g.,* knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

[6] D.C. Code § 22-3202. Aggregation of amounts received to determine grade of offense. ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.")

[7] Inclusion of AVIN in RCC § 22E-2001 does not suggest however that multiple convictions are categorically barred when the accused alters multiple VINs, on multiple motor vehicles or motor vehicles parts, even when the alterations occur as part of a single act or course of conduct.

[8] D.C. Code § 22-3233.

[9] RCC § 22E-701.

threshold for the higher grade of AVIN at $1,000.[10] In contrast, the revised statute's $2,500 aligns with the grading differences in value in the RCC theft,[11] criminal damage to property,[12] possession of stolen property,[13] and other comparable offenses. This change improves the consistency and proportionality of the revised offense.

Beyond these four changes to current District law, two other aspects of the revised AVIN statute may constitute substantive changes to current District law.

First, by reference to the RCC's definition of "motor vehicle," the revised AVIN statute may change the scope of the offense as compared to current law. The current statute defines "motor vehicle" to include "any non-operational vehicle that is being restored or repaired." The RCC's "motor vehicle" definition omits this language, and is intended to include non-operational vehicles regardless of whether they are being restored or repaired, if they meet the other requirements of the definition. It is unclear whether the current definition of motor vehicle excludes non-operational vehicles that are *not* being restored or repaired, and there is no relevant DCCA case law. This change clarifies the revised statute.

Second, determination of value for the revised first degree AVIN statute depends on the object that the actor intended to conceal or misrepresent, be it a part or the whole motor vehicle. The current D.C. Code statute says a person is subject to the higher gradation "if the value of the motor vehicle or motor vehicle part is $1,000 or more…."[14] There is no case law interpreting this provision. To resolve ambiguities about the relevant value when a car contains a part with an obliterated identification number, paragraph (a)(3) of the first degree AVIN statute refers to "such" motor vehicle or motor vehicle (in paragraph (a)(2)) that the actor intended to conceal or misrepresent. Consequently, when the accused acts with intent to conceal or misrepresent the identity of just a motor vehicle part, the value of that part, not the vehicle from which it was taken, shall be used to determine valuation. This change clarifies the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a VIN.[15] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a VIN. The change is not intended to narrow the scope of the offense.

[10] D.C. Code § 22-3233(b)(2).
[11] RCC § 22E-2101.
[12] RCC § 22E-2503.
[13] RCC § 22E-2401.
[14] D.C. Code § 22-3233(b)(2).
[15] D.C. Code § 22-3233.

RCC § 22E-2404. Alteration of Bicycle Identification Number.

Explanatory Note. *This section establishes the alteration of a bicycle identification number (ABIN) offense and penalty for the Revised Criminal Code (RCC). This offense criminalizes knowingly altering a bicycle identification number (BIN), with the intent to conceal or misrepresent the identity of the bicycle or bicycle part. The revised ABIN offense replaces the current altering or removing bicycle identification numbers*[1] *statute in the current D.C. Code.*

Paragraph (a)(1) requires that the accused knowingly alters an identification number of a bicycle or bicycle part. "Alters" is an undefined term, intended to be broadly construed. The terms "identification number" and "bicycle" are defined in D.C. Code § 50-1609. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which here requires that the accused must be practically certainty that he or she would alter an identification number of a bicycle or bicycle part.

Paragraph (a)(2) further specifies that the accused must alter a BIN "with intent to" conceal or misrepresent the identity of the bicycle or bicycle part. "Intent" is a defined term in RCC § 22E-206, here meaning the accused was practically certain that he or she would conceal or misrepresent the identity of the bicycle or bicycle part. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually concealed or misrepresented the identity of the bicycle or bicycle part, only that the accused was practically certain that he or she would do so.

Subsection (b) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] There is only one grade of ABIN, and the value of the bicycle or bicycle part is irrelevant.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC and the current D.C. Code.

Relation to Current District Law. *The revised ABIN statute changes current District law in one main way.*

The revised ABIN statute requires that the accused act with intent to conceal or misrepresent the identity of the bicycle or bicycle part. Under the current statute, it appears that a person commits an offense by merely knowingly altering a BIN, regardless of the purpose for doing so.[2] No case law exists as to whether a person would be guilty under the current statute for altering a BIN for some other purpose. In contrast, the revised statute eliminates liability for a person who alters[3] a BIN for purposes besides concealment or misrepresentation of identity. The change improves the proportionality of the revised offense.

[1] D.C. Code § 22-3234.
[2] D.C. Code § 22-3234.
[3] *E.g.,* knowingly painting over or cutting off an automobile part with a VIN from one's own vehicle is criminal under the plain language of the current statute, but, without evidence of intent to conceal or misrepresent the identity thereof, such conduct would not be criminal under the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The current statute makes it a crime to "remove, obliterate, tamper with, or alter" a BIN.[4] The revised statute only uses the word "alter," omitting the words "remove," "obliterate," or "tamper with." The word "alter" is intended to be broadly construed to cover removing, obliterating, or tampering with a BIN. The change is not intended to narrow the scope of the offense.

[4] D.C. Code § 22-3234.

RCC § 22E-2501. Arson.

Explanatory Note. *This section establishes the revised arson offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire, or causing an explosion, that damages or destroys a dwelling or building. The penalty gradations are based on the harm or risk of harm to human life. The revised arson offense, in conjunction with the RCC reckless burning offense, replaces the current arson offense,[1] and the closely-related offenses of burning one's own property with intent to injure or defraud another person[2] and placing explosives with intent to destroy or injure property.[3]*

Paragraph (a)(1) states the prohibited conduct for first degree arson—starting a fire, or causing an explosion, that damages or destroys a dwelling or building. "Dwelling" and "building" are defined terms in RCC § 22E-701. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be aware to a practical certainty that his or her conduct starts a fire or causes an explosion that damages or destroys a "dwelling" or "building."

Paragraph (a)(2) and paragraph (a)(3) specify two additional requirements for first degree arson. Paragraph (a)(2) requires that the accused is "reckless" as to the fact that a person who is not a participant in the crime is present in the dwelling or building. "Reckless" is a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the dwelling or building is occupied by someone not a participant in the crime. Paragraph (a)(3) requires that the fire or explosion "in fact" cause death or serious bodily injury to another person who is not a participant in the crime. "Serious bodily injury" is a defined term in RCC § 22E-701. Subject to causation limitations, paragraph (a)(3) may also include harm to first responders. "In fact," a term defined in RCC § 22E-207, is used to indicate here that there is no culpable mental state requirement as to whether the fire or explosion caused death or serious bodily injury to another person who is not a participant in the crime.

Subsection (b) specifies the requirements for second degree arson. The requirements in paragraph (b)(1) and sub paragraph section (b)(2) are the same as the requirements in paragraph (a)(1) and paragraph (a)(2) for first degree arson. There are no additional requirements for second degree arson.

Subsection (c) specifies the requirements for third degree arson. The requirements in third degree arson are the same as the requirements in paragraph (a)(1) for first degree arson. There are no additional requirements for third degree arson.

Subsection (d) establishes an affirmative defense that applies only to third degree arson. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. It is an affirmative defense that the defendant, in fact, had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement

[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.

for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. In subsection (d), "in fact" means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (e) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (f) cross-references applicable definitions located elsewhere in the RCC

Relation to Current District Law. *The revised arson statute clearly changes current District law in nine main ways.*

First, the revised arson statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current D.C. Code arson statute,[4] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The DCCA has stated that the malice culpable mental state in the current D.C. Code arson statute requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[5] Beyond this, District case law holds that the meaning of malice in the current D.C. Code arson and current malicious destruction of property (MDP) offenses is the same.[6] And, in the context of MDP, the DCCA has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[7] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[8]

In contrast, the revised arson statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the revised offense—knowledge as to starting a fire, or causing an explosion, that damages or destroys a dwelling or building, recklessness as to occupancy, and strict liability as to causing death

[4] D.C. Code § 22-301.

[5] *Phenis v. United States,* 909 A.2d 138, 164 (D.C. 2006) (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States,* 909 at 163-64. "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[6] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[7] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[8] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e. a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e. defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

or serious bodily injury. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[9] The "reckless" culpable mental state that the revised statute applies to whether the building or dwelling is occupied also approximates, but is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[10] and provides liability for reckless behavior that may result in serious property damage. Finally, the strict liability requirement reflects the fact that the accused has already engaged in serious criminal conduct and no further mental state appears necessary for liability as to the consequences based on his or her recklessness at placing a person risk. In fact, if the defendant had a culpable mental state as to such harm, it may also constitute assault or murder. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[11] Eliminating malice from the revised arson statute also eliminates the special mitigation defenses applicable to the current arson offense.[12] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the revised arson statute requires, in part, that the defendant "causes an explosion." The current D.C. Code arson statute merely requires that the defendant "burn or attempt to burn,"[13] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[14] In contrast, the revised arson statute requires, in part, that the defendant "causes an explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise

[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[10] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").
[11] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").
[12] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").
[13] D.C. Code § 22-301.
[14] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[15]

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current D.C. Code arson statute was enacted in 1901 and specifies a lengthy list of property,[16] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current D.C. Code arson statute also clearly applies to "dwellings" and "houses."[17] In contrast, the revised arson offense includes a railroad car or watercraft only when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[18] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings and dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the revised arson statute eliminates the requirement that the dwelling or building be another person's property. The current D.C. Code arson statute requires that the property is "in whole or in part, of another person."[19] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[20] In contrast, the revised arson statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of arson to avoid liability because another person owned all or part of the property. Under the revised arson statute, ownership of the property is irrelevant. This change clarifies the revised arson statute and eliminates a gap in liability under current law.

Fifth, the revised arson statute provides a new affirmative defense, in subsection (d), to third degree arson where a government permit has been issued regarding the actor's conduct and the actor complied with all the rules and regulations governing the use of such a permit. No comparable statute or case law exists in current District law regarding such a defense. As there is less potential risk to human life in third degree arson, it is appropriate to permit a defendant to avoid liability when acting with property authority. This revision improves the proportionality of the revised offense.

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[15] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[16] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[17] *Id*.

[18] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling.

[19] D.C. Code § 22-301.

[20] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

Sixth, the revised arson statute punishes attempted arson differently than a completed arson. The current arson statute includes both an "attempt to burn" and "burn"[21] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[22] In contrast, under the revised arson statute, the General Part's attempt provisions[23] establish liability for attempted arson consistent with other offenses. There is no clear rationale for such a special attempt provision in arson as compared to other offenses. This revision improves the proportionality of the revised offense.

Seventh, the revised arson statute creates three gradations of arson based primarily upon the actual harm or risk of harm to human life. The current D.C. Code arson statute does not have any gradations and makes no provision for instances where a person suffers serious injury or death as a result of the arson. Case law requires arson to endanger human life to some degree.[24] However, case law also suggests that liability for firefighters and first responders who are seriously injured or killed while responding to the fire or explosion is not covered in current District law.[25] In contrast, the revised arson statute has three gradations that differ on the seriousness of risk to human life. First degree arson provides liability when a defendant, in fact, caused serious bodily injury or death to any person that is not a participant in the crime. Subject to causation limitations, this would also include harm experienced by first responders.[26] No culpable mental state is required for this element because the defendant has already engaged in serious criminal conduct.[27] The revised arson statute excludes participants in the crime because their presence is unrelated to the risk the fire or explosion poses to the occupants or residents of the dwelling or building. In addition, the RCC provides liability under the RCC assault and homicide statutes if a defendant starts a fire or causes an explosion that injures or kills a participant in the crime. Second degree arson requires that the defendant is reckless as to the fact that

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[21] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").
[22] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).
[23] RCC § 22E-301.
[24] *See, e.g.*, *Phenis*, 909 A.2d at 164 ("With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.) (internal citations omitted).
[25] In *Lewis v. United States*, the government argued that "by setting a fire which he knew would require the intervention of firefighters to extinguish, [the appellant] consciously disregarded a substantial risk to the lives of the firefighters." *Lewis v. United States*, 10 A.3d 646, 661 n.8 (D.C. 2010). The DCCA acknowledged that "there is some merit to this argument," but noted that in states in which "a risk to a firefighter safety satisfies an element of arson, this decision has been made by the legislature." *Id*. The court stated "[i]n light of these statutes applicable in other states, we refrain from extending the 'risk of harm to human life' element to include a risk to responding emergency personnel since we believe the legislature is more apt to make such a change in our arson law." *Id.*
[26] Where the harm to a first responder is by an unrelated or in no way a foreseeable event, for example an airplane crash landing at the location where the fire occurred, the causal connection between setting a fire to an occupied dwelling and the harm may be too tenuous to sustain liability. See commentary to RCC § 22E-204 Causation, for further explanation of causation requirements in the RCC.
[27] Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence. *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

a person who is not a participant in the crime is present in the dwelling or building. Third degree arson applies to dwellings or buildings with no additional requirements and recognizes the heightened risk to human life at these properties even if they happen to be unoccupied at the time of the offense.[28] This revision improves the proportionality of the revised offense by distinguishing more and less culpable conduct.

Eighth, the RCC arson statute replaces two D.C. Code statutes that are closely related to the current arson statute: burning one's own property with intent to defraud or injure another person,[29] and placing explosives with intent to destroy or injure property.[30] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[31] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[32] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

Ninth, under the revised arson statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication. The current statute is silent as to the effect of intoxication. However, the DCCA has held that the current arson statute is a general intent crime,[33] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental

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[28] All buildings, as enclosed spaces, pose greater risks of harm from a fire than open areas or business yards.

[29] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[30] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[31] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[32] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

[33] *See Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) (citing *Barrett v. United States*, 377 A.2d 62 (D.C. 1977); *Charles v. United States*, 371 A.2d 404 (D.C. 1977)).

state requirements for the offense.[34] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[35]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for arson. By contrast, per the revised arson offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of arson. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in arson.[36] This change improves the clarity, consistency, and proportionality of the offense.

Beyond these nine main changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised arson statute requires a defendant, in relevant part, to "start[] a fire." The current D.C. Code arson statute requires that the defendant "burn" the specified property.[37] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[38] but no decision is directly on point. Resolving this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

Second, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A)

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[34] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[35] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

[36] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[37] D.C. Code § 22-301.

[38] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[39] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised arson statute requires that the fire or explosion "damage[] or destroy[]" the specified property. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[40] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

[39] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[40] D.C. Code § 22-301.

RCC § 22E-2502. Reckless Burning.

Explanatory Note. *This section establishes the reckless burning offense and penalty for the Revised Criminal Code (RCC). The offense proscribes knowingly starting a fire or causing an explosion with recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. Reckless burning is a lesser included offense of all the gradations of the revised arson offense (RCC § 22E-2401). It differs from the revised arson offense because it is limited to recklessly damaging or destroying the property at issue, whereas the revised arson statute requires knowingly damaging or destroying the property at issue. Along with the revised arson offense, the reckless burning offense replaces the current arson statute,[1] as well as the closely-related offenses of burning one's own property with intent to injure or defraud another person[2] and placing explosives with intent to destroy or injure property.[3]*

Paragraph (a)(1) states the prohibited conduct—starting a fire or causing an explosion. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) to be "knowingly," a term defined at RCC § 22E-206 which here requires the accused to be at least aware to a practical certainty that his or her conduct starts a fire or causes an explosion.

Paragraph (a)(2) states that the fire or explosion must damage or destroy a "dwelling" or a "building" as those terms are defined in RCC § 22E-701. Paragraph (a)(2) specifies a culpable mental state of "reckless," a defined term in RCC § 22E-206 that here means the accused must consciously disregard a substantial risk that the fire or explosion damages or destroys a "dwelling" or "building." It must be proven both that the fire or explosion damaged or destroyed the building and that the actor had a reckless culpable mental state as to that result.[4]

Subsection (b) establishes an affirmative defense to the reckless burning offense. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. It is an affirmative defense that the defendant, in fact, had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per RCC § 22E-207, "in fact" applies to any result element or circumstance element that follows the phrase "in fact" unless a culpable mental state is specified. In subsection (b), "in fact" means that there is no culpable mental state requirement as to whether the defendant had a valid blasting permit issued by the District of Columbia Fire and Emergency Medical Services Department, and that he or she complied with all the rules and regulations governing the use of the permit.

Subsection (c) specifies the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

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[1] D.C. Code § 22-301.
[2] D.C. Code § 22-302.
[3] D.C. Code § 22-3305.
[4] If the actor knowingly starts a fire or causes an explosion with recklessness that the fire or explosion would damage or destroy a building or dwelling, but there is no such damage or destruction, then the defendant would be guilty of attempted reckless burning.

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised reckless burning statute clearly changes current District law in seven main ways.*

First, the RCC reckless burning statute specifies culpable mental states of knowledge and recklessness with respect to various elements. "Maliciously" is the only culpable mental state specified in the current D.C. Code arson statute,[5] and it is unclear whether all or just some of the current arson statute elements are modified by the term. The DCCA has stated that the malice culpable mental state in the current D.C. Code arson statute requires the government to "prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy."[6] Beyond this, District case law holds that the meaning of malice in the current D.C. Code arson and current malicious destruction of property (MDP) offenses is the same.[7] And, in the context of MDP, has recently clarified that as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice either requires the defendant act "purposely" or with a blend of "knowingly" and "recklessly" culpable mental states.[8] In addition, the DCCA has held that use of the culpable mental state of malice requires "the absence of all elements of justification, excuse or recognized mitigation," which creates various defenses typically recognized in the context of murder.[9]

In contrast, the RCC reckless burning statute provides definitions for each culpable mental state and specifies the relevant culpable mental states for each of the elements of the revised offense—knowledge as to starting a fire or causing an explosion and recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building. The "knowingly" culpable mental state is consistent with, but somewhat narrower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[10] The "reckless" culpable mental

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[5] D.C. Code § 22-301.

[6] *Phenis*, 909 A.2d at 164. (internal citations omitted). The DCCA has further stated that the culpable mental state of the current arson offense is one of "general intent." *Phenis v. United States,* 909 A.2d 138, 163-64 (D.C. 2006). "General intent" is not used in or defined in the current arson statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128,1132 (D.C. 1984).

[7] *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987).

[8] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[9] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e. a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e. defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[10] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

state that applies to the fact that the fire or explosion damages or destroys and that the property is a dwelling or building approximates, but is somewhat lower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. A recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[11] and provides liability for reckless behavior that may result in serious property damage. As a lesser included offense of arson, penalized at a lower level, the lower culpable mental state in the RCC reckless burning offense creates a wider range of conduct and punishments for arson-type behavior. Eliminating malice from the RCC reckless burning statute also eliminates the special mitigation defenses applicable to the current arson offense.[12] This revision improves the clarity, completeness, and proportionality of the revised statute.

Second, the RCC reckless burning statute requires, in part, that the defendant "cause an explosion." The current D.C. Code arson statute merely requires that the defendant "burn or attempt to burn,"[13] and there is no case law on whether this would include all explosions. At common law, explosions were excluded from arson if they did not burn the property.[14] In contrast, the RCC reckless burning statute requires, in part, that the defendant "causes an explosion." Explosions can be as dangerous, if not more dangerous, than fire and raise similar concerns about occupancy of the location where the explosion takes place. This revision eliminates a possible gap in liability in current District law.[15]

Third, the revised arson statute applies only to railroad cars and watercraft that satisfy the RCC definition of "dwelling" in RCC § 22E-701. The current D.C. Code arson statute was enacted in 1901 and specifies a lengthy list of property,[16] including "any steamboat, vessel, canal boat, or other watercraft" and "any railroad car." The current D.C. Code arson statute also clearly applies to "dwellings" and "houses."[17] In contrast, the RCC reckless burning offense includes a railroad car or watercraft only when that railroad car or watercraft satisfies the definition of "dwelling" in § 22E-701.[18] Fires in railroad cars and watercraft that are not dwellings do not endanger human life the same as fires in buildings

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[11] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[12] *See* D.C. Crim. Jur. Instr. § 5.100 (requiring as an element of arson that the defendant "acted without mitigation" and defining mitigation, in part, as "Mitigating circumstances exist where a person acts in the heat of passion caused by adequate provocation.").

[13] D.C. Code § 22-301.

[14] John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 362 (1986) ("At common law, it was not arson to damage a dwelling house by means of an explosion unless it caused the house to burn rather than first being torn apart by the blast . . . Yet explosions, like fires, entail the likelihood of extensive property damage accompanied by extreme risks to human life and limb.").

[15] As described below, another offense in the current D.C. Code also addresses explosives. D.C. Code § 22-3305 prohibits placing, or causing to be placed, near certain property explosives "with intent to destroy, throw down, or injure the whole or any part thereof."

[16] D.C. Code § 22-301 ("any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car.").

[17] *Id*.

[18] Similarly, the revised arson statute includes a "motor vehicle," as that term is defined in RCC § 22E-701, only when it serves as a dwelling.

and dwellings. Damaging or destroying with fire or explosion railroad cars and watercraft that do not satisfy the definition of "dwelling" in RCC § 22E-701 is criminalized by the RCC criminal damage to property offense (RCC § 22E-2503). This revision clarifies and improves the proportionality of the revised statute.

Fourth, the RCC reckless burning statute eliminates the requirement that the dwelling, or building be another person's property. The current D.C. Code arson statute requires that the property is "in whole or in part, of another person."[19] The limited DCCA case law construing this phrase merely asserts that the element is satisfied if a person other than the defendant legally owns the property.[20] In contrast, the RCC reckless burning statute removes the requirement that the property is "in whole, or in part, of another person." It is inconsistent to permit a defendant who otherwise satisfies the requirements of reckless burning to avoid liability because another person owned all or part of the property. Under the RCC reckless burning statute, ownership of the property is irrelevant. This change clarifies the RCC reckless burning statute and eliminates a gap in liability under current law.

Fifth, the revised reckless burning statute provides a new affirmative defense in subsection (b) where a government permit has been issued regarding the actor's conduct and the actor complied with all the rules and regulations governing the use of such a permit. No comparable statute or case law exists in current District law regarding such a defense. As there is less risk to human life in reckless burning, in these circumstances it is appropriate to permit a defendant to avoid liability when acting with property authority. This change improves the proportionality of the RCC reckless burning offense.

Sixth, the revised reckless burning statute punishes attempted reckless burning differently than a completed reckless burning. The current D.C. Code arson statute includes both an "attempt to burn" and "burn"[21] and case law appears to construe this language to mean that attempted arson is punished the same as completed arson.[22] In contrast, under the RCC reckless burning statute, the General Part's attempt provisions[23] will establish liability for attempted reckless burning consistent with other offenses. There is no clear rationale for such a special attempt provision in arson or reckless burning as compared to other offenses. This revision improves the proportionality of the revised offense.

Seventh, in codifying a reckless burning offense, the RCC replaces two D.C. Code statutes that are closely related to the current arson statute: burning one's own property with intent to injure or defraud another person,[24] and placing explosives with intent to

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[19] D.C. Code § 22-301.

[20] *Posey v. United States*, 26 App. D.C. 302, 304-05 (D.C. Cir. 1906) (affirming the attempted arson conviction of a defendant that tried to burn down a building he was renting and noting that "the appellant was occupying the building as a tenant does not take it out of the terms of this section."); *Chaconas v. United States*, 326 A.2d 792, 793, 797 (D.C. 1974) (upholding the appellant's conviction for burning a store that his corporation rented); *Byrd v. United States*, 705 A.2d 629, 631, 635 (affirming appellant's conviction for arson and finding that appellant's testimony that is parents owned the house was sufficient for the house to be "in whole or in part, of another person.").

[21] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling…").

[22] *Gilmore v. United States*, 742 A.2d 862, 870 (D.C. 1999).

[23] RCC § 22E-301.

[24] D.C. Code § 22-302 ("Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure

destroy or injure property.[25] In the RCC, conduct currently prohibited by burning one's own property with intent to defraud or injure another person is criminalized under multiple revised statutes, including the revised arson statute which now applies to property belonging to anyone.[26] Similarly, in the RCC, conduct currently prohibited by placing explosives with intent to injure or destroy property is criminalized under multiple statutes, including arson which now explicitly includes use of explosives to cause damage.[27] This revision reduces unnecessary overlap with the revised arson offense, the revised reckless burning offense in RCC § 22E-2502, and other offenses.

Beyond these seven changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the RCC reckless burning statute requires a defendant, in relevant part, to "start[]a fire." The current D.C. Code arson statute requires that the defendant "burn" the specified property.[28] Several DCCA arson cases refer to conduct to "set" the fire or "set fire to" as if this language were equivalent to "burn,"[29] but no decision is directly on point. Instead of this ambiguity, the revised arson statute requires "start[] a fire." This revision clarifies the revised statute.

Second, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical

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any other person, shall be imprisoned for not more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[25] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[26] Burning one's own property with intent to defraud or injure another person would be subject to the revised arson statute if the property was one of the specific property types covered by arson (dwelling or building) or the revised criminal damage to property statute if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct may also satisfy the RCC reckless burning offense, although with a significantly lower penalty than under the revised arson statute. In addition to these property damage offenses, such conduct may well constitute an attempt (RCC § 22E-301) to commit fraud (RCC § 22E-2201), assault (RCC § 22E-1202), or murder (RCC § 22E-1101) depending on the facts of the case.

[27] Placing explosives with intent to injure or destroy property would constitute an attempt (RCC § 22E-301) to commit arson if the property was one of the specific property types covered by the revised arson statute (dwelling or building) or criminal damage to property if the property satisfied the definition of "property of another" in RCC § 22E-701. This conduct could also satisfy an attempt (RCC § 22E-301) to commit reckless burning, although with a significantly lower penalty than under the revised arson statute.

[28] D.C. Code § 22-301.

[29] *Lewis v. United States*, 10 A.3d 646, 657 (D.C. 2010) (holding "there is sufficient evidence to prove that Lewis acted maliciously when *he set the fire*") and noting that the issue was whether "Lewis acted with the required *mens rea* of malice when he *set fire to* the house.") (emphasis added); *Phenis v. United States*, 909 A.2d 138, 164 (D.C. 2006) (concluding, in part, that the evidence was sufficient that the appellant "intentionally set fire to" his mother's apartment."); *In re D.M.*, 993 A.2d 535, 543 (D.C. 2010) ("the trial judge reasonably could find, as she did, that appellant intentionally set the fire . . .").

to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[30] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised reckless burning statute requires that the fire or explosion damage or destroy a dwelling or building. The current arson statute requires only that the defendant "burn" (or attempt to burn) the property specified in the statute.[31] Insofar as burning constitutes some kind of damage or destruction to the property at issue, this change merely clarifies the revised offense.

[30] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[31] D.C. Code § 22-301.

RCC § 22E-2503. Criminal Damage to Property.

Explanatory Note. *This section establishes the criminal damage to property (CDP) offense and penalty gradations for the Revised Criminal Code (RCC). The CDP offense proscribes damaging or destroying property without the effective consent of an owner. The penalty gradations are based on the amount of damage to the property, as well as the type of property and the defendant's culpable mental state in causing the damage or destruction. The CDP offense is closely related to the revised arson,[1] revised reckless burning,[2] and revised criminal graffiti offenses.[3] The CDP offense replaces the current malicious destruction of property (MPD) offense[4] and multiple statutes[5] in the current D.C. Code that concern damage to particular types of property.*

Paragraph (a)(1) specifies the prohibited conduct for first degree CDP—damaging or destroying the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon without consent, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in subsection (a)(1)—damages or destroys the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct damages or destroys the "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Paragraph (a)(3) requires that the amount of damage to the property for first degree CDP "in fact" be $500,000 or more. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

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[1] RCC § 22E-2501.
[2] RCC § 22E-2502.
[3] RCC § 22E-2504.
[4] D.C. Code § 22-303.
[5] D.C. Code §§ 22-3305, 22-3307, 22-3309, 22-3310, 22-3312.01, 22-3312.04, 22-3312.05, 22-3313, and 22-3314.

Paragraph (b)(1) and paragraph (b)(2) specify the prohibited conduct for second degree CDP. The requirements in paragraph (b)(1) and paragraph (b)(2) are the same as those in paragraph (a)(1) and paragraph (a)(2) for first degree CDP. Paragraph (b)(3) requires that the amount of damage to the property for second degree CDP "in fact" be $50,000 or more. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

There are two alternative means of committing third degree CDP in subsection (c). Paragraph (c)(1) specifies one type of prohibited conduct for third degree CDP. The requirements in paragraph (c)(1) and subparagraph (c)(1)(A) are the same as those in paragraph (a)(1) and paragraph (a)(2) for first degree CDP. Sub-subparagraph (c)(1)(B)(i), sub-subparagraph (c)(1)(B)(ii), and sub-subparagraph (c)(1)(B)(iii) specify the gradation requirements for this type of third degree CDP. Per the rules of interpretation in RCC § 22E-207, "in fact" in subparagraph (c)(1)(B) applies to the elements in sub-subparagraph (c)(1)(B)(i), sub-subparagraph (c)(1)(B)(ii), and sub-subparagraph (c)(1)(B)(iii). "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state as to the amount of damage ($5,000 or more in sub-subparagraph (c)(1)(B)(i)) or the type of property that is damaged or destroyed (cemetery, grave, other place for the internment of human remains, place of worship, or public monument in sub-subparagraphs (c)(1)(B)(ii) and (c)(1)(B)(iii)).[6] "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged.

Paragraph (c)(2) establishes an alternative set of requirements for third degree CDP that requires only recklessness as to the damage or destruction, but requires a higher amount of damage than the first alternative set of requirements under paragraph (c)(1). Paragraph (c)(2) specifies the prohibited conduct for this type of third degree CDP—damages or destroys property. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Recklessly" is a defined term in RCC § 22E-206 that here requires that the defendant consciously disregard a substantial risk that his or her conduct damages or destroys "property."[7] Subparagraph (c)(2)(A) further requires that the property be "property of another." "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Subparagraph (c)(2)(A) specifies a culpable mental state of "knowing."

[6] Harm to the specific types of property described gradations in third degree CDP—a "cemetery, grave, or other place for the internment of human remains" (sub-subparagraph (c)(1)(B)(ii)) and a "place of worship or a public monument" (sub-subparagraph (c)(1)(B)(iii))—may be charged at least as third degree CDP. However, depending on the amount of damage, damage or destruction of these types of property may also be charged as a higher gradation of CDP. Prosecutors are also able to charge conduct involving these types of property under a lower, lesser gradation than third degree CDP.

[7] Although paragraph (c)(2) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," subparagraph (c)(2)(A) requires a culpable mental state of "knowingly" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for this type of third degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

"Knowing" is a defined term in RCC § 22E-206 that here requires that the defendant is practically certain that the property is "property of another." Subparagraph (c)(2)(B) requires that the prohibited conduct be "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property with which the accused is not privileged to interfere. Per the rules of interpretation in RCC § 22E-207, the "knowing" mental state in subparagraph (c)(2)(A) also applies to subparagraph (c)(2)(B). "Knowing" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner. Finally, subparagraph (c)(2)(C) requires that the amount of damage "in fact" be $50,000 or more for this type of third degree CDP. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (d)(1), paragraph (d)(2), and paragraph (d)(3) specify the prohibited conduct for fourth degree CDP. These requirements are the same as the same requirements for third degree CDP in paragraph (c)(2), subparagraph (c)(2)(A), and subparagraph (c)(2)(C).[8] Paragraph (d)(4) requires that the amount of damage to the property for fourth degree CDP "in fact" be $500 or more. "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

Paragraph (e)(1), paragraph (e)(2), and paragraph (e)(3) specify the prohibited conduct for fifth degree CDP. These requirements are the same as the requirements for third degree CDP in paragraph (c)(2), subparagraph (c)(2)(A), and subparagraph (c)(2)(C).[9] Paragraph (e)(4) requires that the amount of damage to the property for fifth degree CDP is "any amount." "Amount of damage" is a defined term in RCC § 22E-701 that generally depends on whether the property was completely destroyed or partially damaged. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the amount of damage to the property.

[8] Although paragraph (d)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," paragraph (d)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fourth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

[9] Although paragraph (e)(1) initially requires only a culpable mental state of "recklessly" for the fact that the item at issue is "property," paragraph (e)(2) requires a culpable mental state of "knowing" for "property of another." The definition of "property of another" in RCC § 22E-701 incorporates the term "property" and its RCC definition. Thus, for fifth degree CDP, a "knowing" culpable mental state ultimately applies to the fact that the item at issue is "property," consistent with the other gradations.

Subsection (f) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions located elsewhere in the RCC

Relation to Current District Law. *The revised CDP statute clearly changes current District law in eight main ways.*

First, the revised CDP statute specifies culpable mental states of knowledge, recklessness, and strict liability with respect to various elements. "Maliciously" is the only culpable mental state specified in the current D.C. Code MDP statute,[10] and it is unclear whether all or just some of the current MDP statute elements are modified by the term. The DCCA has defined malice to mean: "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result."[11] Per the first part of this holding, MDP is subject to various defenses more typically recognized in the context of murder.[12] Per the second part of this holding, the DCCA has further clarified that, as compared to the Model Penal Code (MPC) definitions of culpable mental states, malice in MDP either requires the defendant act "purposely" (corresponding to an "actual intent to cause the particular harm") or with a blend of "knowingly" and "recklessly" culpable mental states (corresponding to a mental state of "wanton and willful…with awareness of a plain and strong likelihood").[13]

In contrast, the RCC provides standardized definitions for each culpable mental state and specifies the relevant culpable mental states for the revised CDP offense: knowledge or recklessness as to damaging or destroying property, knowledge for the fact that the item at issue is "property" and "property of another," as those terms are defined in RCC § 22E-701,[14] and knowledge for lacking the effective consent of an owner. In

[10] D.C. Code § 22-303.

[11] *Harris v. United States*, 125 A.3d 704, 708 (D.C. 2015) (quoting Guzman v. United States, 821 A.2d 895, 898 (D.C.2003)). The DCCA has further stated that the culpable mental state of the current MDP offense is one of "general intent." *Carter v. United States,* 531 A.2d 956, 962 (D.C. 1987). "General intent" is not used in or defined in the current MDP statute, but the DCCA has said that it is frequently defined as the "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[12] In the District, "[r]ecognized circumstances of mitigation" include, most notably, provocation: i.e. a situation "where the killer has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger." *Comber*, 584 A.2d at 41. In addition to provocation, however, DCCA case law also recognizes *imperfect* justifications and excuses (i.e. defenses based upon *unreasonable* mistakes of fact and/or law), "such as when excessive force is used in self-defense or in defense of another and a killing is committed in the mistaken belief that one may be in mortal danger," as mitigating circumstances that preclude the formation of malice. *Id.*

[13] *Harris v. United States*, 125 A.3d 704, 708 n. 3 (D.C. 2015).

[14] The CDP statute consistently requires a culpable mental state of knowledge for the fact that the item at issue satisfies the RCC definitions of "property" and "property of another" in RCC § 22E-701, but the drafting varies. Paragraph (a)(1) of first degree CDP, paragraph (b)(1) of second degree CBP, and paragraph (c)(1) of third degree CDP each specify a "knowingly" culpable mental state for the element "property of another." Since the definition of "property of another" in RCC § 22E-701 incorporates the term "property," also defined in RCC § 22E-701, the "knowingly" culpable mental state also applies to the fact that the item is "property."

addition, the RCC specifies strict liability as to the amount of damage required, as well as to the type of property specified in some of the alternative requirements for third degree CDP. The "knowingly" culpable mental state is consistent with, but somewhat narrower than, existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] The "reckless" culpable mental state that the revised CDP statute applies to lower grades of the statute is somewhat lower than existing DCCA case law insofar as malice is a blend of reckless and knowledge culpable mental states. However, the recklessness requirement still requires subjective awareness of the critical facts that distinguish innocent from criminal conduct,[16] and provides liability for reckless behavior that may result in serious property damage. The strict liability requirement as to the amount of damage or type of property reflects the fact that the accused has already engaged in serious criminal conduct, and no further mental state appears necessary for liability as to the consequences based on his or her recklessly (or knowingly) damaging property. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[17] Finally, eliminating malice from the revised CDP statute also eliminates the special mitigation defenses applicable to MDP.[18] This revision improves the clarity, completeness, and proportionality of the revised statute.

Paragraph (c)(2) of third degree CDP, paragraph (d)(1) of fourth degree CDP, and paragraph (e)(1) of fifth degree CDP require that the defendant "recklessly" damage or destroy "property." Although the "recklessly" culpable mental state applies to the element that the item at issue is "property," subparagraph (c)(2)(A) of third degree CDP, paragraph (d)(2) of fourth degree CDP, and paragraph (e)(2) of fifth degree CDP require that the defendant know that the item is "property of another," as that term is defined in RCC § 22E-701. Thus, given that the definition of "property of another" incorporates the definition of "property," these gradations ultimately require a "knowing" culpable mental state for the fact the item at issue is "property."

[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[16] *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part, dissenting in part) ("And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.").

[17] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[18] *Brown v. United States*, 584 A.2d 537, 539 (D.C. 1990) ("Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case."); *see also* D.C. Crim. Jur. Instr. § 5.400 (requiring as an element of MDP that the defendant "acted without mitigation" and defining mitigation, in part, as "when a person acts in the heat of passion caused by adequate provocation" and "when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.").

Second, the revised CDP statute grades the offense, in part, based upon the "amount of damage" done to the property, a defined term in RCC § 22E-701. The current MDP statute states that it is the "value" of the property that determines the gradation. DCCA case law has interpreted "value" for MDP to mean the fair market value of the object when the object is completely destroyed, or the "reasonable cost of the repairs necessitated" where an item is only partly damaged.[19] The DCCA further noted that where the cost of repair exceeds the fair market value of the item as a whole, the value would simply be the fair market value of the whole before the damage occurred.[20] In contrast, the revised CDP statute is graded simply on the "amount of damage"—not the value of the property as in the current MDP statute. The RCC definition of "amount of damage" is intended to be consistent with existing case law and is discussed in the commentary to RCC § 22E-701. This revision improves the proportionality of the revised statute.

Third, the revised CDP statute punishes an attempted offense the same as most other criminal attempts. The current D.C. Code MDP statute includes "attempts to injure or break or destroy" as well as "injur[es] or break[s] or destroy[s]"[21] and there is no District case law construing this "attempt" language. The current D.C. Code MDP statute penalizes an attempted offense the same as a completed offense. In contrast, under the revised CDP statute, the general attempt provision in RCC § 22E-301 will establish liability and penalties for attempted CDP consistent with other RCC offenses. Under RCC § 22E-301, the penalty for an attempted offense is one-half the maximum penalty of the completed offense, consistent with several of the more recently revised D.C. Code offenses.[22] There is no clear rationale for attempts to be treated differently in MDP as compared to other offenses, or for penalizing attempted MDP the same as the completed offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the CDP statute increases the number and type of gradations for the offense. The current D.C. Code MDP offense is limited to two gradations based solely on the value of the property.[23] First degree MDP is for property that has a "value" of $1,000 or more, and is punished as a serious felony. Second degree MDP involves property valued at less than $1,000 and is a misdemeanor. In contrast, the revised CDP offense has a total of five gradations, which span a much greater range of loss in value to the property, including distinctions for destruction of property that is of special significance and distinctions based upon the defendant's mental state as to the damage or destruction. The dollar value cutoffs in the revised CDP are consistent with other revised offenses and the increase in gradations, differentiated by offense seriousness, improves the proportionality of the revised offense.

Fifth, the revised CDP offense consolidates most prohibited conduct in the D.C. Code that involves damage to or destruction of property, and deletes multiple statutes that are closely related to the current MDP statute. The revised CDP statute will cover the vast

[19] *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).
[20] That is, in the instance that the value of the entire item or property is less than $200 (the then-current threshold for MDP) but the cost of repair is $200 or more, it would be "unjust to measure the value of the damaged portion by the cost of restoration." *Id.* at n.3.
[21] D.C. Code § 22-303 ("Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy…").
[22] *See, e.g.,* D.C. Code § 22–3018, Attempts to commit sexual offenses.
[23] The DCCA has interpreted "value" in the MDP statute as meaning "fair market value." *Nichols v. United States*, 343 A.2d 336, 342 (D.C. 1975).

majority of prohibited conduct pertaining to damaging property in these deleted statutes.[24] The only apparent exceptions are causing damage to boundary markers that are on one's own property[25] and placing excrement or filth on property in a manner that does not damage it,[26] but it is disproportionate to impose liability for criminal damage to property in these situations. Attempted CDP under the general attempt provision in RCC § 22E-301, the RCC arson offense,[27] and the RCC reckless burning offense[28] cover the conduct prohibited in current D.C. Code § 22-3305 pertaining to placing explosive substances near property.[29] In addition to property damage, several of these deleted statutes prohibit removing or concealing property[30] and there may be liability for this conduct in the RCC theft (RCC §

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[24] D.C. Code §§ 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys . . . the whole or any part of" specified public records or papers); 22-3309 ("Whoever maliciously cuts down, destroys . . . any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever . . . ."); 22-3310 ("It shall be unlawful for any person willfully to top, cut down . . . girdle, break, wound, destroy, or in any manner injure" trees, specified vegetation, or any boxes or protection thereof of another person); 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip . . . to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon" property"); 22-3313 ("It shall not be lawful for any person or persons to destroy, break, cut, disfigure, deface, burn, or otherwise injure" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or "to cut, destroy, or injure any scaffolding, ladder, or other thing used in or about such building or improvement . . . ."; and 22-3314 ("If any person shall maliciously cut down, demolish, or otherwise injure any railing, fence, or inclosure around or upon any cemetery, or shall injure or deface any tomb or inscription thereon . . . .").

[25] D.C. Code § 22-3309 ("Whoever maliciously cuts down, destroys, or removes any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, *either of his or her own lands* or of the lands of any other person whatsoever, even though such boundary or bounded trees should stand within the person's own land so cutting down and destroying the same, shall be fined not more than the amount set forth in § 22-3571.01 and imprisoned not exceeding 180 days.") (emphasis added). The statute appears to include boundary markers regardless of ownership, unlike the revised CDP offense, which requires that the property be "property of another," as that term is defined in RCC § 22E-701.

[26] D.C. Code § 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to … cover, rub with, or otherwise place filth or excrement of any kind…."). There may be liability, however, for unauthorized use of property (RCC § 22E-2102) or trespass (RCC § 22E-2601).

The remaining prohibited conduct in D.C. Code § 22-3312.01 appears to be covered by the revised CDP statute or revised criminal graffiti statute in 22E-2404. D.C. Code § 22-3312.01 ("It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip . . . to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon . . . . ").

[27] RCC § 22E-2401.

[28] RCC § 22E-2402.

[29] D.C. Code § 22-3305. D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[30] D.C. Code §§ 22-3307 ("Whoever maliciously or with intent to injure or defraud any other person . . . abstracts, or conceals the whole or any part of" specified public records or papers); D.C. Code § 22-3309 ("Whoever maliciously . . . removes any boundary tree, stone, or other mark or monument . . . either of his or her own lands or of the lands of any other person whatsoever . . . ."); D.C. Code § 22-3310 ("It shall be unlawful for any person willfully to . . . remove" trees, specified vegetation, or any boxes or protection thereof

22E-2101), unauthorized use of property (RCC § 22E-2102), and fraud (RCC § 22E-2201) offenses. This change removes unnecessary overlap among criminal statutes and improves the proportionality of the revised statutes.

Sixth, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," allows aggregation of value for the revised CDP offense based on a single scheme or systematic course of conduct. The current MDP offense is not part of the current aggregation of value provision for property offenses.[31] In contrast, the provision in RCC § 22E-2001, "Aggregation of Property Value to Determine Property Offense Grades," applies to the revised CDP statute. This change improves the proportionality of the revised statute.

Seventh, under the revised CDP statute the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim he or she did not act "knowingly" due to his or her self-induced intoxication.[32] The current D.C. Code MDP statute is silent as to the effect of intoxication. However, the DCCA has held that the current MDP statute is a general intent crime,[33] which would preclude a defendant from receiving a jury instruction on whether intoxication prevented the defendant from forming any of the culpable mental state requirements for the offense.[34] This DCCA holding would also likely mean that a defendant would be precluded from directly raising—though not necessarily presenting evidence in support of[35]—the claim that, due to his or her self-induced intoxicated state, the defendant did not possess any of the culpable mental state requirements for MDP. By contrast, per the revised CDP offense, a defendant would both have a basis for, and will be able to raise and present relevant and admissible evidence in support of, a claim of that self-induced intoxication prevented the defendant from forming the knowledge required for various elements of CDP. Likewise, where appropriate, the defendant would be entitled to an instruction, which clarifies that a not guilty verdict is

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of another person); D.C. Code § 22-3313 ("It shall not be lawful for any person or persons to . . . remove" any building materials, materials intended for the improvement of streets, avenues, highways, similar modes of passage, and inclosures, or any scaffolding, ladder, or other similar object).

[31] D.C. Code § 22-3202 ("Amounts or property received pursuant to a single scheme or systematic course of conduct in violation of § 22-3211 (Theft), § 22-3221 (Fraud), § 22-3223 (Credit Card Fraud), § 22-3227.02 (Identity Theft), § 22-3231 (Trafficking in Stolen Property), or § 22-3232 (Receiving Stolen Property) may be aggregated in determining the grade of the offense and the sentence for the offense.").

[32] With respect to those elements of CDP subject to a culpable mental state of recklessness, the Revised Criminal Code effectively precludes an intoxication defense where the intoxication is self-induced. *See* RCC § 209(c)("Imputation of Recklessness for Self-Induced Intoxication. When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if: (1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and (2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.").

[33] *See Carter v. United States*, 531 A.2d 956, 962 (D.C. 1987).

[34] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

[35] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

necessary if the defendant's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge at issue in CDP.[36] This change improves the clarity, consistency, and proportionality of the offense.

Eighth, the revised CDP statute requires a result element of "damages or destroys." The current MDP statute refers to "injures or breaks,"[37] but does not define these terms. The DCCA has twice made rulings that depended on the definition of "injury," and in doing so referred to a dictionary definition of the term as meaning: "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing."[38] In one of these rulings the DCCA suggested that temporary disassembly of an object which does not involve loss or destruction of a part of the object constitutes injury so long as the immediate, ordinary purpose of the object is substantially affected.[39] In contrast, under the revised statute, damage does not include mere temporary disassembly of an object which does not involve loss or destruction of a part.[40] Instead, such a temporary disassembly would be a violation of the revised unauthorized use of property (UUP) offense in RCC § 22E-2102. This change clarifies and improves the proportionality of the revised offense.

Beyond these eight changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised CDP statute requires the property be "property of another," defined in RCC § 22E-701, in part, as any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The current D.C. Code MDP statute refers to the affected property as being "not his or her own," and does not further define the meaning of this phrase. The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned."[41] However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property.[42] The use of the RCC defined term

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[36] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[37] D.C. Code § 22-303.

[38] *Baker v. United States*, 891 A.2d 208, 215 (D.C. 2006) ("Second, using black spray paint to inscribe obscenities on walls and on an automobile causes damage sufficient under the statute. "Injury" is defined as "detriment to, or violation of, person, character, feelings, rights, property, or interests, or value of the thing." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.1947). Applying this definition to the facts here demonstrates that the graffiti, although temporary, caused sufficient "injury." In order to repair Boggs' vehicle, the paint had to be removed and then replaced with a new layer of paint, otherwise, the vehicle would have been significantly devalued."); *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

[39] *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009) ("As with, for example, most broken human arms, the effect is temporary, but nevertheless substantial and sufficient to defeat the immediate purpose of its ordinary or intended use.").

[40] This meaning of "damage" may affect the rulings in *Baker v. United States*, 891 A.2d 208 (D.C. 2006) and *Thomas v. United States*, 985 A.2d 409 (D.C. 2009) which relied upon a dictionary definition of "injury" to decide the case.

[41] *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003).

[42] *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked

"property of another" in the revised CDP offense is consistent with case law holding that a person may be liable for destroying jointly-owned property without consent of the other where the joint owner has an interest the other joint owner is not privileged to infringe upon.[43] However, the revised CDP offense, by use of "property of another," excludes liability for damaging or destroying property in which the only sense in which the property belongs to another is that another has a security interest in the property. This is because the revised definition of "property of another" specifically excludes "property in the possession of the accused that the other person has only a security interest in." No case law has interpreted whether the current MDP statute's reference to "not his or her own" would include property in the possession of, and owned by, the accused except for a security interest held by another. This change in the revised CDP statute clarifies the offense and applies a consistent definition across theft and theft-related offenses in Chapter 20 of Subtitle III of the RCC through the definition of "property of another."

Second, by use of the phrase "in fact," the revised CDP statute codifies that no culpable mental state is required as to the amount of damage in all gradations of the offense or as to the type of property required in some of the alternative variations of third degree CDP. The current D.C. Code MDP statute is silent as to what culpable mental state, if any, applies to the current MDP value gradations. There is no District case law on what mental state, if any, applies to the current MDP value gradations, although District practice does not appear to apply a mental state to the monetary values in the current gradations.[44] Resolving this ambiguity, the revised CDP statute applies strict liability to the amount of damage in all gradations of the offense and to the type of property required in some of the alternative variations of third degree CDP. Applying no culpable mental state requirement to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[45] Clarifying that the amount of the loss in value is a matter of strict liability in the revised CDP gradations clarifies and potentially fills a gap in District law.

Third, the revised CDP statute requires that the defendant act without the "effective consent of an owner" and applies a culpable mental state of "knowingly" to this element. The current D.C. Code MDP statute does not reference the defendant's lack of consent, although it does require that the property be "not his or her own," which may suggest that the defendant lack consent. DCCA case law interpreting the phrase "not his or her own" is limited to determining issues of joint ownership.[46] More broadly, it seems as though consent would negate the malice requirement in the current MDP statute, given that malice

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at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.

[43] Note that, under the revised definition of "property of another," joint owners are not categorically liable under CDP for destroying property of another.

[44] D.C. Crim. Jur. Instr. § 5.300.

[45] D.C. Crim. Jur. Instr. § 5.400.

[46] The DCCA has stated that the phrase "not his or her own" is "ambiguous" because "it could either refer to property that is fully owned by an individual or property that is at least partially owned." *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003). However, the DCCA has found that a co-owner of property can be found liable under the current MDP for destroying jointly-owned property. *Id.* at 964. Since the court determined the statutory language was ambiguous, it first looked to the legislative history. *Id.* at 965. The legislative history "provid[ed] no assistance," so the court then looked at case law from other jurisdictions, academic commentators, and the link between destruction of property and domestic violence. *Id.* at 965-67.

generally requires the absence of "justification, excuse, or mitigation."[47] Resolving this ambiguity, the revised CDP statute requires that the defendant lack the "effective consent of an owner" and applies a "knowingly" culpable mental state to this element. This revision improves the clarity and proportionality of the revised statute and improves its consistency with other RCC property offenses that require that the defendant know that he or she lack the consent or effective consent of an owner, such as the criminal graffiti statute (RCC § 22E-2504).

Fourth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[48] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

For example, the revised CDP statute deletes "by fire or otherwise" and "any public or private property, whether real or personal" that are in the current MDP statute.[49] The language is surplusage and deleting it will not change the scope of the offense.

[47] *See, e.g.*, *Thomas v. United States*, 985 A.2d 409, 412 (D.C. 2009).

[48] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[49] D.C. Code § 22-303.

RCC § 22E-2504. Criminal Graffiti.

Explanatory Note. *This section establishes the revised criminal graffiti offense and penalty for the Revised Criminal Code (RCC). The revised criminal graffiti offense prohibits placing any inscription, writing, drawing, marking, or design on the property of another without the effective consent of an owner. There is a single penalty gradation for the offense. The revised criminal graffiti offense is closely related to the revised criminal damage to property offense (CDP).[1] The two offenses share several elements, but the revised criminal graffiti offense addresses a specific type of damage to property. The revised criminal graffiti offense replaces the current graffiti offense,[2] the current graffiti definitions,[3] the current graffiti penalty provisions,[4] the current possessing graffiti material offense,[5] and the current defacing public or private property offense.[6]*

Paragraph (a)(1) states the proscribed conduct—placing any inscription, writing, drawing, marking, or design on the property of another. "Property" is a defined term in in RCC § 22E-701 that means an item of value and includes real property and tangible or intangible personal property. "Property of another" is a defined term in RCC § 22E-701 which means that some other person has a legal interest in the property at issue that the defendant cannot infringe upon, regardless of whether the defendant also has an interest in that property. Paragraph (a)(1) specifies a culpable mental state of "knowingly." Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) applies to all of the elements in paragraph (a)(1)—placing any inscription, writing, drawing, marking, or design on the property of another. "Knowingly" is a defined term in RCC § 22E-206 that here requires the defendant to be aware to a practical certainty that his or her conduct places any inscription, writing, drawing, marking or design on the "property of another."

Paragraph (a)(2) states that the proscribed conduct must be done "without the effective consent of an owner." The term "consent," as defined in RCC § 22E-701, requires an indication of agreement given by a person generally competent to do so. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception." Lack of effective consent means there was no agreement, or the agreement was obtained by means of physical force, an explicit or implicit coercive threat, or deception. "Owner" is a defined term in RCC § 22E-701 to mean a person holding an interest in property that the accused is not privileged to interfere with. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206, here requiring the accused to be aware to a practical certainty that he or she lacks effective consent of an owner.

Subsection (b) specifies the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

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[1] RCC § 22E-2403.
[2] D.C. Code § 22-3312.04(d).
[3] D.C. Code § 22-3312.05.
[4] D.C. Code § 22-3312.04.
[5] D.C. Code § 22-3312.04(e).
[6] D.C. Code § 22-3312.01. The RCC criminal damge to property offense also replaces current D.C. Code § 22-3312.01. See commentary to criminal damage to property, RCC § 22E-2503.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised criminal graffiti statute clearly changes current District law in four main ways.*

First, the revised criminal graffiti punishes attempted criminal graffiti differently than a completed criminal graffiti offense. District law currently codifies a separate, attempt-type offense for graffiti that prohibits, in part, possessing graffiti material with the intent to place graffiti,[7] in addition to providing liability under the current general attempt statute.[8] In contrast, the revised criminal graffiti statute relies solely on the General Part's attempt provisions[9] to establish liability for attempts to place graffiti, consistent with other offenses. The General Part's attempt provisions differ from the current attempt-type offense for graffiti chiefly by requiring the person to be "dangerously close" to committing the offense for there to be liability. Such a requirement reflects longstanding District case law regarding criminal attempts generally.[10] There is no clear rationale for such a special attempt-type offense for graffiti as compared to other offenses. This revision improves the clarity and proportionality of the revised offense.

Second, the revised criminal graffiti offense specifies a culpable mental state of "knowingly" for all elements of the offense. The current D.C. Code graffiti offense[11] specifies a culpable mental state of "willfully." The current D.C. Code graffiti offense does not define the term "willfully" and there is no generally applicable definition in the District's current criminal code. No case law exists interpreting the culpable mental state of the graffiti statute. In contrast, the revised criminal graffiti offense specifies a culpable mental state of "knowingly" for all elements of the offense. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[12] Requiring a knowing culpable mental state also makes the revised criminal graffiti offense consistent with the elements of higher gradations of the revised CDP statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[13] This revision improves the clarity and consistency of the revised statute.

Third, the revised criminal graffiti statute does not require that the graffiti be visible from a public right-of-way. The current D.C. Code statute defines "graffiti," in part, as requiring that the inscription, etc., be visible from a "public right-of-way."[14] There is no

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[7] D.C. Code §§ 22-3312.05(5) (defining "graffiti material"), 22-3312.04(e) ("Any person who willfully possesses graffiti material with the intent to place graffiti on property without the consent of the owner shall be fined not less than $100 or more than $1,000.").

[8] D.C. Code §§ 22-1803.

[9] RCC § 22E-301.

[10] See commentary to RCC § 22E-301.

[11] D.C. Code § 22-3312.04(e).

[12] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[13] *See, e.g.*, RCC § 22E-2503.

[14] D.C. Code § 22-3312.05(4) ("'Graffiti' means an inscription, writing, drawing, marking, or design that is painted, sprayed, etched, scratched, or otherwise placed on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials that are on public or private property without the

DCCA case law interpreting this requirement and it appears to have been included for an abatement of graffiti provision that has since been repealed.[15] In contrast, the revised criminal graffiti offense does not require that the graffiti be visible from a public right-of-way. This requirement unnecessarily restricts the scope of the offense to places visible to the public, even though the harm to a property owner is the same whether or not the location is visible to the public. The requirement also is inconsistent with the revised criminal damage to property offense (RCC § 22E-2504), which applies to "property of another." This revision improves the proportionality and consistency of the revised statute.

Fourth, the revised criminal graffiti statute does not provide for mandatory restitution provision or have a specific parental liability provision. The current D.C. Code graffiti statute mandates restitution in addition to any fine or imprisonment,[16] and makes parents and guardians civilly liable for fines and abatement fees that their minor cannot pay.[17] However, there also is a substantially similar provision in D.C. Code § 16-2320.01 that states the court "may" enter a judgment of restitution in any case in which the court finds a child has committed a specified delinquent act and it also provides that the court may order the parent or guardian of a child, a child, or both to make such restitution.[18]

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consent of the owner, manager, or agent in charge of the property, and the graffiti is visible from a public right-of-way.").

[15] Subsection (c) of D.C. Code § 22-3312.04 establishes the current graffiti offense. Subsection (c) was added to D.C. Code § 22-3312.04 by the Anti-Graffiti Amendment Act of 2000 (Act 13-560). The Anti-Graffiti Amendment Act of 2000 also codified the definitions in D.C. Code § 22-3312.05, including the current definition of "graffiti," as well as an abatement of graffiti provision in former D.C. Code § 22-3312.03a. The abatement provisions in former D.C. Code § 22-3312.03a appear to depend, in part, on whether the graffiti is visible from a public right-of-way, as required in the definition of "graffiti" and as specified in the abatement provision. D.C. Code § 22-3312.03a(a), (b) ("(a) Any person applying graffiti on public or private property shall have the duty to abate the graffiti within 24 hours after notice by the Director, the Chief of Police, or the private owner of the property involved. Abatement shall be done in a manner prescribed by the Director. Any person applying the graffiti shall be responsible for the abatement or payment for the abatement. When graffiti is applied by a minor, the parents or legal guardian shall also be responsible for the abatement or payment for the abatement if the minor is unable to pay. (b) Subject to the availability of annual appropriations for that purpose, the Mayor shall provide graffiti removal services to abate graffiti on public property. The Mayor shall provide, subject to appropriations, graffiti removal services for the abatement of graffiti on private property that is visible from the public right-of-way without charge to the property owner if the property owner first executes a waiver of liability in the form prescribed by the Mayor."). (repl.).

The Anti-Graffiti Act of 2010 repealed the abatement provision in D.C. Code § 22-3312.03a and codified in Title 42 a new abatement provision and definition of "graffiti" that requires visibility from a public right-of-way. Anti-Graffiti Act of 2010 (Law 18-219). Despite the repeal of the abatement provision in D.C. Code § 22-3312.03a, the definition of "graffiti" in D.C. Code § 22-3312.05 was not repealed. The legislative history for the Anti-Graffiti Act of 2010 does not discuss whether the Council intentionally kept the visibility requirement in the definition of "graffiti" in D.C. Code § 22-3312.05.

[16] D.C. Code § 22-3312.04(f) ("In addition to any fine or sentence imposed under this section, the court shall order the person convicted to make restitution to the owner of the property, or to the party responsible for the property upon which the graffiti has been placed, for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.").

[17] D.C. Code § 22-3312.04(g) ("The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.").

[18] D.C. Code § 16-2320.01(a) ("(a)(1) Upon request of the Corporation Counsel, the victim, or on its own motion, the Division may enter a judgment of restitution in any case in which the court finds a child has committed a delinquent act and during or as a result of the commission of that delinquent act has: (A) Stolen,

With respect to adults, D.C. Code § 16-711 provides judicial authority for (but does not require) ordering restitution. In contrast, the revised criminal graffiti statute deletes both the mandatory restitution provision and parental liability provision that apply to the current graffiti offense. Instead, matters of adult restitution are left to judicial discretion per D.C. Code § 16-711[19] and juvenile restitution and parental liability to judicial discretion per D.C. Code § 16-2320.01. This change improves the consistency and proportionality of the revised statute, and removes unnecessary overlap with other penalty provisions in the D.C. Code.

Beyond these four changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised criminal damage to property statute requires that the "inscription, writing, drawing, marking, or design" be placed on the "property of another" and applies the definition of "property of another" in RCC § 22E-701. The current D.C. Code graffiti offense does not specify any ownership requirements for the property, although it does require the defendant to act "without consent of the owner." The definition of "property of another" in RCC § 22E-701 specifies that "property of another" is any property with which the actor is not privileged to interfere without consent, regardless of whether the actor also has an interest in that property. The definition of "property of another" also excludes from the revised criminal graffiti offense property that is in the possession of the accused in which the other person has only a security interest. This narrow exclusion for security interests is the same exclusion that applies to the revised criminal damage to property offense (RCC § 22E-2504) and other property offenses in Chapter 20 of Subtitle III of the RCC. As with the other offenses, the exclusion is justified because civil remedies such as contract liability, rather than criminal liability, address the situation when a debtor damages property and the other party has only a security interest in that property. However, under RCC the definition of "property of another," a third party could be criminally liable for damaging property that is in the possession of the debtor because the debtor has a possessory interest in that property. Given the nature of the revised criminal graffiti offense, it is unlikely that the security interest exclusion will often apply. However, the consistency of the RCC improves if the criminal damage to property and the revised criminal graffiti offenses cover the same range of property interests.

Second, the revised criminal graffiti statute requires a person to act "without the effective consent of an owner." "Consent," "effective consent," and "owner" are defined terms in RCC § 22E-701 that together generally require a person to lack some indication of an owner's agreement to the placement of graffiti from a person holding an interest in the property. The current D.C. Code graffiti offense requires that the defendant act "without the consent of the owner," but there is no statutory definition of these terms, and no District case law addresses the meaning of "without the consent" or "owner" in the graffiti statute. Requiring a person to act "without the effective consent of an owner" and

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damaged, destroyed, converted, unlawfully obtained, or substantially decreased the value of the property of another . . . (2) The Division may order the parent or guardian of a child, a child, or both to make restitution to: (A) The victim; (B) Any governmental entity; (C) A third-party payor, including an insurer, that has made payment to the victim to compensate the victim for a property loss under paragraph (1)(A) of this subsection or pecuniary loss under paragraph (1)(B) or (C) of this subsection.").

[19] RCC § 22E-602 generally authorizes courts to order restitution in accordance with D.C. Code § 16-711.

using the definitions in RCC § 22E-701 that apply to other property offenses in Chapter 20 of Subtitle III of the RCC improves the clarity and consistency of the revised offense.

Third, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[20] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised criminal graffiti statute eliminates the "on public or private property" requirement that is in the current D.C. Code definition of "graffiti."[21] Similarly, the revised criminal graffiti offense deletes "on structures, buildings, dwellings, statues, monuments, fences, vehicles, or other similar materials" that is in the current definition of "graffiti."[22] Such language is surplusage and deletion will not change District law.

Second, the revised criminal graffiti statute deletes the language in the current D.C. Code definition of "graffiti"[23] that refers to a "manager, or agent in charge of the property" because the RCC relies on civil law principles of agency to determine when an individual is authorized to give "consent" on behalf of another person. Deleting the language will not change District law.

Finally, the revised criminal graffiti offense deletes specific reference to the methods of making graffiti that are in the current definition of "graffiti:"[24] "is painted, sprayed, etched, scratched, or otherwise placed." Instead, the revised criminal graffiti statute requires the defendant to "place[]" "any inscription, writing, drawing, marking, or design." "Any inscription, writing, drawing, marking, or design" is taken from the current definition of "graffiti" without change. "Places" and the types of graffiti specified in the

[20] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rule of construction stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").
[21] D.C. Code § 22-3312.05(4).
[22] D.C. Code § 22-3312.05(4).
[23] D.C. Code § 22-3312.05(4).
[24] D.C. Code § 22-3312.05(4).

revised statute render "is painted, sprayed, etched, scratched, or otherwise placed" are surplusage. Deletion will not change District law.

RCC § 22E-2601. Trespass.

Explanatory Note. *This section establishes the trespass offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly entering or remaining in certain locations without a privilege or license to do so under civil law. The offense is graded based on the location at issue. The revised trespass offense is closely related to burglary,[1] with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised trespass offense replaces the forcible entry and detainer,[2] unlawful entry on property[3] and unlawful entry of a motor vehicle[4] statutes in the current D.C. Code.[5]*

Paragraphs (a)(1), (b)(1), and (c)(1) require that the defendant "enters or remains in" a given place. The "enters" element does not require complete or full entry of the body, and evidence of partial entry is sufficient proof for a completed trespass.[6] The alternate phrase "remains in" creates liability for a person who remains on property with knowledge that he or she has no right or permission to be there.[7] A person who commits a trespass by remaining after being asked to leave must have a reasonable opportunity to do so.[8] Where a person is uncertain as to whether they can safely comply with a notice to quit, a justification defense may apply. Paragraphs (a)(1), (b)(1), and (c)(1) also specify the culpable mental state for these elements to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.[9]

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[1] RCC § 22E-2701.
[2] D.C. Code § 22-3301.
[3] D.C. Code § 22-3302.
[4] D.C. Code § 22-1341.
[5] To the extent that the District's current unlawful entry statute also protects "other property," besides dwellings, buildings, land, watercrafts, and motor vehicles, the RCC punishes exercising control over any property of another as unauthorized use of property in RCC § 22E-2102.
[6] Evidence of unlawful entry of a body part or a camera, microphone, or other instrument held by an actor is sufficient proof for a completed trespass.
[7] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).
[8] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty); *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977); *Rahman v. United States*, 208 A.3d 734, 741 (D.C. 2019).
[9] *See, e.g., Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (reversing a conviction where the government failed to prove that the defendant knew that he was barred from a sidewalk appeared to be a public walkway).

Paragraphs (a)(1), (b)(1), and (c)(1) also describe the places where a trespass can occur. Trespass into a dwelling is punished more severely per paragraph (a)(1) than trespass into a building per paragraph (b)(1), which is punished more severely than trespass on land or into a watercraft or motor vehicle per paragraph (c)(1). The terms "dwelling," "building," and "motor vehicle" are defined in RCC § 22E-701. The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a parcel, building, or vehicle, that person may not have a right to enter another area in the same location.[10] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, land, watercraft, or motor vehicle.

Paragraphs (a)(2), (b)(2), and (c)(2) state that the proscribed conduct must be done "[w]ithout a privilege or license to do so under civil law."[11] Determining criminal liability for trespass depends on a wide array of non-criminal laws[12] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[13] In some instances, it may be obvious that a person has a right to be present.[14] However, particularly where there are competing rights,[15] or where there is public access[16] to a given parcel, building, or vehicle,

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[10] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[11] A license may be specific or general and need not be communicated directly to the accused. For example, a private homeowner may be indifferent to children using her yard as a shortcut to and from school. A child who uses the yard for that purpose does not commit a trespass.

[12] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[13] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[14] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[15] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[16] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)); *see also Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (D.C. App. Apr. 30, 2020).

it may be less clear whether an individual is legally licensed to enter or remain. Even if a person apparently has obtained permission to enter or remain, the means by which the person obtained permission may render an entry unlawful.[17] Or, a person may commit a trespass by unlawfully exceeding the scope of a permission that is limited in time, place, or purpose.[18] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state also applies to paragraphs (a)(2), (b)(2), and (c)(2), requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.[19]

Paragraph (d)(1) codifies the proof requirements in cases alleging unlawful entry onto the grounds of public housing. Where the government seeks to prove unlawful entry premised on a violation of a barring notice for District of Columbia Housing Authority ("DCHA") properties,[20] it must prove that the barring notice was issued for a reason described in DCHA regulations.[21] Additionally, the government must offer evidence that the DCHA official who issued the barring notice had an objectively reasonable basis for believing that the criteria identified in the relevant regulation were satisfied.[22] Even if sufficient cause for barring in fact exists, the issuance of a DCHA barring notice without objectively reasonable cause will render the notice invalid.[23] Paragraph (d)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for the elements in paragraph (d)(1).

Paragraph (d)(2) excludes from trespass liability the failure to pay an established transit fare to the Washington Metropolitan Area Transit Authority. Such conduct is punished exclusively under D.C. Code § 35-252. Paragraph (d)(2) specifies "in fact," a

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[17] For example, a person who obtained permission by making a coercive threat may nevertheless commit a trespass.

[18] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a trespass by instead (or additionally) entering another part of the home unrelated to the repair.

[19] For example, an investigative journalist who gains entry by going undercover does not commit a trespass unless she is practically certain that she does not have a privilege or license to do so under civil law. Consider also, a person who walks into the lobby of a residential building to leave menus, fliers, or business cards inside. *See also Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (D.C. App. Apr. 30, 2020) (reversing a conviction where the government failed to prove that the defendant knew that he was barred from a sidewalk appeared to be a public walkway).

[20] This means any temporary, extended, or permanent notice barring a person from a location that is owned, operated, developed, administered, or financially assisted by the Department of Housing and Urban Development or District of Columbia Housing Authority. It includes notices issued by parties other than DCHA officials, including property managers and law enforcement officers.

[21] *See* 14 DCMR § 9600, et seq.

[22] *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015) (reversing a conviction where the defendant was barred from public housing for being an unauthorized person without first verifying whether the defendant was the guest of a resident); *Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

[23] Consider, for example, the facts in *Winston v. United States*, 106 A.3d 1087 (D.C. 2015). A security guard observed a non-resident on the grounds of a public housing complex unaccompanied by a resident and, based on this information alone, barred Mr. Winston as unauthorized, pursuant to 14 DCMR § 9600.4. The officer's actions were found to be objectively unreasonable because no steps were taken to verify that Mr. Winston was not a guest of a resident, permitted to enter pursuant to 14 DCMR § 9600.2. Accordingly, the barring notice was ruled invalid and the violation of the barring notice did not amount to an unlawful entry. It was deemed of no consequence whether Mr. Winston was, in fact, a guest or an unauthorized person.

defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here that the conduct constitutes a violation of D.C. Code § 35-252.

Subsection (e) specifically provides that a factfinder may infer that a person lacks a privilege or license to enter or remain in an otherwise vacant[24] location when there are at least two indicia of unlawful entry. The premises must show signs of forced entry[25] and either be secured in a manner that reasonably conveys that it is not to be entered[26] or display signage that is reasonably visible prior to or outside the location's points of entry that says "no trespassing" or similarly indicates that a person may not enter.

Subsection (f) provides the penalties for each grade of the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised trespass statute clearly changes current District law in five main ways.*

First, the revised offense includes three penalty gradations. Current law separately criminalizes, with three different penalties, unlawful entry into a dwelling, building, or other property,[27] and unlawful entry of a motor vehicle.[28] In contrast, the revised trespass offense includes both real property and vehicles, but grades intrusions into dwellings more severely than intrusions into other buildings, which in turn are graded more severely than intrusions on land and vehicles. This change logically reorganizes the revised offenses and improves the consistency and proportionality of the revised offenses.

Second, the revised statute punishes an attempt to trespass differently from a completed trespass. Current D.C. Code § 22-3302 punishes an attempt to trespass the same as a completed trespass. In contrast, the revised offense punishes attempted trespass in a manner consistent with other revised offenses, relying on the general part's common definition of attempt[29] and penalty for an attempt.[30] This change improves the consistency and proportionality of the revised offenses.

Third, under the revised trespass statute, the general culpability principles for self-induced intoxication in RCC § 22E-209 allow a defendant to claim they did not act "knowingly" or with "intent" due to their self-induced intoxication. The current unlawful entry statutes are silent as to the availability of an intoxication defense, however, the DCCA has characterized the current statute is a general intent crime.[31] Under the RCC trespass statute, a defendant will be able to raise and present relevant and admissible evidence in support of a claim of that voluntary intoxication prevented the defendant from forming the

[24] Here, "vacant" means that the property is uninhabited, not merely unoccupied at a particular moment in time.
[25] Signs of forced entry are not limited to broken doors or windows.
[26] For example, boarding up the property or locking a gate or entryway to the property may be means of reasonably conveying that the public is not free to enter.
[27] D.C. Code § 22-3302 (providing a 180-day penalty for trespass of private buildings and a 6-month penalty for trespass of public buildings); *see also Broome v. United States,* 240 A.3d 35 (D.C. 2020).
[28] D.C. Code § 22-1341 (providing a 90-day penalty).
[29] RCC § 22E-301(a).
[30] RCC § 22E-301(c)(1).
[31] *See Ortberg*, 81 A.3d at 305.

knowledge or intent required to prove a trespass. Likewise, where appropriate, a defendant will be entitled to an instruction on intoxication.[32]

Fourth, the permissive inference in the revised offense requires that the affected property be vacant and shows signs of forced entry. Current D.C. Code § 22-3302 provides, "The presence of a person in any private dwelling, building, or other property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign, shall be prima facie[33] evidence that any person found in such property has entered against the will of the person in legal possession of the property." This language is unclear as to whether the location must be vacant if it displays a no trespassing sign, and there is no case law on point. The current D.C. Code statute, however, clearly does not require evidence of forced entry as part of the permissive inherence. Legislative history indicates that the permissive inference was added to "make it easier to arrest unlawful occupants on vacant property."[34] In contrast, the inference in the revised offense requires signs of forced entry, to ensure that the inference meets the legal standard of being an indicator that it is "more likely than not" that the accused is acting without a privilege or license to do so.[35] A homeowner, real estate agent, or repair person who enters a vacant location that displays a "no trespassing" sign should not be able to be found guilty without further evidence of wrongdoing. This change improves the proportionality and may improve the constitutionality of the revised offense.

Fifth, the RCC repeals D.C. Code § 22-3301, Forcible Entry and Detainer, which is archaic, unused, and duplicative of conduct in the revised Trespass and Burglary statutes.[36] This change reduces unnecessary overlap between the revised statutes.

Beyond these five changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised trespass statute specifies knowledge as the culpable mental state required for all offense elements. The current District statutes do not specify a culpable mental state for any element of the unlawful entry on property or unlawful entry of a motor vehicle offenses. The District of Columbia Court of Appeals ("DCCA") has generally said

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[32] These results are a product of the logical relevance principle set forth in RCC § 22E-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22E-209(b).

[33] The phrase "prima facie" is not defined by statute or in case law interpreting the current unlawful entry statutes. However, the same phrase, in the context of the bail reform act (D.C. Code § 22-1327), has been construed as "a permissive inference, not a presumption." *Trice v. United States*, 525 A.2d 176, 182 (D.C. 1987); see also *Raymond v. United States*, 396 A.2d 975, 976-77 ("although the wording…may be read to imply that the inference of willfulness is mandatory…the trier of fact has merely been permitted and not required to infer willfulness. We conclude that this instruction, incorporating a permissive inference, properly construes the statute."). As the phrase may be unnecessarily confusing to lawyers and lay people alike, the revised offense uses more straightforward language to convey that the inference is optional. This approach appears to be in line with current District practice. *See* D.C. Crim. Jur. Instr. § 5.401 ("You may, but you are not required to, presume that [name of defendant] entered the property against the will" of the lawful occupant.).

[34] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 11.

[35] *See Leary v. United States*, 395 U.S. 6 (1969); *Reid v. United States*, 466 A.2d 433, 435-36 (D.C. 1983).

[36] RCC §§ 22E-2601 and 22E-2701.

that trespass is a general intent crime,[37] while also stating that it must be proven that the actor "knew or should have known" that entry was unwanted,[38] and also upholding a requirement that the actor "entered, or attempted to enter the property voluntarily, on purpose, and not by mistake or accident."[39] In addition, the court also has consistently recognized that a person who holds a bona fide belief that she has a right to remain does not commit a trespass.[40] To resolve these ambiguities, the revised statute requires a culpable mental state of knowingly, using the RCC standard definition. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[41] This change improves the consistency of the revised offense and the proportionality of penalties.

Second, under the revised trespass offense, criminal liability turns on whether the accused acted without privilege or license to do so under civil law. Current D.C. Code § 22-3302 prohibits entering property "against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit…" An array of DCCA cases have construed, in light of specific fact patterns, the meaning of, and exceptions to, the terms "against the will,"[42] "the lawful occupant,"[43] "the person lawfully in charge thereof,"[44] and "without lawful authority."[45] Current D.C. Code § 22-1341 prohibits entering or being inside a motor vehicle "without the permission of the owner or person lawfully in charge," and lists

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[37] *Ortberg v. United States*, 81 A.3d 303, 305 (D.C. 2013); *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984) (requiring "general intent" and "the absence of an exculpatory state of mind").

[38] *See Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013); *Wicks v. United States*, 226 A.3d 743 (D.C. 2020) (D.C. App. Apr. 30, 2020); *see also Ronkin v. Vihn*, 71 F. Supp. 3d 124, 133 (D.D.C. 2014).

[39] *See Ortberg v. United States*, 81 A.3d 303, 309 (D.C. 2013).

[40] *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967); *Gaetano v. United States*, 406 A.2d 1291, 1294 (D.C. 1979); *Darab v. United States*, 623 A.2d 127, 136 (D.C. 1993).

[41] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[42] *Compare Bowman v. United States*, 212 A.2d 610, 611 (D.C. 1965) ("the entry must be against the expressed will, that is, after a warning to keep off") *with McGloin v. United States*, 232 A.2d 90, 90 (D.C. 1967) ("*Bowman* must be read in the light of the facts of that case. It concerned an unlawful entry into a restricted area of the Union Station, a semi-public building. In such a building the public generally is permitted to enter and if there are portions which are not obviously private or restricted, it is only reasonable that warning of some kind be given the public to stay out. Even in a semi-public or public building there are portions obviously not open to the public; and surely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry.").

[43] *See Smith v. Unite States*, 445 A.2d 961, 964 (D.C. 1982) (finding a secret service agent is a lawful occupant of the White House); *Moore v. United States*, 136 A.2d 868, 869 (D.C. 1957) (explaining that whether the complainant is a lawful occupant is a question for the jury); *see also Bodrick v. United States,* 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[44] *See Whittlesey v. U. S.*, 221 A.2d 86, 91 (D.C. 1966) ("[A] person may be lawfully in charge even though there are other persons who could, if they chose to do so, countermand or override his authority."); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("[T]he person in charge may act through an agent in ordering someone to leave.") (citing *Grogan v. United States,* 435 A.2d 1069, 1071 (D.C.1981)); *Woll v. United States*, 570 A.2d 819, 822 (D.C. 1990) (finding a lessee's right to the use of a corridor is sufficient to bring her within the meaning of "person lawfully in charge thereof.").

[45] *See, e.g., Dent v. United States*, 271 A.2d 699, 700 (D.C. 1970) (affirming a conviction where defendant was told "never to come back to the apartment, since he didn't know how to act.").

a few statutory exceptions where permission is not needed.[46] The revised statute more broadly refers to whether an actor has a "privilege or license"[47] for entry (or remaining) under civil law.[48] This standard more plainly alludes to the many instances in which a person is entitled to occupy a particular space or vehicle over the express objection of an owner, occupant, manager, or security guard.[49] Unlike theft[50] (requiring unlawful taking) and burglary[51] (requiring intent to commit a crime), trespass criminalizes mere presence. Considerations of freedom of expression, assembly, movement, and association are, therefore, of paramount concern. Accordingly, criminality turns entirely on the entitlements of accused and not merely on the express objection of others. This change improves the clarity and consistency of the revised statute.

Third, the revised statute's permissive inference provision includes an explicit reasonableness requirement. The current trespass statute's evidentiary inference applies to a "property that is otherwise vacant and boarded-up or otherwise secured in a manner that conveys that it is vacant and not to be entered, or displays a no trespassing sign…" There is no case law on what manner of securing conveys a location is vacant or what standards may apply to the display of a no trespassing sign. To resolve these ambiguities, the revised permissive inference requires the manner in which the premises are secured to "reasonably convey" that it is not to be entered, or that the "no trespassing" signage be "reasonably visible" prior to or outside the property's points of entry. The reasonableness requirements provide courts with a degree of flexibility in assessing whether the manner of securing or signage is sufficient to infer that the defendant was on notice that the entry was unlawful.[52]

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[46] D.C. Code § 22-1341(b) ("Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle.").

[47] The phrasing "license or privilege" follows the Model Penal Code and many other jurisdictions' use. *See* § 21.2(a) Nature of the intrusion, 3 Subst. Crim. L. § 21.2(a) (3d ed.). The RCC does not intend to limit construction of these terms to that of any other particular jurisdiction, but the basic distinction held by some jurisdictions seems appropriate that "licensed" refers to a consensual entry while "privileged" refers to a nonconsensual entry. *Id.*

[48] The term "civil law" is intended to refer broadly to non-criminal law. Black's Law Dictionary (10th ed. 2014).

[49] For example, current D.C. Code § 22-1341 includes several exclusions from liability for the government, tow truck operators, and re-possessors to enter a motor vehicle without the owner's permission. Similarly, there are many legitimate reasons for a person to occupy real property without permission from the titleholder. For example, a person may have rights in contract or landlord-tenant law (D.C. Code § 42-3505.01); under local or federal housing regulations (14 DCMR § 9600 et seq.; *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015)); by private necessity (*Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015)), or as protected by the First Amendment or the District's protections of traditional public forums (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982); D.C. Code § 5-331.01 et seq.; D.C. Code § 2-575). *See also Bodrick v. United States,* 892 A.2d 1116, 1121 (D.C. 2006) (explaining that, in the case of a stay away order, a person's interest as leaseholder is subordinate to her occupancy and use).

[50] *See* RCC § 22E-2101.

[51] *See* RCC § 22E-2701.

[52] Depending on the particular facts of the case, the reasonableness requirement may narrow the applicability of the permissive inference as compared to current law. *E.g.,* a single "No trespassing" sign that is obscured or at one entrance of a building with multiple entrances accessible to the public may not "reasonably" indicate that the building is not to be entered, but arguably may provide adequate notice under the current statute. On the other hand, the reasonableness requirement in the revised offense also may

The reasonableness requirements are an objective matter, to be determined from the perspective of an ordinary person entering or remaining in the location. Of course, even if the reasonableness requirements are not met, the government may prove the defendant's guilt without the benefit of the permissive inference.[53] This change clarifies the revised statute.

Fourth, the definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[54] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised offense replaces the reference to "other property" in the current unlawful entry on property statute with a specific list of locations where trespass may occur. The current statute[55] protects "any private dwelling, building, or other property" as well as "any public building, or other property," and parts thereof. The DCCA has not provided clear or comprehensive guidance, however, on how broadly "or other property"

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expand the applicability of the permissive inference, as compared to the current statute. For example, sign that read, "Employees Only," "Keep Out," or "Authorized Personnel Only" would all be included within the ambit of the RCC permissive inference, while they might not be included within the current statute.

[53] *See, e.g., Culp v. United States*, 486 A.2d 1174 (D.C. 1985) (Where police officers observed defendant inside a vacant building, and had reason to believe that defendant did not belong there, and the property itself revealed indications of a continued claim of possession by the owner or manager, police had probable cause to arrest defendant for unlawful entry); *Smith v. United States*, 281 A.2d 438 (D.C. 1971) (Where a construction company, the occupant of lot, had posted signs indicating its rightful control of the site, it had never authorized defendant to use the site at night when no one was present, and where site was protected at night by locked gates and a mesh chain link fence topped by barbed wire, there was no need that an explicit "keep out" sign be posted to establish that defendant was acting against the will of the construction company when he entered the site).

[54] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[55] D.C. Code § 22-3302.

should be read.[56] The revised trespass offense clarifies that the protected locations are dwellings, buildings, land, watercraft, and motor vehicles. Use of other property[57] without a privilege or license under civil law may be punishable in the RCC as unauthorized use of property.[58]

Second, the revised statute replaces the phrase "refuses to quit" with the more modern "remains in." This does not appear to be a substantive change, merely a stylistic one supported by modern usage.[59]

Third, the revised statute codifies an exclusionary rule for violations of DCHA barring notices. In *Winston v. United States*,[60] the DCCA required an objectively reasonable basis for believing that valid grounds exist to bar a person from public housing pursuant the regulations in 14 DCMR § 9600 et seq. Where a barring notice is issued incorrectly or arbitrarily—in that case, without first verifying that the person was not a guest[61]—violation of the notice does not amount to a criminal unlawful entry.

Fourth, the revised trespass offense clarifies that fare evasion may not be prosecuted as a trespass. The Fare Evasion Decriminalization Amendment Act of 2018 provides that fare evasion may be prosecuted as a civil infraction only, not as trespass or theft.[62]

Fifth, the statutory text of the revised offense does not list the exclusions from liability that are enumerated in current D.C. Code § 22-1341(b).[63] The revised offense's requirement that the accused know that they are acting without privilege or license under civil law renders this language superfluous.

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[56] The DCCA has affirmed convictions for intrusions into places other than buildings or dwellings, including a Home Depot parking lot (*Gray v. United States,* 100 A.3d 129 (D.C. 2014)), the steps of the United States Capitol (*Abney v. United States,* 616 A.2d 856 (D.C. 1992)), the area immediately surrounding the Farragut West Metro station *(United States v. Powell,* 536 A.2d 1086 (D.C. 1989)), and the White House grounds (*Leiss v. United States,* 364 A.2d 803 (D.C. 1976)).

[57] For example, a bicycle.

[58] RCC § 22E-2102.

[59] The DCCA has used the term "remaining" in construing the elements of the offense. *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976) (the offense prohibits "the act of entering or *remaining* upon any property when such conduct is both without legal authority and against the expressed will of the person lawfully in charge of the premises.") (emphasis added). *See also* § 21.2(a) Nature of the intrusion, 3 Subst. Crim. L. § 21.2(a) (3d ed.) ("The 'enters or remains' language of the Model Penal Code is used in the great majority of the state criminal trespass statutes…").

[60] 106 A.3d 1087 (D.C. 2015).

[61] *See also Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

[62] Prior to this legislation being enacted, fare evasion may have been prosecuted as a trespass. *See Bowman v. U.S., 212 A.2d 610* (D.C. 1965) (finding defendants were properly convicted under statute for unlawful entry where they, without a ticket and intent to board a train, had entered restricted area despite sign and public announcements whereby only persons having tickets were permitted through the gate to the restricted area.)

[63] "Subsection (a) of this section shall not apply to: (1) An employee of the District government in connection with his or her official duties; (2) A tow crane operator who has valid authorization from the District government or from the property owner on whose property the motor vehicle is illegally parked; or (3) A person with a security interest in the motor vehicle who is legally authorized to seize the motor vehicle."

RCC § 22E-2701. Burglary.

Explanatory Note. *This section establishes the burglary offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowingly and fully entering or surreptitiously remaining in certain locations without a privilege or license to do so under civil law, with intent to commit a crime inside. The offense is graded based on location. The revised burglary offense is closely related to trespass,[1] with the primary difference that trespass does not require that the defendant intend to commit a crime on the premises. The revised burglary offense replaces the burglary statute in the current D.C. Code.[2]*

Paragraphs (a)(1), (b)(1), and (c)(1) require the defendant act "with intent to" commit one or more District crimes inside that is either an offense against persons under Subtitle II or a "predicate property offense," as defined in paragraph (e)(2). "Intent" is a defined term in RCC § 22E-206 that here means here means the accused was practically certainty that his or her conduct constitutes a criminal offense under District of Columbia law. The defendant must have the intent to commit the crime at the moment he or she enters or begins to surreptitiously hide inside.[3] Also, the actor must intend to commit the crime in that location. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary that the accused attempted or completed the predicate offense, only that the accused believed to a practical certainty that he or she would attempt or complete the predicate offense.

Paragraphs (a)(2), (b)(2), and (c)(2) require that the defendant "fully enters or surreptitiously remains in" a given place. The "fully enters" element requires complete entry of the body, and evidence of partial entry of the body is insufficient proof for a completed burglary.[4] The alternate phrase "surreptitiously remains in" creates liability for a person who hides[5] on property with knowledge that he or she has no permission to be there.[6] Paragraphs (a)(2), (b)(2), and (c)(2) also specify the culpable mental state for these

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[1] RCC § 22E-2601.

[2] D.C. Code § 22-801.

[3] For example, a person who decides to steal an item after noticing it inside may commit a theft but not a burglary. *See* RCC § 22E-2101.

[4] Fact patterns involving a person's nonconsensual reaching—but not full body entry—into a dwelling, building, or business yard with intent to commit a crime inside may constitute attempted burglary (e.g., a person caught on top of a fence to a business yard) or an attempted or completed form of the predicate crime (e.g., theft, where a person reaches through a window to take an object from a building).

[5] A person who remains without hiding may commit a trespass, in violation of RCC § 22E-2601, but not a burglary. Consider, for example, a person who enters a store open to the public, makes a scene and is asked to leave by a manager, and who thereafter refuses and makes a criminal threat against the manager—such a person may be liable for trespass and criminal threats, but not burglary.

[6] A person may be notified that his or her presence is unlawful by someone other than the titleholder. *See, e.g., Smith v. United States*, 445 A.2d 961, 964 (D.C. 1982) (a Secret Service officer can demand that protestors leave the grounds of the White House, even though the officer was not the highest ranking officer at the White House); *Whittlesey v. United States*, 221 A.2d 86 (D.C. 1966) (President need not personally order protestors to leave the White House grounds); *Hemmati v. United States*, 564 A.2d 739, 746 (D.C. 1989) ("The evidence in this case was sufficient to permit a finding that Joan Drummond was in charge of the office and that she exercised her authority through her agent, Carol Kiser."); *Fatemi v. United States*, 192 A.2d 525, 528 (D.C. 1963) (an embassy minister asked intruder to leave); and *Grogan v. United States*, 435 A.2d 1069, 1071 (D.C. 1981) (a receptionist at an abortion clinic asked person to leave).

elements to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "enters or remains in" the prohibited space.

Paragraphs (a)(2), (b)(2), and (c)(2) also describe the places where a burglary can occur. Burglary into an occupied dwelling is punished more severely than burglary into an unoccupied dwelling[7] or into an occupied building, which are punished more severely than burglary into an unoccupied building[8] or a business yard. The terms "dwelling," "building," and "business yard" are defined in RCC § 22E-701.[9] The phrase "or part thereof" makes clear that while a person may have a right to enter one part of a dwelling, building, or business yard, that person may not have a right to enter another area in the same location.[10] The "knowingly" mental state requires that the defendant at least be aware to a practical certainty that the identity of the location is a dwelling, building, or business yard.

Paragraph (a)(3), subparagraphs (b)(2)(A) and (b)(2)(B), and paragraph (c)(3) state that the entering or remaining must be done "[w]ithout a privilege or license to do so under civil law."[11] Determining criminal liability for burglary depends on a wide array of non-criminal laws[12] to establish whether a person is "[w]ithout a privilege or license to do so under civil law."[13] In some instances, it may be obvious that a person has a right to be present.[14] However, particularly where there are competing rights,[15] or where there is public access[16] to a given building or business yard, it may be less clear whether an

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[7] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.

[8] Or, an occupied building, when the defendant is not reckless as to occupancy.

[9] The term "dwelling" may include houseboats and other structures that are not buildings.

[10] For example, a retail store may give members of the general public effective consent to enter the floor room to shop and simultaneously withhold consent to enter a locked storage room in the rear of the store.

[11] A license may be specific or general and need not be communicated directly to the accused.

[12] The determination of whether a person is without a privilege or license under civil law to enter a location may depend on property law, contract law, family law, civil procedure, or other legal sources. For example, a landlord who seeks to evict a tenant must follow the notice and hearing requirements that govern evictions and may not instead have the tenant arrested and removed pursuant to the revised trespass statute. *See generally* D.C. Code § 42-3505, et seq.

[13] *See Spriggs v. United States*, 52 A.3d 878, n. 2 (D.C. 2012) (explaining, "The law relating to occupancy and the procedures required to resolve disputes is complicated with respect to trespassers, guests, roomers, lodgers, licensees, and true tenants, including holdover tenants.").

[14] Consider, for example, a person who owns and inhabits a home or a person who is shopping a local store that is open to the public.

[15] Compare, for example, a roommate who bars another roommate's paramour from a shared apartment with a situation where a parent bars a teenage child's paramour from a shared apartment. *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

[16] When public property is involved, the court has previously explained, "[O]ne must be without legal right to trespass upon the property in question." *Leiss v. United States*, 364 A.2d 803, 806 (D.C. 1976). The court construed the current unlawful entry statute to require "some additional specific factor establishing the party's lack of a legal right to remain," so as to protect a citizens First Amendment rights by ensuring that his "otherwise lawful presence is not conditioned upon the mere whim of a public official." Accepted "additional specific factors" include: a published WMATA free speech regulation (*O'Brien v. United States*, 444 A.2d 946 (D.C. 1982)), the issuance of a Capitol police order (*Abney v. United States*, 616 A.2d 856 (D.C. 1992)), the existence of a chain that separated a tourist line from the White House lawn (*Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980)), a "pair of gates which WMATA personnel closed every night at the conclusion of the day's business," (*United States v. Powell*, 563 A.2d 1086 (D.C. 1989)), and a regulation prohibiting sitting or lying down combined with a police officer's warning that the defendant

individual is legally licensed to enter or remain. Even if a person apparently has obtained permission to enter, the means by which the person obtained permission may render an entry unlawful.[17] Or, a person may commit a burglary by unlawfully exceeding the scope of a permission that is limited in time, place, or purpose.[18] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraphs (a)(2), (b)(2) and (c)(2) also apply to the element "without a privilege or license," requiring the defendant to be at least aware to a practical certainty or consciously desire that his or her presence at the location is unlawful.

Sub-subparagraph (b)(2)(B)(i) and subparagraph (c)(2)(B) specify that buildings and business yards must not be open to the general public at the time of the burglary.[19] "Open to the general public" is defined in RCC § 22E-701 to mean no payment, membership, affiliation, appointment, or special permission is required to enter. A person does not commit a burglary by entering a public space with intent to commit a crime.[20]

Paragraph (a)(4) and sub-subparagraph (b)(2)(B)(ii) provide heightened liability where a defendant is reckless as to the dwelling or building being occupied. "Recklessly" is defined in RCC § 22E-206 and here requires that the accused consciously disregard a substantial risk that the location is occupied by someone other than a participant in the burglary at the moment he or she enters or begins to surreptitiously hide inside.[21] Paragraph (a)(4) and sub-subparagraph (b)(2)(B)(ii) further require that a non-participant, in fact, directly perceive the actor, by sight or sound or touch.[22] "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element and, applied here, indicates that the actor need not have any awareness as to being directly perceived during the burglary. Entering a dwelling undetected is punished as second

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was in violation of the regulation (*Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993)). However, additional specific factors that the DCCA has rejected includes: closing early the public buildings early in response to the defendant-protestors themselves (*Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988)), and an invalid arrest under a different statute (*Hasty v. United States*, 669 A.2d 127, 135 (D.C. 1995)).

[17] For example, a person who obtained permission by deceit may nevertheless commit a burglary. *See, e.g., McKinnon v. United States*, 644 A.2d 438, 440 (D.C. 1994).

[18] For example, a person who obtains permission to enter a home for the purpose of completing a repair may commit a burglary by instead (or additionally) entering another part of the home unrelated to the repair with intent to commit a crime.

[19] There are instances in which a person is unauthorized to enter a space that is open to the general public. In those cases, other liability may attach but burglary liability will not. Consider, for example, a person is barred from a grocery store for shoplifting and returns to the same grocery store, in violation of the bar notice, with intent to commit theft, during business hours. That person may have committed a trespass, but not a burglary. Consider also, a person is ordered to stay 100 yards away from a former intimate partner, sees the former partner at the grocery store, approaches her, and assaults her. That person may have committed contempt, but not a burglary.

[20] For example, a person who enters a store during business hours with intent to steal and does steal may commit theft, but not burglary. *See* RCC § 22E-2101. A person who enters a tavern with intent to fight and does fight may commit an assault but not a burglary. *See* RCC § 22E-1202.

[21] Where an occupant returns home after the burglary commences and the burglary is immediately discovered, the offense is punished as second degree burglary only, not first degree. However, where an occupant returns home after the burglary commences and the burglar remains surreptitiously on the premises, the offense is punished as first degree burglary.

[22] Where a building occupant observes a burglar remotely, through a camera system, the burglar commits a third degree burglary only, not second degree.

degree burglary, not as first degree. Entering a building undetected is punished as third degree burglary not as second degree.[23]

Subsection (d) provides the penalties for each grade of the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (d)(4) authorizes a penalty enhancement where the actor carries a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location. Paragraph (d)(4) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means that the actor is at least aware to a practical certainty that he or she holds or carries on the actor's person, while entering or surreptitiously remaining in the location, an item. Paragraph (d)(4) further requires that the item be, "in fact," a "dangerous weapon" or "imitation firearm" as those terms are defined in RCC § 22E-701. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here that the item is a "dangerous weapon" or "imitation firearm."

Subsection (e) cross-references applicable definitions in the RCC and defines the term "predicate property offense" to include specified offenses in Subtitle III of the RCC.

Relation to Current District Law. *The revised burglary statute clearly changes current District law in seven main ways.*

First, the revised burglary statute prohibits surreptitiously remaining in a specified location. Current D.C. Code § 22-801 punishes unlawfully entering but not unlawfully remaining. In contrast, the revised statute provides liability in instances where a person lawfully enters a location and then hides to facilitate commission of a crime at a later time.[24] This change eliminates an unnecessary gap in liability.

Second, the revised burglary statute requires fully entering or remaining. Although current D.C. Code § 22-801 does not define the term "enter," District case law that previously has held that the term includes entering with "any part of a person's body."[25] In contrast, the RCC punishes partial entry of the body or a camera, microphone, or other instrument held by an actor as trespass[26] but reserves the revised burglary statute's more severe penalties for instances in which the potential for harm to another person or property is greater. This change improves the organization and proportionality of the revised offenses.

Third, the revised burglary offense requires proof that the defendant's presence in the location is "without a privilege or license…under civil law"—i.e. trespassory. The current burglary statute does not require that the defendant's presence is otherwise unlawful.[27] The lack of a trespassory element in burglary leads to some counterintuitive

[23] Consider, for example, a person who enters the lobby and mailroom of a large building, undetected by an employee on the fifth floor.

[24] Consider, for example, a person enters a store during business hours and hides away, intending to steal from the store once it is closed.

[25] *Edelen v. United States*, 560 A.2d 527, 529 (D.C. 1989); *Davis v. United States*, 712 A.2d 482, 485 (D.C. 1998).

[26] RCC § 22E-2601.

[27] *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("It is thus apparent that since the District of Columbia first degree burglary statute makes it an offense to enter an occupied dwelling with intent to commit a crime therein and that such offense can be committed without a violation of the unlawful entry statute, the entry need not necessarily be against the will of the occupants."); *see also Spriggs v. United States*, 52 A.3d

outcomes. For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law, even though their presence in the specified location was invited. In contrast, the revised burglary statute requires that the defendant's presence in the location amount to a trespass. This change improves the clarity and proportionality of the revised offenses.

Fourth, the revised burglary offense includes three penalty gradations that distinguish liability for when the actor is directly perceived or goes undetected, and the nature of the location. The current burglary statute contains two gradations: first degree burglary, which punishes those who burgle a dwelling where another person is present;[28] and second degree burglary which punishes invasions of dwellings where no one is present, all other buildings, and the miscellaneous watercraft and railroad cars discussed below.[29] No distinction in liability is made under current law as to whether the actor encountered or was seen by anyone in the location. In contrast, the revised burglary offense has three gradations to better distinguish the degree of possible danger—though threats or violence are highly unusual[30] and not required—and the expectation of privacy that is violated. The topmost gradation applies to dwellings when the actor is reckless as to occupancy and is, in fact, directly perceived. The revised statute includes an intermediate gradation that applies in two circumstances: burglary of a dwelling that is unoccupied or when the burglary is not perceived,[31] and burglary of an occupied building (other than a dwelling) when the actor is reckless as to occupancy and is, in fact, directly perceived. The lowest gradation of the revised statute applies to any type of building or a business yard. This change improves the proportionality of the revised statutes.

Fifth, the first and second degrees of the revised burglary statute require recklessness as to a location being occupied at the time of the burglary[32] while knowledge is the required culpable mental state for all other elements of the offense besides an intent to commit a crime or the fact that the burglar was perceived. Current D.C. Code § 22-801 is silent as to applicable the culpable mental states required, other than "intent" (undefined) to commit another crime at the time of the entry.[33] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is

878 (D.C. 2012) (affirming a conviction for burglary of an apartment where the defendant was himself staying); *Bodrick v. United States,* 892 A.2d 1116, 1120 (D.C. 2006) (affirming a conviction for burglary of a marital home after a separation and court order to stay away).

[28] D.C. Code § 22-801(a).

[29] D.C. Code § 22-801(b).

[30] *See* Phillip M Kopp, *Is Burglary a Violent Crime? An Empirical Investigation of the Armed Career Criminal Act's Classification of Burglary as a Violent Felony*, Vol. 30(5) CRIM. JUSTICE POLICY REV. 663–680 (2016) (analysis of National Crime Victimization Survey data for the period of 2009 to 2014 showed that national incidence of actual violence or threats of violence during a burglary was 7.9%, with, at most, 2.7% of burglaries involving actual acts of violence).

[31] Or, an occupied dwelling, when the defendant is not reckless as to occupancy.

[32] A person who is not at least reckless as to the presence of others in a location remains liable for burglary but is subject to a lower penalty. This change improves the consistency and proportionality of the revised offenses.

[33] *See also* D.C. Crim. Jur. Instr. § 5.101.

a well-established practice in American jurisprudence.[34] A reckless culpable mental state is consistent with a wide range of penalty enhancements in the RCC related to the complainant's characteristics,[35] and has been recognized by some authorities as an appropriate minimal basis for liability.[36] This change improves the clarity and completeness of the revised offense.

Sixth, the revised burglary offense only protects a stable, watercraft, or railroad car if it is being used as a dwelling[37] or is affixed to land. The current second degree burglary statute expressly protects any "stable…steamboat, canalboat, vessel, or other watercraft, [or] railroad car."[38] In contrast, although the RCC punishes a trespass onto any land, watercraft, or motor vehicle,[39] it punishes only burglary of dwellings, buildings, or business yards. "Building" is broadly defined to include any "structure affixed to land that is designed to contain one or more natural persons."[40] Unlike trespass, burglary is an inchoate offense that, in practice, provides a location enhancement for confined places where a person may be surprised by a burglar and where a person there is a special expectation of privacy. This change improves the organization and proportionality of the revised offenses.

Seventh, the revised burglary offense requires an intent to commit one of several specific offenses in the revised code. Current D.C. Code § 22-801 refers broadly to "intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit *any* criminal offense" (emphasis added). However, a least one District Court opinion has interpreted this statutory language to be narrower,[41] requiring that the nature of the intended criminal offense be reasonably related to the sanctity of the place entered—usually a crime of violence against persons or a crime involving the taking or destruction of property.[42] The same court has declined to state that the District's burglary statute reaches an intent to commit *any* misdemeanor[43] and specifically held that trespass may not itself be the basis for a burglary conviction.[44] In

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[34] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).
[35] *See, e.g.,* RCC § 22E-1202. Assault.
[36] *See Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring in part and dissenting in part) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").
[37] E.g., a berth in an Amtrak sleeping car.
[38] D.C. Code § 22-801(b).
[39] RCC § 22E-2601(c).
[40] RCC § 22E-701.
[41] *United States v. Frank*, 225 F. Supp. 573 (D.D.C 1964) (dismissing a burglary charge premised on intent to operate a radio apparatus without a station license, in violation of the Federal Communications Act).
[42] *United States v. Frank*, 225 F. Supp. 573, 576 (D.D.C 1964) (rejecting a broader reading of "any criminal offense" that would criminalize as housebreaking entry of any room with an intent to violate the anti-trust laws or the regulations of the Securities & Exchange Commission, for instance).
[43] *See United States v. Fox*, 433 F.2d 1235, 1236-37 (D.C. Cir. 1970).
[44] *See United States v. Melton*, 491 F.2d 45, 47 (D.C. Cir. 1973) ("The element that distinguishes burglary from unlawful entry is the intent to commit a crime once unlawful entry has been accomplished. To allow proof of unlawful entry, ipso facto, to support a burglary charge is, in effect, to increase sixty-fold the statutory penalty for unlawful entry."); *Lee v. United States*, 37 App. D.C. 442, 445 (D.C. Cir. 1911) ("To constitute the crime of housebreaking, it is necessary to show an unlawful entry, with the intent to commit *some other* offense") (emphasis added).

contrast, the revised statute limits burglary to specified crimes. The terms "bodily injury," "sexual act," "sexual contact," and "property" are defined in RCC § 22E-701, consistent with the use of these terms in other parts of the revised code. This change improves the clarity, consistency, and proportionality of the revised offense.

Beyond these seven changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[45] Resolving this ambiguity, the revised statute uses the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, by use of the word "inside," the revised burglary statute clarifies that the defendant must intend to commit the offense within the trespassed location. Although this requirement does not appear in the statutory text, the DCCA has included this requirement in some of its recitations of burglary's elements.[46] The purpose is to exclude from liability instances where a person passes through one property *en route* to the property where he or she intends to commit the crime.[47]

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[45] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[46] *Shelton v. United States*, 505 A.2d 767, 769 (D.C. 1986) ("A conviction for burglary requires a finding that the defendant entered the premises having already formed the intent to commit a criminal offense inside."); *Marshall v. United States*, 623 A.2d 551, 557 (D.C. 1992) ("In order to prove armed first degree burglary, the government must establish beyond a reasonable doubt, an armed entry (by appellant or by a principal aided and abetted by appellant) into an occupied dwelling with the intent to commit a crime therein. The intent to commit the crime inside the premises must have been formed by the time of the entry.") (internal citations omitted); *Lee v. United States*, 699 A.2d 373, 383 (D.C. 1997) ("To prove burglary, the government must establish that the defendant entered the premises having already formed an intent to commit a crime therein.") (internal quotations and citations omitted).

[47] For example, imagine adjacent houses A and B. A burglar plans to enter House B to steal property; but to do so, she knows she must cross over the backyard of House A to get to House B. She does so. Absent

Second, the revised burglary statute specifies that participants in the crime cannot be the "other person" required in first degree and second degree burglary. The current statute is silent on this matter. The basis for treating burglaries of occupied places more seriously is the added danger and terror those occupants may experience. Such danger and terror are far less likely to occur if the other person present during the crime is an accomplice, co-conspirator, or aider and abettor.

Third, the revised burglary statute updates and modernizes the language of the offense in various other ways that do not change the scope of the offense. For instance, the revised offense simply eliminates a number of contradictory and redundant phrases.[48]

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the requirement that the burglar must intend to commit an offense "therein," it appears that the burglar has actually committed burglary twice, once as to House A and once as to House B. Although counterintuitive, the burglar did trespass with intent to commit an offense when she entered the backyard of House A. Under the revised statute, the burglar would only be guilty of a trespass as to House A, and a burglary as to House B.

[48] The phrases are, "in the nighttime or in the daytime," which is pure surplusage; "break and enter, or enter without breaking," which is also surplusage; "room used as a sleeping apartment in any building," which is covered by the RCC's definition of dwelling; and "with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto," which is surplusage to the phrase "with intent to commit any criminal offense therein." D.C. Code § 22-801. In the case of second-degree burglary, "bank, store, warehouse, shop, stable," are redundant because each is covered by the broader term "building."

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

Explanatory Note. *This section establishes the possession of tools to commit property crime offense for the Revised Criminal Code (RCC). The offense criminalizes possession of a tool designed or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door, with intent to use the tool to commit a property offense. The revised possession of tools to commit property crime statute replaces the possession of implements of crime[1] statute and a minimum statutory penalty for the offense[2] in the current D.C. Code.*

Paragraph (a)(1) specifies that the defendant must "possess" the prohibited item, a term defined at RCC § 22E-701. Paragraph (a)(1) also specifies the culpable mental state for paragraph (a)(1) of the offense to be knowledge, a term defined at RCC § 22E-206 to mean the defendant must be aware to a practical certainty that he possesses an item or items[3] that is a property crime tool. Paragraph (a)(1) specifies that the types of tools that are covered by the offense are limited to tools for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door.[4] The tools must be designed or specifically adapted for such use, and do not include unmodified, common, general use objects.[5]

Paragraph (a)(2) clarifies that the person must act "with intent to" use the tool to commit a District crime and that the crime must be Theft,[6] Unauthorized Use of Property,[7] Unauthorized Use of a Motor Vehicle,[8] Shoplifting,[9] Alteration of Motor Vehicle Identification Number,[10] Alteration of Bicycle Identification Number,[11] Arson,[12] Criminal Damage to Property,[13] Criminal Graffiti,[14] Trespass,[15] or Burglary.[16] "Intent" is a term defined at RCC § 22E-206 that here means the defendant was practically certain that he or she would use the tool to commit one of the specified crimes. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this

[1] D.C. Code § 22-2501.
[2] D.C. Code § 24-403.01(f)(3) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of . . . (3) Possession of the implements of a crime in violation of § 22-2501, occurring after the person has been convicted of a violation of that section or of a felony, either in the District of Columbia or in another jurisdiction.").
[3] Possession of multiple tools at a given time amounts to only one count of the possession of tools to commit property crime offense.
[4] *E.g.*, lock picks, lock shims, bolt-cutters, computer software to deactivate security systems, and specialty tools to slide under locked doors to open them from the inside.
[5] *E.g.*, an unmodified small (jeweler's) screwdriver would not be designed or specifically adapted for picking locks.
[6] RCC § 22E-2101.
[7] RCC § 22E-2102.
[8] RCC § 22E-2103.
[9] RCC § 22E-2301.
[10] RCC § 22E-2403.
[11] RCC § 22E-2404.
[12] RCC § 22E-2501.
[13] RCC § 22E-2503.
[14] RCC § 22E-2504.
[15] RCC § 22E-2601.
[16] RCC § 22E-2701.

phrase. It is not necessary to prove that the defendant actually used the tool to commit a crime, only that the defendant was practically certain that he or she would do so.

Subsection (b) specifies that attempted possession of tools to commit property crime is not an offense.

Subsection (c) establishes the penalty for this offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised possession of tools to commit property crime statute clearly changes current District law in five main ways.*

First, the revised statute changes the range of prohibited items by including tools that are designed or specifically adapted for "picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door" and by eliminating tools for picking pockets. The current statute only covers tools "for picking locks or pockets."[17] District case law has explicitly held that bolt-cutters, for example, are not tools covered by the current statute because they would destroy, not pick, a lock.[18] In contrast, the revised statute broadens the scope of the statute to include tools designed or specifically adapted for other purposes, including "cutting chains," which likely would include bolt-cutters. Such tools may commonly be used in gaining access to an object or location to commit a property crime. The revised statute reduces unnecessary gaps in the existing offense.

Second, the revised offense limits the offense to tools "designed or specifically adapted for" the specified purposes. The current statute is silent as to whether the tool must be fashioned in a manner suited for the specified purposes of picking locks, etc. In contrast, the revised statute no longer covers objects that are not designed or specifically adapted for one of the stated purposes. This change eliminates liability for many common items carried by citizens that could be used for—but are not designed or specifically adapted for—picking locks or pockets.[19] This change clarifies and improves the proportionality of the revised offense.

Third, the revised statute eliminates the repeat offender penalty provision in the current statutes consistent with other nonviolent revised offenses in the RCC. In current law, the offense ordinarily is punishable by a maximum term of imprisonment of 180 days and a maximum fine of $1,000.[20] However, if the defendant has ever been previously convicted of the offense, or of any felony, the offense is punishable by a minimum term of imprisonment of one year, a maximum term of imprisonment of five years, and a maximum fine of $12,500.[21] By contrast, the revised offense is subject to a single, standard penalty classification. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statutes.

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[17] D.C. Code § 22-2501.

[18] *In re J.W.*, 100 A.3d 1091, 1092-94 (D.C. 2014) (holding that bolt-cutters do not constitute tools for "picking" locks or pockets).

[19] *E.g.*, nail files, nail clippers, or pocket knives.

[20] D.C. Code § 22-2501.

[21] D.C. Code §§ 22-2501; 24-403.01(f)(3).

Fourth, the revised offense bars any attempt liability. Under current law, possession of implements of crime is subject to the general attempt statute.[22] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to revised possession of tools to commit property crime, that person has committed no offense under the revised code. Completed possession of tools to commit property crime is already an inchoate crime, closely related to an attempted form of theft or burglary, for which the RCC provides liability. This change improves the proportionality of the revised statute.

Fifth, the revised offense limits the target crimes within the scope of the revised statute to District crimes involving the trespass, misuse, taking, or damage of property. The District's current possession of implements of a crime statute refers broadly to "a crime."[23] In contrast, the revised offense requires an intent to commit a broad range of specified District property crimes. The revised statute consequently excludes the use of such tools to commit assault or drug crimes, or exclusively federal[24] crimes. By requiring intent to commit a property crime, the revised offense punishes only intended conduct that, by its nature, is logically related to the use of the tools that are within the scope of the statute. Possession[25] and use[26] of such tools as dangerous weapons to commit offenses against persons are addressed in other sections of the RCC. This change clarifies and improves the proportionality of the revised offense.

Beyond these five changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The definition of "person" in RCC § 22E-701 is applicable to all RCC property offenses and provisions, including the definitions of "actor," "complainant," "owner," and "property of another," which in turn rely on the definition of "person" in the RCC property offenses. The definition of "person" in RCC § 22E-701 establishes that "person" categorically includes both natural persons and non-human legal entities such as trusts, estates, companies, etc. The RCC definition of "person" is substantively identical to the definition of "person" in current D.C. Code § 22-3201(2A), which is limited to the Theft, Fraud, Stolen Property, Forgery, and Extortion offenses and other provisions in Chapter 32 of the current D.C. Code Title 22. The current D.C. Code § 22-3201(2A) definition of "person" does not apply to property offenses codified outside of current Chapter 32 of Title 22 despite a similar scope of conduct.[27] Resolving this ambiguity, the revised statute uses

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[22] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.").

[23] D.C. Code § 22-2501.

[24] *See, e.g., U.S. v. Frank*, 225 F. Supp. 573 (D.D.C. 1964) (Construing "intent…to commit any criminal offense" in the District's burglary statute to not include an intent to violate the Federal Communications Act insufficient to support burglary prosecution.).

[25] See offenses under Chapter 41 of Title 22E in the RCC.

[26] RCC § 22E-1202.

[27] It should be noted that there is a definition of "person" in D.C. Code § 45-604 that applies to the current D.C. Code. *See* D.C. Code §§ 45-601 (rules of interpretation stating that "[i]n the interpretation and construction of this Code the following rules shall be observed."); 45-604 (stating that "person" "shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office,

the definition of "person" in RCC § 22E-701. This change improves the clarity, consistency, and proportionality of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised offense requires a culpable mental state of knowledge for paragraph (a)(1). The current statute does not specify a culpable mental state for these elements and no case law exists on point. However, given the current and revised offenses' requirements that the defendant have an intent to commit a crime with the tool,[28] a knowing culpable mental state as to the facts that the defendant possessed a relevant kind of tool appears appropriate. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[29] Requiring a knowing culpable mental state also makes the revised possession of tools to commit property crime offense consistent with the revised burglary statute and other property offenses, which generally require that the defendant act knowingly with respect to the elements of the offense.[30] This change improves the clarity and consistency of the revised statute.

unless the context shows that such words were intended to be used in a more limited sense."). However, this definition is not dispositive and in some D.C. Code property offenses outside Chapter 32 of Title 22, the term "person" is not used at all (e.g., the current malicious destruction of property statute, D.C. Code § 22-303, does not use the term "person," instead referring to "whoever").

[28] D.C. Code § 22-2501 ("No person shall have in his or her possession [an implement of crime] with the intent to use [the implement] to commit a crime.").

[29] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citations omitted.)).

[30] *See, e.g.*, RCC § 22E-2702.

COMMENTARY:
SUBTITLE IV. OFFENSES AGAINST GOVERNMENT OPERATION

RCC § 22E-3201. Impersonation of an Official.

Explanatory Note. *This section establishes the impersonation of an official offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-1404-1406 (Falsely impersonating public officer or minister, false personation of inspector of departments of District, and false personation of police officer, respectively). The revised statute also replaces D.C. Code § 22-1409 (Use of official insignia; penalty for unauthorized use) decriminalizing under District law conduct associated with the misuse of official insignia that does not satisfy the requirements for impersonation of an official or a more general property crime.*

Paragraph (a)(1) specifies that the actor must engage in conduct with intent to deceive another as to the actor's lawful authority and with intent to cause harm to another or that any person receive a personal benefit.

In subparagraph (a)(1)(A), "deceive" is a defined term that means: "[c]reating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions; [p]reventing another person from acquiring material information; [and], failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship."[1] "Intent" is a defined term in RCC § 22E-206 that here means the actor is practically certain that another person would be deceived as to the actor's authority. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor successfully deceives another person, only that the actor believes to a practical certainty that another person will be deceived as to the actor's lawful authority.

In subparagraph (a)(1)(B), per the rules of interpretation in RCC § 22E-207, the culpable mental state "with intent" also applies to whether the actor intends to cause harm to another person or believes that any person will receive a personal benefit. It is not necessary to prove that the actor or another actually receives a benefit or causes harm to another, only that the actor believes to a practical certainty that they will harm another person or any person will receive such a personal benefit. The personal benefit need not be monetary or material in nature. [2]

Paragraph (a)(2) specifies that to be criminally liable for impersonation of an official, the actor must knowingly represent themselves to currently hold lawful authority as a person in a specialized role, and they must know that such a representation is false. The term "knowingly" is defined in RCC § 22E-206, and applied here means that the actor must be practically certain that he or she is representing him- or herself to hold lawful authority as a person in one or more of the enumerated roles listed in subparagraphs (a)(2)(A)-(H) and must be practically certain that such a representation is false.

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[1] RCC § 22E-701.

[2] *Gary v. United States*, 955 A.2d 152, 155 (D.C. 2008).

Subparagraphs (a)(2)(A)-(a)(2)(H) list eight roles that an actor may be liable for falsely claiming the lawful authority of under the revised offense. Subparagraph (a)(2)(A) refers to a judge of a federal or local court in the District of Columbia, subparagraph (a)(2)(B) refers to a prosecutor for the United States Attorney for the District of Columbia or the Attorney General for the District of Columbia, and subparagraph (a)(2)(C) refers to a notary public. Subparagraph (a)(2)(D) refers to a "law enforcement officer,"[3] subparagraph (a)(2)(E) refers to a "public safety employee,"[4] and subparagraph (a)(2)(F) refers to a "District official."[5] Subparagraph (a)(2)(G) refers to a "District employee with power to enforce District laws or regulations." This language includes the role of a District of Columbia inspector for any department of government.[6] Subparagraph (a)(2)(H) refers to a "person authorized to solemnize marriage."[7]

Paragraph (a)(3) specifies that, in addition to the requirements outlined in paragraphs (a)(1) and (a)(2), the actor must perform the duty, exercise the authority, or attempt to perform the duty or exercise the authority associated with the role listed in subparagraphs (a)(2)(A)-(H). Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "knowingly" also applies to whether the actor performs the duty, exercises the authority, or attempts to do so related to a role listed in subparagraphs (a)(2)(A)-(H).

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[3] RCC § 22E-701 ("'Law enforcement officer' means:
(A) A sworn member, officer, reserve officer, or designated civilian employee of the Metropolitan Police Department, including any reserve officer or designated civilian employee of the Metropolitan Police Department;
(B) A sworn member or officer of the District of Columbia Protective Services;
(C) A licensed special police officer;
(D) The Director, deputy directors, officers, or employees of the District of Columbia Department of Corrections;
(E) Any officer or employee of the government of the District of Columbia charged with supervision of juveniles being confined pursuant to law in any facility of the District of Columbia regardless of whether such institution or facility is located within the District;
(F) Any probation, parole, supervised release, community supervision, or pretrial services officer or employee of the Department of Youth Rehabilitation Services, the Family Court Social Services Division of the Superior Court, the Court Services and Offender Supervision Agency, or the Pretrial Services Agency;
(G) Metro Transit police officers; and
(H) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A)-(G) of this paragraph, including state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.").

[4] RCC § 22E-701 ("'Public safety employee' means: (A) a District of Columbia firefighter, emergency medical technician/ paramedic, emergency medical technician/intermediate paramedic, or emergency medical technician; (B) any investigator, vehicle inspection officer as defined in D.C. Code § 50-301.03(30B), or code inspector, employed by the government of the District of Columbia; and, (C) any federal, state, county, or municipal officer performing functions comparable to those performed by the District of Columbia employees described in paragraph (A) and paragraph (B).")

[5] RCC § 22E-701 ("'District official' has the same meaning as 'public official' in D.C. Code § 1-1161.01(47)(A) - (H).").

[6] See D.C. Code § 22-1405 (referring to "an inspector of any department of the District government").

[7] See D.C. Code § 46-406.

Subsection (b) specifies the requirements of impersonation of an official in the second degree. Paragraphs (b)(1) and (b)(2) are identical to paragraphs (a)(1) and (a)(2). The second degree differs from the first degree of the offense only in its omission of the requirements in paragraph (a)(3); to commit the offense in the second degree, the actor need not perform the duty, exercise the authority, or attempt to do so related to a role listed in subparagraph (b)(2)(A)-(H).

Subsection (c) specifies that the Metropolitan Police Department and the Fire and Emergency Medical Services Department have the sole ownership of their official uniform insignia. This subsection is a civil provision and does not itself specify a criminal offense, although a violation of these ownership rights may constitute another crime under District or federal law.[8]

Subsection (d) specifies the penalties for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised impersonation of an official statute clearly changes current District law in four main ways.*

First, the revised statute has two gradations distinguished by whether or not the actor performed the duty or exercised the authority of a specified official, or attempted to do so. Current D.C. Code § 22-1404 (falsely impersonating public officer or minister) requires that the actor "attempt[] to perform the duty or exercise the authority pertaining to any such office or character," but the offense has no other gradation for when an actor does not make such an attempt. Other current false personation statutes (D.C. Code § 22-1405, § 22-1406) only require false representation as being an official, no actual or attempted use official powers, and have just one gradation. In contrast, the revised statute codifies a first degree gradation where there is actual or attempted performance or exercise of the duty or authority of the impersonated official, and a second degree gradation for false representation where there is merely impersonation but no attempt to perform or exercise the duty or authority of the impersonated official. This change improves the consistency and proportionality of the revised statute.

Second, the revised statute prohibits and penalizes impersonation of a District inspector the same as impersonation of other specified officials. Current D.C. Code § 22–1405 provides that falsely representing oneself as an "inspector of any department of the District government" is a crime punishable by a specified fine (with a first offense differing from the standard schedule of fines in the D.C. Code), 6 months imprisonment, or both.[9]

[8] For example, such a violation may constitute a federal crime for copyright or trademark infringement.

[9] D.C. Code § 22–1405 ("It shall be unlawful for any person in the District of Columbia to falsely represent himself or herself as being an inspector of the Department of Human Services of said District, or an inspector of any department of the District government; and any person so offending shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court of the District of Columbia shall be punished by a fine of not less than $10 nor more than $50 for the 1st offense, and for each subsequent offense by a fine of not less than $50 and not more than the amount set forth in § 22-3571.01, or imprisonment in the Jail of the District not exceeding 6 months, or both, in the discretion of the court.").

Current D.C. Code § 22–1404 provides in relevant part that falsely representing oneself as a "public officer" and attempting to perform the duty or exercise the authority of such a position is a crime punishable by a fine, one to three years imprisonment, or both.[10] There is no case law on the scope of the phrase "inspector of any department of the District government" under D.C. Code § 22–1405 or the scope of the phrase "public officer"[11] under D.C. Code § 22–1404. Per the current general attempt statute in D.C. Code § 22–1803, an attempt to commit a crime under D.C. Code § 22–1404 by impersonating a "public official" and attempting to exercise that authority is punishable by a maximum 180 days imprisonment. In contrast, the revised statute specifies that impersonation of a District employee with power to enforce District laws or regulations is punishable the same as other specified officials. First degree impersonation of an official provides higher penalties where there is not only a false representation but an attempt to exercise the authority or duty to enforce District laws or regulations, consistent with an interpretation that the current D.C. Code § 22–1404 term "public officer" includes District inspectors.[12] Second degree impersonation of an official punishes false representation as a District employee with power to enforce District laws or regulations the same as inchoate violations of D.C. Code § 22–1404 for impersonating other officials.[13] This change clarifies and improves the consistency and proportionality of the revised statutes.

Third, the revised statute codifies as an element of the offense that the actor engaged in the conduct either with intent to harm another person or that anyone gain a personal benefit. Current D.C. Code § 22-1404, § 22-1405, and § 22-1409 make no mention of a personal benefit. D.C. Code § 22-1406 requires that an actor impersonating a police officer do so "with a fraudulent design," and case law has construed this phrase to broadly mean

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[10] D.C. Code § 22–1404 ("Whoever falsely represents himself or herself to be a judge of the Superior Court of the District of Columbia, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than 1 year nor more than 3 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[11] The reference to "public officer" appears in the 1901 codification of this offense. *See* An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321) ("SEC. 860. Whoever falsely represents himself to be a justice of the peace, notary public, police officer, constable, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any of such officers after his appointment or commission has expired or he has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than one year nor more than three years.").

[12] Notably federal law does not differentiate punishment for an "officer" and other employees attempting to exercise official authority. *See* 18 U.S. Code § 912 ("Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.").

[13] Compare the 180-day (non-jury demandable) penalty for an attempted violation of D.C. Code § 22–1404 (requiring not only a false representation but an attempt to exercise the authority of the false role) with the 6-month (jury demandable) penalty for a violation of D.C. Code § 22–1405.

gaining any advantage over another.[14] In contrast, the RCC provides liability for falsely impersonating an official to cause harm to another or that anyone receive a personal benefit. Deliberately harming another through the impersonation of an official appears to be at least as blameworthy as gaining a benefit, and captures instances of impersonation not within the scope of the current statutes. This change improves the clarity and consistency of the revised statutes and may reduce an unnecessary gap in liability.

Fourth, the revised statute eliminates as a separate criminal offense with a distinct penalty the misuse of official uniform insignia of the Metropolitan Police Department and the Fire and Emergency Medical Services Department. Current D.C. Code § 22–1409(b) criminalizes a person who "for any reason, makes or attempts to make unauthorized use of" an "official insignia" of the Metropolitan Police Department (MPD) or the Fire and Emergency Medical Services Department (FEMS)."[15] The term "official insignia" is not defined and there is no case law regarding that term or the scope of the phrase, "for any reason, makes or attempts to make unauthorized use of." Legislative history, however, indicates that the offense was intended to proscribe people misrepresenting themselves (or being an accomplice to another person misrepresenting themselves) as an MPD or FEMS employee through the use of official badges.[16] In contrast, the revised statute does not separately criminalize misuse of MPD and FEMS insignia. For misuses of insignia to impersonate MPD or FEMS, the revised statute provides liability, consistent with the apparent legislative intent for the offense.[17] For other misuses of insignia that involve mere property crime rather than impersonation, federal copyright[18] and trademark[19] laws may preempt part or all of current D.C. Code § 22–1409(b) or other RCC provisions concerning

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[14] *See Gary v. United States*, 955 A.2d 152, 155 (D.C. 2008) ("As to the second element, we have said that "'fraud' is a 'generic term which embraces all the multifarious means ... resorted to by one individual to gain advantage over another by false suggestions or by suppression of the truth.' " Thus, to prove the defendant's fraudulent design, there must be evidence that the defendant impersonated a police officer to deceive another in order to gain some advantage thereby. But the advantage need not be monetary or even material in nature.").

[15] D.C. Code § 22–1409(b) ("Any person who, for any reason, makes or attempts to make unauthorized use of, or aids or attempts to aid another person in the unauthorized use or attempted unauthorized use of the official badges, patches, emblems, copyrights, descriptive or designated marks, or other official insignia of the Metropolitan Police Department or the Fire and Emergency Medical Services Department shall, upon conviction, be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than one year, or both.").

[16] *See* Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002" (April 4, 2002) at 23-24 ("Title VII, the 'Badge Protection Act of 2002,' gives the MPD and FEMS Department the sole and exclusive rights to have and use, in carrying out their respective missions, their official badges, patches, emblems, copyrights, descriptive or designating marks, or other insignia and makes it a misdemeanor offense for persons to misuse such insignia in any way. This title is intended to deter and penalize individuals from misrepresenting themselves as an MPD or FEMS employee through the use of official badges. This language implicates, but is not limited to, potential uses to carry out terrorist acts, such as using insignia to gain access to an area or to avoid going through security screenings.").

[17] Unlike the current D.C. Code § 22-1404 and § 22-1406 which do not clearly cover FEMS, the revised statute broadly provides liability for any means of falsely representing oneself as possessing lawful authority as MPD or FEMS personnel, whether through use of insignia, oral communications, or other conduct.

[18] *See* 17 U.S.C. § 301(c).

[19] *See* 15 U.S.C. 1127.

theft[20] and unauthorized use of property[21] may be applicable. This change improves the clarity, consistency, and possibly the constitutionality[22] of the revised statutes.

Beyond these four changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute codifies a culpable mental state requirement of "with intent to" for the elements of deceiving and receiving a benefit or causing harm to another, and a culpable mental state requirement of "knowingly" as to the elements of falsely representing themselves to currently hold a specified type of lawful authority. Current D.C. Code § 22-1404 (falsely impersonating public officer or minister) specifies a "knowingly" element for one phrase in that offense about attempting to use official power after expiration of an appointment[23] and current D.C. Code § 22-1405 (false impersonation of a police officer) requires proof that the false representation be conducted "with a fraudulent design," although case law[24] appears to treat this element as a kind of motive (personal gain) rather than a culpable mental state. However, the current D.C. Code false impersonation statutes are otherwise silent as to culpable mental state requirements, and no DCCA case law exists on point. Resolving this ambiguity, the revised impersonation of an official statute requires "with intent to" for the elements of deceiving and receiving a benefit or causing harm to another, and a culpable mental state requirement of "knowingly" as to the elements of falsely representing themselves to currently hold a specified type of lawful authority. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American

[20] RCC § 22E-2101.
[21] RCC § 22E-2102.
[22] Federal preemption is ultimately based on the Supremacy Clause of the U.S. Constitution, Article VI, cl.2. In addition, however, broadly criminalizing "misuse" of insignia without time, place, and manner restrictions may violate First Amendment protections (and fair use exceptions to trademark and copyright based on the First Amendment). The legislative history indicates that potential First Amendment concerns with the legislation were known to the Council. *See* Committee on the Judiciary Report on Bill 14-373, the "Omnibus Anti-Terrorism Act of 2002" (April 4, 2002) at 24 ("The Committee inserted the word "official" into the language contained in Title VII to avoid encompassing the recreational use of the name or insignia of the agencies for the purpose of showing support for those agencies. For example, the intent of the law is not to penalize an individual wearing a tee shirt or baseball cap with the initials 'MPDC' emblazoned on them. The Committee believes that the language 'Any person who makes unauthorized use of or attempts to make unauthorized use of or attempts to aid another person in the unauthorized use or attempted unauthorized use' also insures that the law is only applicable to individuals who actively use the badges or insignia for an unauthorized purpose.").
[23] D.C. Code 22-1404 ("…or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office, shall suffer imprisonment…").
[24] *See Gary v. United States*, 955 A.2d 152, 155 (D.C. 2008) ("As to the second element, we have said that " 'fraud' is a 'generic term which embraces all the multifarious means ... resorted to by one individual to gain advantage over another by false suggestions or by suppression of the truth.'" Thus, to prove the defendant's fraudulent design, there must be evidence that the defendant impersonated a police officer to deceive another in order to gain some advantage thereby. But the advantage need not be monetary or even material in nature.").

jurisprudence.[25] The "with intent" requirement substantively matches a knowledge requirement except that the object of the phrase need not be separately proven.[26] This change improves the clarity and consistency of the revised statutes.

Second, the revised statute specifically includes within the scope of the offense impersonation of a judge in a federal or local court in the District, District prosecutors, a wide array of persons exercising law enforcement authority besides a "police officer," fire fighters, and paramedics. Current D.C. Code §22-1404 specifically refers only to "a judge of the Superior Court of the District of Columbia, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage," without definitions of these terms. There is no case law defining the scope of "public officer" or other terms in the statute. Current § 22-1405 refers only to an "inspector of the Department of Human Services of said District, or an inspector of any department of the District government," and § 22-1406 specifically refers to a "member of the police force." Again, none of these terms, including are defined in case law. Resolving this ambiguity around the scope of the terms "police officer," "public officer," and "inspector of any department of the District government," the revised statute specifies that the covered roles include all local and federal judges in courts in the District, District prosecutors, an array of persons besides Metropolitan Police Department (MPD) officers who exercise law enforcement authority, fire fighters, and paramedics. There is no apparent reason for excluding impersonation of a sworn member or officer of the District of Columbia Protective Services or other law enforcement agency, or other persons such as firefighters and paramedics who exercise extraordinary powers under color of law from the scope of the statute. This change improves the clarity and consistency of the revised statutes and may reduce an unnecessary gap in liability.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

To clarify the applicability of the revised statute to persons who previously, but no longer, hold authority, the revised statute replaces the phrase in D.C. Code 22-1404 "or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office," with "currently hold lawful authority as." It may not be necessary to specifically refer to a person who knowingly seeks to exercise lawful authority after the expiration of their authority, as that special instance appears to be already included in the plain language of both the current D.C. Code 22-1404 and the revised statute referring to false representation. However, for clarity, the revised statute continues to specify the requirement that the actor falsely represent themselves to *currently* hold lawful authority.

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[25] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted.)").
[26] RCC § 22E-205.

RCC § 22E-3202. Misrepresentation as a District of Columbia Entity.

Explanatory Note. *The RCC misrepresentation as a District of Columbia entity offense prohibits engaging in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services and using the name of the District of Columbia in a business communication with intent to deceive another as to the actor's lawful authority. The RCC misrepresentation as a District of Columbia entity offense replaces the current D.C. Code statutory provisions concerning the crime of Use of "District of Columbia" by Certain Persons.*[1]

Subsection (a) specifies the prohibited conduct for the revised misrepresentation as a District of Columbia entity statute. Paragraph (a)(1) specifies that the actor must knowingly engage in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services, and knowingly use the words "District of Columbia," "District," or "D.C.," in the business name or in a business communication, written or oral. "Knowingly" is a defined term in RCC § 22E-206, and here means the actor must be practically certain that the actor is engaging in business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services, and is also practically certain that the actor is using the words "District of Columbia," "District," or "D.C.". The actor's use of the words "District of Columbia," "District," or "D.C.," may be oral or in writing.

Paragraph (a)(2) requires that the conduct outlined in paragraph (a)(1) be committed with intent to deceive any other person as to the actor's lawful authority as a District of Columbia entity, and the actor must intend to receive a personal or business benefit of any kind. "Intent" is a defined term in RCC § 22E-206, and here means that the actor was practically certain that his or her conduct as outlined in subsections (a)(1)(A) and (a)(1)(B) would cause someone to be deceived as to the actor's authority as a District of Columbia entity and result in a personal or business benefit for the actor. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that deception or a personal or business benefit, in fact, occurred, just that the actor believed to a practical certainty that the deception or personal or business benefit would result from his or her conduct.

Paragraph (a)(3) specifies that misrepresentation as a District of Columbia entity requires that, in fact, the name or communication would cause a reasonable person in the complainant's circumstances to believe that the actor is a District of Columbia government entity or representative. The use of "in fact" indicates that no culpable mental state is required as to whether the misrepresentation would cause a reasonable person in the complainant's circumstances to believe that the actor is a District of Columbia government entity or representative. However, it must be proven that the communication would cause

[1] D.C. Code §§ 22-3401-3403.

a reasonable person in the complainant's circumstances to believe the misrepresentation that the actor is a representative of a District of Columbia government entity.

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC and specifies that in this section the term "actor" includes a legal entity that is not a natural person. This definition of "actor" differs from the RCC general definition of an "actor" which, through its use of the defined term "person," does not specify whether or not non-natural persons are included for this or other offenses in Subtitle IV.[2]

Relation to Current District Law. *The revised misrepresentation as a District of Columbia entity statute changes current District law in two main ways.*

First, the revised misrepresentation as a District of Columbia entity offense requires that the actor's use of the words "District of Columbia," "District," or "D.C." be done with the intent to deceive another as to the actor's lawful authority as a District of Columbia entity and receive a personal or business benefit. The current Use of "District of Columbia" by Certain Persons statute does not require an intent to deceive or to receive a personal or business benefit, and only requires that the use be "in such manner as reasonably to convey the impression or belief that such business is a department, agency, bureau, or instrumentality of the municipal government of the District of Columbia or in any manner represents the District of Columbia."[3] There is no case law on point. In contrast, the revised statute requires that the actor's use of "District of Columbia," "District," or "D.C." be with intent to deceive another as to the actor's lawful authority as a District of Columbia entity and receive a personal or business benefit. The revised statute eliminates criminal liability for actors whose communications are unintentionally misleading and there is no intent to deceive or receive a benefit. Requiring that the actor be practically certain that the use of the District's name will deceive another person and provide a benefit is similar to a knowledge requirement except that deception or benefit need not be proven. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense

[2] D.C. Code § 45-604 broadly states that, in interpreting the D.C. Code: "The word "person" shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense." The definition of "actor" in this section more clearly specifies that the crime of misrepresentation as a District of Columbia entity may be committed by non-natural Second, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of intent, requiring that the actor use of the words "District of Columbia", "District", or "D.C." with the intent to deceive and receive a benefit. This is in contrast to the current Use of "District of Columbia" by Certain Persons statute does not specify a culpable mental state current Use of "District of Columbia" by Certain Persons statute does not specify a culpable mental state, which allows for criminal culpability for actors whose communications may be inadvertently misleading but where there is no intent to deceive or receive a benefit.

[3] D.C. Code § 22–3401.

that make otherwise legal conduct illegal is a generally accepted legal principle.[4] Commercial speech is protected under the First Amendment unless there is a recognized exception to such rights.[5] However, requiring as an element of the offense an intent to deceive another by the commercial speech, for a personal or business benefit, makes the revised statute similar to fraud and other deceptive practices crimes that are not subject to First Amendment protections.[6] The revised statute's language regarding deception and benefit is also consistent with language RCC § 22E-2201, fraud, and RCC § 22E-3201, impersonation of an official offenses. This change improves the clarity, consistency, and completeness of the revised offenses, and may improve the constitutionality of the statute.

Second, the revised statute applies to actors engaged in the collection of non-private debts or obligations. The current Use of "District of Columbia" by Certain Persons statute only applies to actors engaged in the collection of "private debts or obligations."[7] In contrast, the misrepresentation as a District of Columbia entity offense expands criminal liability to include actors engaged in the collection of debts or obligations, both private and non-private.[8] When undertaken with intent to deceive as to the actor's lawful authority, it is not clear why the collection of private debt should be treated differently than public debt. This change may reduce an unnecessary gap in liability in the revised statutes.

Beyond these two substantive changes to current District law, three other aspects of the revised misrepresentation as a District of Columbia entity offense may be viewed as substantive changes of District law.

First, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of knowingly as to the nature of the actor's conduct and the use of the words "District of Columbia," "District," or "D.C." in the business name or in a business communication. The current Use of "District of Columbia" by Certain Persons statute does not specify a culpable mental state as to the elements of the offense, and there is no case law on point. To resolve this ambiguity, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of "knowingly," using the RCC definition of that term. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[9] This change improves the clarity, consistency, and completeness of the revised offenses.

Second, the revised misrepresentation as a District of Columbia entity offense does not limit the type of communication that can fall under the statute to writings. The current

[4] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").
[5] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).
[6] *Id.* at 638.
[7] D.C. Code § 22–3401.
[8] For example, a private collection agency engaged in the collection of federal student loan payments may be liable under the revised statute if other elements of the offense are satisfied.
[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

Use of "District of Columbia" by Certain Persons statute refers to "use as part of the name of such business, or employ in any communication, correspondence, notice, advertisement, circular, or other writing or publication, the words "District of Columbia"…" in which it is unclear whether the phrase "or other writing or publication" is a limitation on the prior list of nouns such as "communication." There is no case law on point. To resolve this ambiguity, the revised statute refers broadly to any reference to the District in a business name or business communication, without limit to written or published communications. It is not clear that the harm addressed by the offense differs significantly depending on whether the misrepresentation is oral or written or published. This change improves the clarity of the revised statute and may reduce an unnecessary gap in liability.

Third, the revised statute eliminates specific reference to an actor who is "aiding" in debt collection. The current statute specifically includes liability for a person "aiding in the collection of private debts or obligations." [10] The meaning of "aiding" is unclear, however, and there is no case law on point. To resolve this ambiguity, the revised statute does not refer to "aiding," and instead relies on the RCC § 22E-210 provisions specifying the requirements and penalty for accomplice liability when a person purposely assists in the planning or commission of conduct constituting an offense. This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The revised statute eliminates specific reference to the offense covering "any emblem or insignia utilizing any of the said terms as part of its design."[11] Such conduct is already covered by the current and revised statutes' reference to any use of the terms in a business name or business communication, whether in an emblem or otherwise.

[10] D.C. Code § 22–3401.
[11] D.C. Code § 22–3401.

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

Explanatory Note. *This section establishes the escape from a correctional facility or officer offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits knowingly absconding from the lawful official custody of a government actor or agency. It replaces D.C. Code § 22-2601, Escape from institution or officer, and D.C. Code § 10-509.01a,[1] Escape from juvenile facilities.*

Subsection (a) establishes the first degree gradation of escape, which prohibits leaving confinement in a correctional facility, secure juvenile detention facility, or cellblock operated by the United States Marshals Service without effective consent. "Correctional facility" is defined in RCC § 22E-701 to mean any building or building grounds located in the District of Columbia operated by the Department of Corrections for the secure confinement of persons charged with or convicted of a criminal offense.[2] The word "secure" makes clear that placements in an unsecured inpatient drug treatment program or independent living program are excluded. "Secure juvenile detention facility" is defined in RCC § 22E-701 to mean any building or building grounds, whether located in the District of Columbia or elsewhere, operated by the Department of Youth Rehabilitation Services for the secure confinement of persons committed to the Department of Youth Rehabilitation Services.[3] The word "secure" makes clear that a placement at home or in a community-based residential facility is excluded.[4] These definitions do not include facilities such as behavioral health hospitals that are principally concerned with providing medical care. Nor do they include buildings used by private businesses to detain suspected criminals.[5] The term "building" is also defined in RCC § 22E-701 and means "a structure affixed to land that is designed to contain one or more natural persons." "Building grounds" refers to the area of land occupied by the correctional facility and its yard and outbuildings, with a clearly identified perimeter.[6]

The phrase "in fact" in paragraph (a)(1) indicates that the accused is strictly liable[7] with respect to whether he or she was under a court order at the time the elements of the escape offense were completed.[8] The term "court order" includes any judicial directive,

[1] The penalty for this offense appears in D.C. Code § 10-509.03.
[2] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF"). The term does not include locations operated by the Metropolitan Police Department or the United States Marshals Service. However, escaping from the lawful official custody of such an agency may be punished as second degree escape.
[3] E.g., Youth Services Center (located inside the District of Columbia), New Beginnings Youth Development Center (located outside the District of Columbia).
[4] Community-based residential facilities include group homes, therapeutic foster care, extended family homes, and independent living programs.
[5] For example, a person who runs from the booking room of a retail store does not commit an escape under RCC § 22E-3401(a)(1)(A).
[6] *See, e.g.*, D.C. Code § 22-2603.01.
[7] RCC § 22E-207.
[8] A good faith belief that the order was expired or vacated is not a defense.

oral or written. The word "authorizing" makes clear that an order permitting a custodial agency[9] to choose either a secured or unsecured residential placement is sufficient.[10]

Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that they do not have the effective consent of the Mayor, the Director of the Department of Corrections, the Director of the Department of Youth Rehabilitation Services, or the United States Marshals Service to leave.[11] A person leaves a facility when they depart from the building grounds.[12] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[13] "Consent" is also defined in RCC § 22E-701.

Subsection (b) establishes the second degree gradation of escape, which prohibits escaping the lawful official custody of a law enforcement officer. "Official custody" is defined in RCC § 22E-701 to mean full submission after an arrest or substantial physical restraint after an arrest.[14] For example, official custody may include being detained by an officer on the street, being securely confined to a holding cell, or being securely transported to a court appearance or medical facility.[15]

The phrase "in fact" in paragraph (b)(1) indicates that the accused is strictly liable[16] with respect to whether they were in lawful official custody at the time the elements of the escape offense were completed. For liability to attach, the official custody must, in fact, be lawful. Where a law enforcement officer has detained a person without requisite cause or authority, in violation of any federal or District law, the person is not in lawful official custody. The term "law enforcement officer" is defined in RCC § 22E-701 and includes persons with limited arrest powers, such as special police officers[17] and community supervision officers acting in their official capacity,[18] but excludes private actors who are

[9] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.
[10] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.
[11] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the warden or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.
[12] A person who leaves the building but is apprehended on building grounds does not commit a completed escape from a correctional facility but may have committed an attempted escape.
[13] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.
[14] *Davis v. United States*, 166 A.3d 944, 948 (D.C. 2017). Efforts to forcibly evade arrest may create liability for resisting arrest, but not escape. *See* D.C. Code § 22-405.01.
[15] *See* D.C. Code §§ 22-3001(6)(A) and (B).
[16] RCC § 22E-207.
[17] D.C. Code § 23-582(a).
[18] 18 U.S.C. § 3606; *see also* 2017 H.R. 1039, the Probation Officer Protection Act of 2017 (a proposal to extend federal probation officers' arrest authority beyond supervisees to third parties who physically obstruct an officer or cause an officer physical harm).

performing a citizen's arrest.[19] The officer must be employed by the District or federal government.

Paragraph (b)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that the person detaining him or her is a law enforcement officer[20] and that they do not have the effective consent of the law enforcement officer to leave official custody.[21] A person leaves official custody when they distance themselves from the officer in an effort to avoid apprehension.[22] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception. "Consent" is also defined in RCC § 22E-701.

Subsection (c) establishes the third degree gradation of escape, which punishes unlawful absences from correctional facilities and halfway houses.

The phrase "in fact" in paragraph (c)(1) indicates that the actor is strictly liable[23] with respect to whether the actor was under a court order at the time the elements of the escape offense were completed.[24] The term "court order" includes any judicial directive, oral or written. The word "authorizing" makes clear that an order permitting a custodial agency[25] to choose either a secured or unsecured residential placement is sufficient.[26]

Paragraph (c)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that the person does not have the effective consent of the Mayor, the Director of the Department of Corrections, the Director of the Department of Youth Rehabilitation Services, or the United States Marshals Service to leave or remain away.[27] "Effective consent" is a defined term

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[19] See D.C. Code § 23-582(b).

[20] Consider, for example, a person who is tackled by an undercover officer and cannot understand the officer identifying himself as a policeman.

[21] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

[22] For example, a person who maneuvers her way out of handcuffs but stays seated in a police car has not committed a completed escape. On the other hand, a person who remains handcuffed and runs three blocks may have committed an escape.

[23] RCC § 22E-207.

[24] A good faith belief that the order was expired or vacated is not a defense.

[25] E.g., Department of Corrections, Bureau of Prisons, United States Parole Commission, Department of Youth Rehabilitation Services.

[26] For example, if a person who was ordered to participate in a work release program violates the rules of the program and is administratively remanded to D.C. Jail, that person may not escape from D.C. Jail and defend on grounds that the court order did not explicitly "require" him to stay at the jail.

[27] Where an individual employee of the detaining agency allows a person to leave without requisite authority from the facility or from the court, liability for the escape offense likely turns on the defendant's mental state. A person who is erroneously told she is free to leave may not commit an escape, whereas a person who bribes the employee to release her does commit an escape because she was practically certain she did not have the facility's effective consent and that the employee was acting *ultra vires*.

and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[28] "Consent" is also defined in RCC § 22E-701.

Under subparagraphs (c)(2)(A) and (c)(2)(B), a person may commit a third degree escape by omission. Failing to return to custody after a lawful absence[29] or failing to report to custody as ordered[30] amounts to a third degree escape. Under subparagraph (c)(2)(C), leaving a halfway house without permission also amounts to third degree escape. A person leaves a facility when they depart from the building grounds.

Subsection (d) excludes prosecution for second degree escape for a person who is within a correctional facility (i.e. inside the building or on the building grounds). A person who is lawfully confined to a facility may be subject to first or third degree liability, depending on the facility, but not second degree liability.[31] Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Here, there is no culpable mental state required for the fact that the actor is within a correctional facility, juvenile detention facility, or halfway house.

Subsection (e) specifies the penalties for each grade of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (f) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised escape from a correctional facility or officer statute clearly changes current District law in six main ways.*

First, the revised escape offense has three gradations. The current statute provides only one penalty for all escape offenses.[32] Thus, under current law, a person who returns late to a work release program faces the same maximum penalty as a person who tunnels out of D.C. Jail.[33] Notably, a failure to return to a halfway house may, alternatively, be prosecuted as a misdemeanor by the Attorney General for the District of Columbia,[34] whereas there is no alternative charge in District law for a conventional prison break. In contrast, the revised offense distinguishes between escaping the confinement of an

[28] RCC § 22E-701. Accordingly, a person who obtains permission to leave by impersonating another resident or an employee commits an escape.
[29] E.g., work release, unsupervised furlough.
[30] *See Williams v. United States*, 832 A.2d 158 (D.C. 2003) (where the defendant failed to serve all required consecutive weekends at D.C. Jail); *Mundine v. United States*, 431 A.2d 16 (D.C. 1981) (where the defendant failed to report to DC halfway house after being released in Virginia).
[31] For example, a person who is *confined* within a correctional facility does not commit an escape from the lawful official *custody* of a law enforcement officer by wriggling out of an officer's grasp and returning to their designated cell.
[32] D.C. Code § 22-2601.
[33] Although the verb "escape" is not defined in the statute, District case law has held that escape is "knowingly or deliberately leaving physical confinement, *or failing to return to it*, without permission." *Hines v. United States*, 890 A.2d 686 (D.C. 2006) (emphasis added); *see also Days v. United States*, 407 A.2d 702, 704 (D.C. 1979) (finding the extension of leave beyond that which is granted is the legal equivalent of an escape).
[34] D.C. Code § 24-241.05(b).

institution, escaping the lawful official custody of a police officer, and failing to return or report to an institution.[35] This change improves the proportionality of the revised offense.

Second, the revised statute punishes an attempt to escape as less serious than a completed escape. Current D.C. Code §§ 22-2601[36] and 10-509.01a[37] punish an attempt to escape the same as a completed escape. In contrast, the revised statute relies on the general part's common definition of attempt[38] and penalty for an attempt[39] to define and penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of the revised offense.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 10-509.01a, Escape from juvenile facilities, prohibits aiding or abetting an escape from a juvenile facility. In contrast, the revised escape statute relies on the definition of accomplice liability in the revised code's general part,[40] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[41] and carves out exceptions to accomplice liability.[42] This change improves the clarity, consistency, completeness, and the proportionality of the revised offense.

Fourth, the revised statute requires the person whose official custody is escaped be a law enforcement officer and defines the term "law enforcement officer"[43] consistently with other revised offenses. Current D.C. Code § 22-2601(a)(2) prohibits escaping the lawful custody of "an officer or employee of the District of Columbia or of the United States." In contrast, the revised code clarifies that the person must be a law enforcement officer, as defined, who is acting within their lawful authority. While the revised definition of "law enforcement officer" is broad and includes individuals such as probation officers, the revised definition is narrower than the current statute's reference to any person employed by the District or federal government. This change improves the clarity and consistency of the revised offenses.

Fifth, the scope of the revised statute is more precisely defined so as to only include secure locations. Current D.C. Code § 22-2601(a)(1) prohibits escape from "any penal or correctional institution or facility" or from "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed." DCCA case law has held that, in addition to the Central Detention Facility ("D.C. Jail"), the statute also includes the District's halfway

[35] Escaping the lawful official custody of a police officer is graded more severely than failing to report or return because it is more likely to provoke a hot pursuit, which may endanger the arresting officers, the defendant, and bystanders.
[36] The statute begins: "No person shall escape or attempt to escape…".
[37] The statute begins: "No child who has been committed to a juvenile facility shall escape or attempt to escape from…"
[38] RCC § 22E-301(a).
[39] RCC § 22E-301(c)(1).
[40] RCC § 22E-210.
[41] RCC § 22E-211.
[42] RCC § 22E-212.
[43] RCC § 22E-701.

houses.[44] Case law is silent as to which, if any, other locations qualify. The revised offense defines "correctional facility" to include any jails and prisons that are or may be erected in the District[45] and "secure juvenile detention facility" so as to include any physically secure juvenile placement.[46] The revised statute may broaden current law by including escapes from the Youth Services Center, pre-adjudication[47] or pre-commitment.[48] The revised statute may narrow current law by excluding escapes from unsecured congregate care placements such as group homes.[49] This change clarifies and may eliminate a gap in liability and improve the proportionality of the revised offense.

Sixth, the revised statute eliminates the consecutive sentencing provision in current law. Current D.C. Code § 22-2601(b) states in pertinent part, that the "…sentence [is] to begin, if the person is an escaped prisoner, upon the expiration of the original sentence or disposition for the offense for which he or she was confined, committed, or in custody at the time of his or her escape." The DCCA has interpreted the phrase "original sentence" to mean the sentence being served at the time of the escape.[50] In contrast, the revised statute does not require judges to issue consecutive sentences, but continues to allow such consecutive sentencing where the judge finds it appropriate. The RCC does not include mandatory sentencing provisions. Sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.[51] This change improves the proportionality of the revised statute.

Beyond these six changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised statute specifies that whether a person is subject to a court order or in lawful official custody of a law enforcement officer is a matter of strict liability. The current escape statute does not specify any culpable mental state for this offense element, nor has the DCCA directly addressed the matter. The revised statute resolves this

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[44] *See Demus v. United States,* 710 A.2d 858, 861 (D.C.1998); *Gonzalez v. United States,* 498 A.2d 1172, 1174 (D.C. 1985); *Hines v. United States*, 890 A.2d 686, 689 (D.C. 2006).

[45] E.g., Central Detention Facility ("D.C. Jail") and Central Treatment Facility ("CTF").

[46] E.g., Youth Services Center (located inside the District of Columbia), New Beginnings Youth Development Center (located outside the District of Columbia).

[47] The DCCA has not considered or decided whether the Youth Services Center qualifies as a "penal or correctional institution or facility," under D.C. Code § 22-2601(a)(1). However, the Center is not described as penal or correctional in nature in Title 16. *See, e.g.,* D.C. Code § 16-2310 (authorizing shelter care placement if a child has no parent, guardian, custodian, or other person or agency able to provide supervision). Notably, all references to "penal" and "correctional" institutions in Title 16 are followed by the phrase "for adult offenders" or a reference to Title 22.

[48] Persons held at the Youth Services Center post-commitment currently are subject to escape liability, under D.C. Code § 22-2601(a)(3).

[49] The DCCA has not considered or decided whether any location other than New Beginnings Youth Development Center qualify as "[a]n institution or facility, whether located in the District of Columbia or elsewhere, in which a person committed to the Department of Youth Rehabilitation Services is placed," under D.C. Code § 22-2601(a)(3).

[50] *Veney v. United States*, 738 A.2d 1185, 1199 (D.C. 1999) (requiring resentencing for a person who escaped during a street encounter).

[51] For further discussion, see CCRC Advisory Group Memorandum #32, Supplemental Materials to the First Draft of Report #52.

ambiguity by not requiring any culpable mental state as to being subject to a court order or as to the lawfulness of the official custody. For example, a person who mistakenly believes an arrest warrant is invalid, nevertheless commits an escape if all of the offense elements are satisfied, including the fact that the person knew they lacked effective consent of the institution or officer. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[52] This change clarifies the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute specifies that a "knowing" culpable mental state is required for leaving custody or failure to return or report to custody, and for lacking effective consent to do so. The current escape statute does not specify any culpable mental state. However, the DCCA has explained that escaping is "knowingly or deliberately leaving physical confinement, or failing to return to it, without permission."[53] The revised statute clarifies that the accused must be practically certain that he or she is acting without permission. Consequently, a mistake of fact is an available defense in some, but not all, cases.[54] Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[55] This change clarifies the revised statute.

Second, the revised statute requires the accused to leave or fail to return without "effective consent." The current escape statute is silent as to whether lack of effective consent to the person's behavior, or a similar element, must be proven. District case law requires the accused escape without "permission," but does not specify whose permission is required or further define that term.[56] The revised statute requires a lack of "effective consent," of the person in charge of the facility, a defined term which means consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.[57] This change improves the revised offenses by describing all elements that must be proven and applying consistent definitions throughout the revised code.

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[52] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'").

[53] *Hines v. United States*, 890 A.2d 686 (D.C. 2006). This is also consistent with federal escape case law. "Although § 751(a) does not define the term 'escape,' courts and commentators are in general agreement that it means absenting oneself from custody without permission." *United States v. Bailey*, 444 U.S. 394, 407 (1980).

[54] For example, a person who mistakenly appears at the wrong halfway house is not liable for escape.

[55] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[56] *United States v. Bailey*, 444 U.S. 394, 407 (1980); *Hines v. United States*, 890 A.2d 686 (D.C. 2006).

[57] RCC § 22E-701.

Third, the RCC provides for a general duress defense[58] that is consistent with other revised offenses. The current statute is silent as to whether any duress offense exists to escape. However, District case law has recognized a duress defense to escape in limited circumstances.[59] The revised statute does not separately codify a duress defense to escape, but instead relies on the duress defense in the general part of the RCC. This change clarifies and improves the consistency of the revised statutes.

[58] RCC § 22E-501.
[59] *Stewart v. United States*, 370 A.2d 1374 (D.C. 1977).

RCC § 22E-3402. Tampering with a Detection Device.

Explanatory Note. *This section establishes the tampering with a detection device offense for the Revised Criminal Code (RCC). The offense prohibits purposely removing or interfering with a wearable monitoring device, such as a GPS ankle bracelet. It replaces D.C. Code § 22-1211, Tampering with a detection device.*

Paragraph (a)(1) specifies that for criminal liability to attach, the person must know that the person is legally required to wear a detection device at the time the elements of the tampering offense were completed. The term "detection device" is defined in RCC § 22E-701 and is any technology installed on a person's body or clothing that is capable of monitoring the person's whereabouts.[1] The term refers to the physical device itself and does not include the records or reports that it generates.[2] The term "knowingly" is defined in the general part of the revised code[3] and here means the person must be practically certain that compliance with electronic monitoring was required. The monitoring may be required as a condition of release or as a sanction for noncompliance with other release conditions.[4] The requirement must be valid at the time of the offense.[5]

Subparagraphs (a)(1)(A)-(E) establish five categories of people who are prohibited from tampering with a detection device. Namely, the revised statute applies to persons who must wear the device while subject to a final civil protection order; while on pretrial release; while on presentence or predisposition release;[6] while committed to the Department of Youth Rehabilitation Services or incarcerated; or while on supervised release, probation, or parole. The revised statute does not apply to persons who are required to wear a monitoring device before a court proceeding is initiated or after a sentence is completed. Nor does it apply to people who are required to wear a monitoring device as a result of a judgment issued outside of the Superior Court of District of Columbia.

Paragraph (a)(2) specifies two alternative result element, at least one of which must be proven for the offense. Per the rules of interpretation in RCC § 22E-207(a), the culpable

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[1] Examples include mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the global position systems ("GPS") that are currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the radio frequency identification technology ("RFID") that is currently used by the Department of Corrections.

[2] A person does not commit tampering with a detection device by destroying or manipulating the data generated by the device after it has been transmitted. Consider, for example, a person who hacks into his supervision officer's computer and deletes or alters the monitoring records. Such conduct may, however, constitute tampering with physical evidence, in violation of D.C. Code § 22-723.

[3] RCC § 22E-206.

[4] D.C. Code § 22-1211 was amended in 2016 to include sanctions, following the D.C. Court of Appeals decision in *Hunt v. United States*, 109 A.3d 620, 621 (D.C. 2014).

[5] Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). Accordingly, if a supervision officer employed by the Pretrial Services Agency, Court Services and Offender Supervision Agency, or Court Social Services were to require electronic monitoring without authorization from the court or USPC, the requirement would be invalid. Additionally, if the period of release specified by the court expires before the tampering occurs, criminal liability does not attach.

[6] "Predisposition" refers to minors who have been adjudicated delinquent and are awaiting the juvenile equivalent of sentencing.

mental state of knows[7] specified in paragraphs (a)(1) applies to the following elements in paragraph (a)(2).

Subparagraph (a)(2)(A) prohibits removing the wearable monitor or allowing another to remove it.[8] An unauthorized person refers to a person other than someone that the court or parole commission authorized to remove the device.[9] Applied here, the culpable mental state "knows" requires the person to be practically certain as to their conduct removing or allowing an unauthorized person to do so.

Subparagraph (a)(2)(B) prohibits interfering with the operation of the device,[10] and allowing an unauthorized person to do so.[11] Interfering with the emission or detection of the device includes failing to charge the power for the device or allowing the device to lose the power required to operate,[12] when done knowingly, to interfere with its operation. An unauthorized person refers to a person other than someone that the court or parole commission authorized to interfere with the device.[13] Applied here, the culpable mental state "knows" requires the person to be practically certain as to their interference or allowing an unauthorized person to do so.

Subsection (b) specifies that the District may exercise long-arm jurisdiction over an offense that occurs outside the boundaries of the District of Columbia.

Subsection (c) provides the penalties for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised tampering with a detection device clearly changes current District law in three main ways*

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[7] RCC § 22E-206(b).

[8] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[9] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g., a paramedic providing care) may have a justification defense for removing a bracelet. *See* RCC §§ 22E-401 and 408.

[10] Unless one has a purpose to interfere with the operation of the device, and does so, a person does not violate the revised statute merely by decorating the device, applying a case to make it waterproof, or applying a substance to make it more comfortable to wear.

[11] A person may violate this statute by an act or by an omission, provided that the person behaves purposely. *See* RCC § 22E-202.

[12] *See* D.C. Code § 22-1211(a)(1)(C).

[13] Examples of persons authorized by the court or the parole commission to install and remove monitoring devices may include employees of the Pretrial Services Agency, Court Services and Offender Supervision Agency, Department of Youth Rehabilitation Services, or Court Social Services. Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission ("USPC"). *See Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014). In extenuating circumstances unauthorized persons (e.g., a paramedic providing care) may have a justification defense for removing a bracelet. *See* RCC §§ 22E-401 and 408.

First, the revised statute punishes an attempt to tamper with a detection device as less serious than a completed tampering. Current D.C. Code § 22-1211 punishes an attempt to interfere with the operation of the device the same as a completed tampering.[14] In contrast, the revised statute relies on the general part's common definition of attempt[15] and penalty for an attempt[16] to define and penalize attempts the same as for other revised offenses. This change improves the consistency and proportionality of revised offense.

Second, the revised statute limits the offense to tampering with detection devices that are required in connection with a District of Columbia court case. The plain language of the current statute appears to provide liability for interference with detection devices worn by a person under any jurisdiction's court order. However, it is not clear that this was intended by the Council or that the statute has been applied in such circumstances. There is no case law on point. In contrast, the revised statute excludes violations of court orders imposed by other jurisdictions, where the District has no control over the underlying statutes and procedures that allowed for the placement of a detection device. This revision clarifies the revised statute.

Third, the revised statute specifies that the District of Columbia may exercise jurisdiction over a tampering with a detection device offense that occurs across state lines. Current D.C. Code § 22-1211 does not specify whether a person who tampers with a device outside of the District commits an offense. In contrast, the revised statute includes a provision makes clear that a tampering committed out of state violates the statute. This change clarifies the revised statute and may eliminate a gap in liability.

Beyond these three changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised statute requires knowing conduct. The current tampering statute does not specify a culpable mental state for the circumstance of being under court-ordered detention or supervision that requires electronic monitoring, and there is no case law on point. Current D.C. Code § 22-1211 requires that the defendant "intentionally" remove, alter, mask, or interfere with a device. However, the term "intentionally" is not defined in the statute or in case law, and the legislative history is unclear.[17] By contrast, the revised statute requires that the person know that they are required to wear a detection device and remove it or interfere with its operation. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in

[14] D.C. Code § 22-1211(a)(1)(B).
[15] RCC § 22E-301(a).
[16] RCC § 22E-301(c)(1).
[17] *See* Committee on Public Safety and the Judiciary, *Report on Bill 18-151, "Omnibus Public Safety and Justice Amendment Act of 2009,"* (June 26, 2009) at 5 ("The Committee has slightly revised the language to better clarify the intent requirement that must be present when tampering with monitoring device but declines to add intent to evade. It is not the desire to add another element that the prosecution would be required to prove. Further, from a plain reading of the language, it already seems to clearly convey that the Committee's intent is to implicate individuals who have intentionally acted in order to evade by interfering with the monitoring. That equipment was faulty must be a consideration in whether the individual acted intentionally to interfere with monitoring.").

American jurisprudence.[18] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute amends the word "committed" in paragraph (a)(1) of the current statute to the phrase "committed to the Department of Youth Rehabilitation Services." This clarifies that the statute refers to minors who have been adjudicated delinquent and not to adults who are civilly committed to the Department of Behavioral Health for psychiatric services. This change clarifies the revised statute.

Second, the revised statute strikes the terms "alter" and "mask" as superfluous. The word "interferes" broadly encompasses all interference with the emission and detection of the device's signal. The revised statute does not capture "altering" or "masking" a device in a way that does not affect its functionality, such as decorating a device or covering it with clothing, unless such conduct is also done with a purpose of interfering with the device's monitoring functions. This change clarifies the revised statute.

Third, the revised statute strikes language in D.C. Code § 22-1211(a)(1)(C)[19] as unnecessary and potentially confusing. This meaning of this provision is unclear in light of the possibility of changing technology, the lack of any standard for measuring a "failure to charge," and differing responsibilities of a person to maintain charges for different devices. Moreover, failing to adequately charge a device's battery may be one means of interfering with the operability of the device, in violation of RCC § 22E-3402(a)(2)(B). This change clarifies the revised statute.

Fourth, the revised statute clarifies that the term "protection order" refers to the final civil protection orders that are issued after formal notice and hearing under Title 16 of the D.C. Code. This change clarifies the revised statute.

[18] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[19] "Intentionally fail to charge the power for the device or otherwise maintain the device's battery charge or power."

RCC § 22E-3403. Correctional Facility Contraband.

Explanatory Note. *This section establishes the correctional facility contraband offense and penalty gradations for the Revised Criminal Code (RCC). The offense punishes knowingly bringing certain prohibited items to a person confined in a secure facility. It also punishes a person confined to a facility who knowingly possesses certain prohibited items. The revised statute replaces D.C. Code § 22-2603.02, Unlawful possession of contraband; D.C. Code § 22-2603.03, Penalties; D.C. Code § 22-2603.01, Definitions; and D.C. Code § 22-2603.04, Detainment Power.*

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that one way of committing correctional facility contraband is by bringing[1] a prohibited item to a correctional facility[2] or secure juvenile detention facility[3] with intent that it reach someone who is confined there. It is not an element that the prohibited item actually was received by someone confined. "With intent" is a defined culpable mental state[4] that here requires the person believe their conduct is practically certain to cause the prohibited item to be received by someone who is confined to the facility.[5] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary that the person intend that the item reach a particular resident of the facility.[6] The terms "correctional facility" and "secured juvenile detention facility" are defined in RCC § 22E-701 to include buildings and building grounds.

Subparagraphs (a)(1)(A), (a)(2)(A), (b)(1)(A), and (b)(2)(A) specify that the person must act knowingly, a culpable mental state that is defined in the general part of the revised code.[7] Applied here, it means the person must be practically certain that they have the item[8] and be practically certain that they brought the item to correctional facility grounds.[9] However, causing an innocent third party, such as a mail delivery person, to bring a

[1] The word "bringing" has its ordinary meaning, "to convey, lead, carry, or cause to come along with one toward the place from which the action is being regarded." Merriam-Webster.com, 2020, available at https://www.merriam-webster.com/dictionary/bring. For example, where a person lobs a tennis ball filled with contraband over the wall of a facility, the person can be said to have brought the contraband there, without having entered the building.

[2] E.g., Central Detention Facility ("D.C. Jail"), Central Treatment Facility ("CTF").

[3] E.g., Youth Services Center, New Beginnings Youth Development Center.

[4] RCC § 22E-206.

[5] For example, an attorney who brings a cellular phone into D.C. Jail to take personal phone calls in the waiting room does not commit a contraband offense because she did not intent to give it to a resident.

[6] Consider, for example, a person who places a weapon on the outer wall of a correctional facility's recreation yard, hopeful that any resident might retrieve it. The government is not required to prove which resident was the intended recipient.

[7] RCC § 22E-206.

[8] Consider, for example, an attorney who brings his college backpack to D.C. Jail, without realizing there is a decades-old marijuana cigarette in the bottom of the bag. That attorney has not committed a correctional facility contraband offense.

[9] Consider, for example, a person who attempts to bring contraband into a halfway house, believing it is a temporary housing shelter or a rehabilitation center. That visitor has not committed a correctional facility contraband offense.

prohibited item to a facility may be sufficient for liability if the other elements of the offense are satisfied.[10]

Subparagraphs (a)(1)(B), (a)(2)(B), (b)(1)(B), and (b)(2)(B) require that the person bring the item to the facility without the effective consent of the Mayor, the Director of the Department of Corrections, or the Director of the Department of Youth Rehabilitation Services. "Effective consent" is a defined term and means consent that was not obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[11] "Consent" is also defined in RCC § 22E-701. Where a person has the effective consent of the facility to bring the otherwise-prohibited item to the location, that item does not subject the person to correctional facility contraband liability.[12] Per the rules of interpretation in RCC § 22E-207(a), the culpable mental state of knowingly specified in subparagraphs (a)(1)(A) and (b)(2)(A) apply to this element of the offense. The person must be practically certain that they lack effective consent to bring the item to the facility.[13]

Subparagraphs (a)(1)(C) and (a)(2)(C) require that the item constitute Class A contraband.[14] Subparagraphs (b)(1)(C) and (b)(2)(C) require that the item constitute Class B contraband.[15] The term "in fact" is defined in the revised code to indicate that the actor is strictly liable with respect to this element of the revised offense.[16] Accordingly, it is of no consequence that the person does not know that the item is classified as Class A or Class B contraband.

Paragraphs (a)(2) and (b)(2) state that the second type of person subject to liability for correctional facility contraband is someone who is confined to a correctional facility or secure juvenile detention facility. The word "confined" here refers to the person's legal custodial status and not to the physical strictures of the building. For instance, a corrections officer may, as a practical matter, be securely confined inside D.C. Jail during a shift in a physical sense, but the officer not legally "confined" to the custody of the correctional facility.

Subsection (c) establishes three exclusions from liability for the correctional facility contraband offense. Subsection (c) specifies "in fact." "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element that follows unless a culpable mental state is specified. Here, the "in fact" specified in subsection (c) applies to paragraphs (c)(1), (c)(2), and (c)(3) and there is no culpable mental state requirement for any of these elements.

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[10] See RCC § 22E-211, Liability for causing crime by an innocent or irresponsible person.
[11] RCC § 22E-701.
[12] For example, the department may allow a barber to bring a razor blade to use for cutting and shaving hair.
[13] Consider, for example, a person who gives papers fastened with a binder clip to a resident at D.C. Jail, without knowing that binder clips are disallowed. That person has not committed a contraband offense.
[14] The term "Class A contraband" is defined in RCC § 22E-701.
[15] The term "Class B contraband" is defined in RCC § 22E-701.
[16] RCC § 22E-207.

Paragraph (c)(1) excludes from liability the use of a portable electronic communication device by any person during a legal visit.[17] Paragraph (c)(2) excludes from liability a person's possession of their prescription medication when there is a medical necessity to access the item immediately or to be constantly accessible. Paragraph (c)(3) excludes from liability a person's possession of a syringe, needle, or other medical device when there is a medical necessity to access the item immediately or to be constantly accessible.[18]

Subsection (d) limits the correctional facility's authority to detain a person on suspicion of bringing contraband to a facility under paragraphs (a)(1) and (b)(1) to a period of two hours, pending surrender to the Metropolitan Police Department or, for facilities outside the District of Columbia, to a law enforcement agency designated by the Mayor. Probable cause is both sufficient and required.[19]

Subsection (e) specifies the penalties for each grade of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] The revised statute punishes contraband that may be used to cause an injury or facilitate an escape more severely than other contraband.

Subsection (f) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised correctional facility contraband statute clearly changes current District law in five main ways.*

First, the revised offense reclassifies contraband according to the danger presented. Current statutory law roughly classifies contraband as (A) any item prohibited by law, weapons, escape implements, and drugs;[20] (B) alcohol, drug paraphernalia, and cellular phones;[21] and (C) any item prohibited by rule.[22] The current statute penalizes possession of class C contraband as a criminal offense, even though only administrative sanctions are authorized.[23] In contrast, the revised statute classifies contraband into: (A) weapons and escape implements; and (B) alcohol, drugs, drug paraphernalia, and cellular phones. The revised statute does not otherwise criminalize violations of other facility rules regarding what items that can be possessed. In the RCC, such matters are subject to only administrative processing and sanctions. This reclassification of what constitutes contraband reorders and limits criminal sanctions to items posing significant dangers. This change improves the proportionality of the revised statutes.

Second, the revised statute narrows the list of Class A contraband in two ways. First, the current statute includes as Class A contraband the possession of any civilian

[17] Prohibiting contraband in this context may offend the right to effective assistance of counsel under the Sixth Amendment.
[18] These exceptions apply to medicines and medical devices necessary to treat chronic, persistent, or acute conditions that require constant or immediate medical response such as diabetes, severe allergies, or seizures. Depending on the facts of the case, criminalizing the possession of contraband in this context may offend the prohibition of cruel and unusual punishment in the Eighth Amendment.
[19] *See* D.C. Code § 23-582.
[20] D.C. Code § 22-2603.01(2)(A).
[21] D.C. Code § 22-2603.01(3)(A).
[22] D.C. Code § 22-2603.01(4)(A).
[23] D.C. Code § 22-2603.03(e).

clothing[24] and "[a]ny item, the mere possession of which is unlawful under District of Columbia or federal law."[25] There is no District case law interpreting this phrase, but the language would seem to include not only weapons and controlled substances listed separately as Class A contraband, but items that pose no apparent threat to the safety or order of a correctional facility.[26] In contrast, the revised statute criminalizes as Class A contraband only the possession of a uniform, and punishes possession of any weapon or drug that is prohibited by the District's criminal code, without including any (unspecified) item prohibited by federal or District law. Second, the current statute includes as Class A contraband, "Any object designed or intended to facilitate an escape."[27] In contrast, the revised statute refers more specifically to "A tool created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door."[28] The revised language creates a more objective basis for identifying contraband—rather than intent to facilitate escape—and is consistent with language in the revised possession of tools to commit property crime offense.[29] These changes improve the clarity and consistency of the revised offense and improve the proportionality of penalties.

Third, the revised statute does not criminalize a failure to report contraband except to the extent such conduct meets the requirements for accomplice liability. The current contraband statute compels District employees to report contraband and criminally punishes a failure to do so.[30] In contrast, the revised contraband statute relies on the definition of accomplice liability in the revised code's general part,[31] as well as related provisions that establish a rule for crimes that exploit other persons as innocent instruments,[32] and carves out exceptions to accomplice liability.[33] Offenses relating to public corruption and obstructing justice may also punish employee accomplices in this context.[34] This change improves the consistency and the proportionality of the revised offenses.

Fourth, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the sentencing court. The current contraband statute requires that a sentence for unlawful possession of contraband run consecutive to any term of imprisonment imposed in the case in which the person was being detained at the time this offense was committed.[35] This provision has two notable features that distinguish it from any other sentencing provision in the D.C. Code. First, it applies to persons who are pre-

[24] D.C. Code § 22-2603.01(2)(A)(viii).
[25] D.C. Code § 22-2603.01(2)(A)(i).
[26] *See, e.g.*, 16 U.S.C. § 668 (criminalizing possession of a bald eagle feather).
[27] D.C. Code § 22-2603.01(2)(A)(iv).
[28] RCC § 22E-701.
[29] RCC § 22E-2702.
[30] D.C. Code § 22-2603.02(c).
[31] RCC § 22E-210.
[32] RCC § 22E-211.
[33] RCC § 22E-212.
[34] [The Commission has not yet issued recommendations for reformed public corruption and obstructing justice offenses.]
[35] D.C. Code § 22-2603.03(d).

sentence in any jurisdiction at the time of the contraband offense.[36] Second, it applies to persons who are pre-trial in any jurisdiction at the time of the contraband offense.[37] Legislative history does not clarify why such an infringement on the court's discretion is applied to contraband offenses and not to other correctional facility offenses such as escape. In contrast, the revised statute does not require consecutive sentencing, leaving such a decision to the sentencing court. This change improves the consistency and the proportionality of revised offenses.

Fifth, the revised statute adds an exception to liability for possession of a syringe, needle, or other medical device when the actor has a medical necessity to have the substance immediately or constantly accessible. The current D.C. Code contraband statute only provides an exception for possession of a prescribed controlled substance that is medically necessary to carry.[38] In contrast, the revised statute excepts liability for syringes, needles, or other medical devices where there is a medical necessity or immediate access. The offense's exclusion of liability does not create an affirmative right for a confined person to possess such items, and administrative sanctions may be imposed for such possession. There may also be criminal liability for misuse of a needle, syringe, or medical device under another statute,[39] and possession of a needle, etc. with intent to give the item to a confined person may be liable as an attempt or give rise to accomplice liability. However, a person's mere possession of such a medically necessary item is not grounds for a contraband conviction. This change improves the proportionality of the revised offense.

Beyond these five changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies that a knowing culpable mental state is required for confined persons as to their possession of contraband, just as it is for persons who deliver it. Current D.C. Code § 22-2603.02(b) merely states, "It is unlawful for an inmate, or securely detained juvenile, to possess Class A, Class B, or Class C contraband, regardless of the intent with which he or she possesses it." This language is ambiguous as to whether a person is strictly liable as to whether the item possessed is contraband, or whether a person's intent to use contraband for a non-harmful purpose is irrelevant to liability but they must be aware that they possess contraband.[40] There is no case law on point. District practice appears to treat as a matter of strict liability the fact that an item possessed by a confined person is contraband, while the possession itself must be

[36] By contrast, the District's escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the. D.C. Code § 22-2601(b).
[37] The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).
[38] D.C. Code § 22-2603.03(f).
[39] For example, an inmate who uses a syringe or other device to assault another inmate may face more severe criminal liability for using a dangerous weapon in the assault. See RCC § 22E-1202.
[40] The current statutory definition of Class C contraband also states: "The rules shall be posted in the facility to give notice of the prohibited articles or things," but does not provide any relief to the accused if the notice is not posted. D.C. Code § 22-2603.01(4)(a).

purposeful.[41] In contrast, the revised statute requires a confined person to knowingly possess an item, similar to the requirements for someone bringing contraband into a correctional facility. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[42] This change improves the proportionality of the revised statutes.

Second, the detainment authority provision in the revised offense authorizes and limits detention pending surrender to certain law enforcement authorities to investigate and arrest a person for commission correctional facility contraband. Current D.C. Code § 22-2603.04 refers only to the Metropolitan Police Department as an authorized authority. However, under a separate D.C. Code provision, other officials, may be granted specific authority by the Mayor to make arrests on the District's behalf for offenses occurring out of the District, including at New Beginnings Youth Development Center in Laurel, Maryland under D.C. Code § 10-509.01. There is no case law on whether or how to resolve the potential conflict between these provisions of law. To resolve this ambiguity, the revised statute includes in the detainment provision a reference to an agency designated per D.C. Code § 10-509.01. This change improves the clarity and consistency of the revised statute.

Third, the revised statute punishes accomplice liability consistently with other revised offenses. Current D.C. Code § 22-2603.02(a)(2) makes it unlawful to "cause another" to bring contraband to a secured facility. By contrast, the revised statute relies on the definitions of accomplice liability,[43] solicitation,[44] and criminal conspiracy[45] in the revised code's general part. This change improves the consistency and the proportionality of revised offenses.

Fourth, the revised statute requires a person to know that their possession or introduction of the contraband item is without the effective consent of the person in charge of the facility, and eliminates the exclusions from liability enumerated in D.C. Code § 22-2603.02(d) for items "issued" to a facility employee or law enforcement officer. The current D.C. Code excludes from liability for a contraband offense any item "issued" to a facility employee or a law enforcement officer that is being used in the performance of her official duties.[46] Case law has not addressed the scope or meaning of this provision. The RCC's requirement that the person knowingly act without the facility's effective consent

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[41] Criminal Jury Instructions for the District of Columbia Instruction 6.603 (2018) ("The elements of possessing contraband in [a penal institution] [a secure juvenile residential facility], each of which the government must prove beyond a reasonable doubt, are that: 1. [Name of defendant] was [an inmate] [a securely detained juvenile] in [name of penal institution or secure juvenile residential facility]; 2. S/he possessed [name of object]; [and] 3. S/he did so voluntarily and on purpose, and not by mistake or accident[.] [; and] [4. The [name of object] was [insert applicable definition of contraband from statute].] "voluntarily and on purpose, and not by mistake or accident.").

[42] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[43] RCC § 22E-210.

[44] RCC § 22E-302.

[45] RCC § 22E-303.

[46] D.C. Code § 22-2603.02(d).

renders this statutory exception to liability unnecessary.[47] It also ensures the revised offense does not reach possession of items that the facility authorized but did not "issue," such as personal medication. This change improves the proportionality of the revised offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the phrase "brings…to a correctional facility or secured juvenile detention facility" replaces the phrases "bring…into or upon the grounds of"[48] and "place in such proximity to."[49] Current D.C. Code § 22-2603.02(a) is grammatically difficult to understand. Presumably, paragraph (a)(3) intends to say either, "place in close proximity with intent to give access" or "place in such proximity as to give access." Because the revised statute defines the terms "correctional facility" and "secured juvenile detention facility" to include the building grounds, the word "to" adequately captures all trafficking scenarios targeted by the current law.[50]

Second, the revised code defines "possession" in RCC § 22E-701. The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[51] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Third, the revised offense simplifies the defined term "Cellular telephone or other portable communication device and accessories thereto."[52] Current law defines this term with references to specific technology, several of which are already rare or obsolete.[53] The revised statute uses a simpler reference to portable electronic communication devices and accessories thereto.[54]

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[47] For example, where a facility has permitted an employee to carry a billy or a law enforcement officer to use tear gas, correctional facility contraband liability does not attach.
[48] D.C. Code § 22-2603.02(a)(1).
[49] D.C. Code § 22-2603.02(a)(3).
[50] For example, if a person places contraband on the outer wall of the correctional facility's secured yard, that person has brought contraband to the correctional facility.
[51] *See* D.C. Crim. Jur. Instr. 3.104.
[52] D.C. Code § 22-2603.01(a)(3)(c).
[53] "Cellular telephone or other portable communication device and accessories thereto" means any device carried, worn, or stored that is designed, intended, or readily converted to create, receive or transmit oral or written messages or visual images, access or store data, or connect electronically to the Internet, or any other electronic device that enables communication in any form. The term "cellular telephone or other portable communication device and accessories thereto" includes portable 2-way pagers, hand-held radios, cellular telephones, Blackberry-type devices, personal digital assistants or PDAs, computers, cameras, and any components of these devices. The term "cellular telephone or other portable communication device and accessories thereto" also includes any new technology that is developed for communication purposes and includes accessories that enable or facilitate the use of the cellular telephone or other portable communication device.
[54] RCC § 22E-701.

Fourth, the revised statute clarifies the correctional facilities' detention authority. D.C. Code § 22-2603.04 states that a person who "introduces or attempts to introduce" contraband to a facility may be detained for no more than two hours until police arrive. The statute does not include a standard of proof and the District of Columbia Court of Appeals has not interpreted the statute. The revised statute clarifies that probable cause is required, just as it is for any other warrantless detention.[55]

[55] *See* D.C. Code § 23-582.

COMMENTARY:
SUBTITLE V. PUBLIC ORDER AND SAFETY OFFENSES

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

Explanatory Note. *This section establishes the possession of a prohibited weapon or accessory offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes possession of particular weapons that are so highly suspect and devoid of lawful use that their mere possession is forbidden, without requiring any proof of intent to use the weapon for an unlawful purpose.*[1] *The revised offense replaces D.C. Code §§ 22-4514(a) (Possession of certain dangerous weapons prohibited),* [2] *22-4515a(a) and (c) (Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes),*[3] *7-2506.01(a)(3) (regarding restricted pistol bullets), and 7-2506.01(b) (regarding large capacity ammunition feeding devices).*

Subsection (a) specifies the elements of first degree possession of a prohibited weapon or accessory. Paragraph (a)(1) specifies that to commit first degree possession of a prohibited weapon or accessory, a person must act at least knowingly.[4] That is, the person must be practically certain that they possess an item[5] and must be practically certain that the item they possess is a firearm or an explosive.[6] "Firearm" is a defined term,[7] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[8] but excludes antiques.[9] "Possesses" is a defined term and includes both actual and constructive possession.[10] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[11] With respect to firearms, the person must know they possess a firearm[12] or that they possess component

[1] *See Worthy v. United States*, 420 A.2d 1216 (D.C. 1980).
[2] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4514(c) – (d).
[3] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4515a(d) – (e).
[4] "Knowingly" is defined in RCC § 22E-206.
[5] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).
[6] Consider, for example, a person who finds firearm silencer on the street and, without recognizing the object, carries it away out of curiosity. That person does not commit possession of a prohibited weapon or accessory.
[7] RCC § 22E-701.
[8] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[9] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[10] RCC § 22E-701.
[11] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[12] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

parts that could be arranged to make a whole firearm.[13] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[14] No intent to use the firearm, accessory, or ammunition is required for this possessory offense.[15]

Paragraph (a)(2) specifies that a person must be at least reckless as to whether the weapon or accessory is of the prohibited variety.[16] "Reckless" is a defined term,[17] which, applied here, means the person must consciously disregard a substantial risk that the item is an assault weapon, machine gun, sawed-off shotgun, or restricted explosive. The risk must be of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the ordinary standard of conduct.[18] The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (a)(2)(A) – (D) criminalize possession of four classes of prohibited objects.

Subparagraph (a)(2)(A) makes it unlawful to possess an assault weapon. "Assault weapon" is a defined term that includes an enumerated list of semiautomatic rifles, pistols, and shotguns. The term also includes semiautomatic firearms with specific features that make a firearm more readily capable of mass destruction, such as grenade launchers, flash suppressors, or vertical handgrips. Accordingly, an otherwise lawful firearm may be modified in a manner that converts it into contraband under the statute. It is not a defense that firearm was compliant at the time of manufacture or acquisition.

Subparagraph (a)(2)(B) makes it unlawful to possess a machine gun. "Machine gun" is a defined term and includes any firearm that is capable of automatically firing multiple shots with a single trigger pull. The term also includes a machine gun frame or receiver and parts that are designed and intended to convert a firearm into a machine gun.

Subparagraph (a)(2)(C) makes it unlawful to possess a sawed-off shotgun. "Sawed-off shotgun" is a defined term and means a shotgun having a barrel of less than 18 inches in length or a firearm made from a shotgun if such firearm as modified has an overall length of less than 26 inches or any barrel of less than 18 inches in length.

Subparagraph (a)(2)(D) makes it unlawful to possess a restricted explosive. The term "restricted explosive" is defined to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully

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[13] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).
[14] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.
[15] *Bsharah v. United States*, 646 A.2d 993 (D.C. 1994).
[16] RCC § 22E-207; *see Moore v. United States*, 927 A.2d 1040, 1054–55 (D.C. 2007); *In re D.S.*, 747 A.2d 1182 (D.C. 2000).
[17] RCC § 22E-206.
[18] RCC § 22E-206.

and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.[19]

Subparagraph (a)(2)(E) makes it unlawful to possess a ghost gun. "Ghost gun" is a defined term and generally refers to a firearm that, after the removal of all parts other than a receiver, is not as detectable by walk-through metal detectors. The term also includes an unfinished frame or receiver and parts that do not generate accurate images when inspected by detection devices.

Subsection (b) specifies the elements of second degree possession of a prohibited weapon or accessory. Paragraph (b)(1) specifies that to commit second degree possession of a prohibited weapon or accessory, a person must act at least knowingly.[20] That is, the person must be practically certain that they possess an item[21] and must be practically certain that the item they possess is a firearm accessory or ammunition.[22] "Ammunition" is a defined term, which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. "Possesses" is a defined term and includes both actual and constructive possession.[23] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[24] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[25]

Paragraph (b)(2) specifies that a person must be at least reckless as to whether the accessory or ammunition is of the prohibited variety.[26] "Reckless" is a defined term,[27] which, applied here, means the person must consciously disregard a substantial risk that the item is a firearm silencer, bump stock, or large capacity ammunition feeding device.

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[19] A person who carries a lantern, fireworks, pest exterminators, or demolition dynamite with intent to injure another person may still commit Possession of a Dangerous Weapon to Commit Crime (RCC § 22E-4103) or third degree Carrying a Dangerous Weapon (RCC § 22E-4102). A person who uses fire or explosives to damage property or to injure another person may commit Arson (RCC § 22E-2501), Reckless Burning (RCC § 22E-2502), or Assault (RCC § 22E-1202).

[20] "Knowingly" is defined in RCC § 22E-206.

[21] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

[22] Consider, for example, a person who finds firearm silencer on the street and, without recognizing the object, carries it away out of curiosity. That person does not commit possession of a prohibited weapon or accessory.

[23] RCC § 22E-701.

[24] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[25] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[26] RCC § 22E-207.

[27] RCC § 22E-206.

The risk must be of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the ordinary standard of conduct.[28] The government is not required to prove that the person should have been aware that it is illegal to have the item. Subparagraphs (b)(2)(A) – (C) categorically criminalize possession of three classes of prohibited objects.

Subparagraph (b)(2)(A) makes it unlawful to possess a firearm silencer. A silencer is a device that is designed[29] to reduce the sound of gunfire.

Subparagraph (b)(2)(B) makes it unlawful to possess a bump stock. The term "bump stock" is defined in RCC § 22E-701. The term includes any rifle stock or other device that enables the shooter to fire repeatedly—though less accurately—without moving the trigger finger. These stocks use spring action to propel the stock forward using the kickback from each previous shot.

Subparagraph (b)(2)(C) makes it unlawful to possess a large capacity ammunition feeding device. The term "large capacity ammunition feeding device" is defined[30] to include extended clips or drums that hold more than 10 rounds at a time.

Subsection (c) cross-references applicable exclusions from liability for certain weapons offenses in the RCC. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor satisfies the criteria in RCC § 22E-4118.

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[31] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (e)(3) specifies that a conviction for possession of a prohibited weapon or accessory does not merge with any other offense arising from the same course of conduct.

Subsection (f) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised possession of a prohibited weapon or accessory statute clearly changes current District law in three main ways.*

First, the RCC limits prohibited items to restricted explosives, firearms, and firearm accessories, grading possession of firearm accessories lower than possession of restricted

[28] RCC § 22E-206.

[29] Although everyday household items, such as soda bottles, may also be used to muffle noise, possession of such items which are not designed as silencers is not prohibited under this section, irrespective of unlawful intent.

[30] *See* RCC § 22E-701.

[31] *See, e.g.,* D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991); *see also* RCC § 22E-502, Temporary Possession.

explosives and firearms. D.C. Code § 22-4514(a) provides a single penalty gradation for possession of "any machine gun, sawed-off shotgun, bump stock, ghost gun, knuckles, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms…" In contrast, the revised offense punishes only possession of specified items that are likely to avoid security detection or cause or facilitate multiple fatalities in a single event. Possession of blackjacks and other dangerous weapons[32] is illegal if they are carried outside of the home,[33] possessed with intent to commit a crime,[34] or possessed during a crime.[35] Additionally, the RCC punishes some offenses more severely if a dangerous weapon is displayed or used, including robbery,[36] assault,[37] criminal threats,[38] sexual assault,[39] kidnapping,[40] and criminal restraint.[41] This change logically reorders and improves the proportionality of the revised offenses.

Second, the revised statute eliminates the repeat offender penalty enhancements consistent with other nonviolent revised offenses. Current D.C. Code § 22-4514(c) provides that a first possession of a prohibited weapon offense is punishable by a maximum of one year in jail and a second possession of a prohibited weapon offense (or a possession of a prohibited weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. Current D.C. Code § 22-4515a(d) provides that a first possession of a Molotov cocktail offense is punishable by 1-5 years in prison, a second is punishable by 3-15, and a third is punishable by 5-30. It further provides that a person convicted for a third time may not benefit from the Federal Youth Corrections Act. In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

Third, the revised statute requires that a person be at least reckless as to the weapon or accessory being of the variety that is prohibited. Current D.C. Code § 22-4514(a) does

[32] The term "dangerous weapon" is defined in RCC § 22E-701 to include "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."
[33] RCC § 22E-4102.
[34] RCC § 22E-4103.
[35] RCC § 22E-4104.
[36] RCC § 22E-1201.
[37] RCC § 22E-1202.
[38] RCC § 22E-1204.
[39] RCC § 22E-1301.
[40] RCC § 22E-1401.
[41] RCC § 22E-1402.

not specify a requisite mental state.[42] However, legislative history indicates that Congress intended to create a general intent crime,[43] such that the mere possession of certain enumerated weapons is prohibited, even if the person is unaware of the attributes that render the weapon unlawful.[44] In some instances, the unlawful attribute is not apparent on visual inspection. For example, a semiautomatic weapon may be converted, either by internal modification or simply by wear and tear, into a machine gun within the meaning of the statute.[45] The revised statute requires that a person consciously disregard a substantial risk that the item has the characteristics of a prohibited weapon or accessory. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[46] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[47] This change improves the proportionality of the revised offense.

Beyond these three changes to current District law, two other aspects of the revised statute may constitute substantive changes to District law.

First, the revised statute does not include an explicit reference to manufacturing, transferring, using, transporting, or selling a prohibited weapon. D.C. Code § 7-2506.01(b) makes it unlawful to possess, sell, or transfer any large capacity ammunition feeding device. This conduct is also prohibited by D.C. Code § 7-2504.01(b).[48] D.C. Code § 22-4515a makes it unlawful to manufacture, transfer, use, possess, or transport a Molotov cocktail. This conduct is also prohibited by D.C. Code §§ 7-2502.01[49] and 7-2505.01.[50]

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[42] District case law requires knowledge for the actual or constructive possession of any item. *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

[43] "General intent" is not used in or defined in the current statute, but the DCCA has said that it is frequently defined as "intent to do the prohibited act" which requires "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984).

[44] *See McBride v. United States,* 441 A.2d 644, 660 n. 7 (D.C.1982); *Worthy v. United States,* 420 A.2d 1216, 1218 (1980); *United States v. Brooks,* 330 A.2d 245, 247 (D.C.1974); *In re D.S.*, 747 A.2d 1182, 1186 (D.C. 2000).

[45] *See Staples v. United States*, 511 U.S. 600, 614-15 (1994).

[46] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X-citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[47] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[48] "No person or organization shall engage in the business of selling…any firearm…[or] parts therefor…without first obtaining a dealer's license."

[49] "[N]o person or organization…shall…transfer, offer for sale, sell, give, or deliver any destructive device." *See also* D.C. Code § 7-2501.01 (defining the term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[50] "No person or organization shall sell, transfer or otherwise dispose of any…destructive device…except as provided in § 7-2502.10(c), § 7-2505.02, or § 7-2507.05." *See also* D.C. Code § 7-2501.01 (defining the

In contrast, the RCC's definition of possess[51] includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, transports, or sells a prohibited weapon appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[52] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

Second, the revised statute does not include an explicit exception for possession of a Molotov cocktail during a state of emergency. D.C. Code § 22-4515a(c) provides that a person may not manufacture, transfer, use, possess, or transport an explosive during a state of emergency "except at his or her residence or place of business." There is no clear rationale for why, at present, person can make and transfer explosives during a state of emergency. This conduct is prohibited by D.C. Code §§ 7-2502.01, 7-2504.01(b), and 7-2505.01, none of which contain a similar state-of-emergency exception. Where a state of emergency is occasioned by mass disorder such as rioting, the sale of Molotov cocktails may be even more dangerous than during a time of peace. This change improves the consistency of the revised statutes and reduces an unnecessary gap in liability.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute uses the undefined term "firearm silencer." Current D.C. Code § 22-4514(a) makes it unlawful to possess "any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms." It is unclear from the statute whether it is intended to include only items that are designed to silence firearms or to also include any object[53] that is actually used or could be used to muffle the sound of gunfire. Case law has not addressed the issue. In contrast, the phrase "firearm silencer," which appears twice in D.C. Code § 7-2501.01,[54] more directly refers to items that are designed to silence a firearm.

term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[51] RCC § 22E-701.

[52] *See* D.C. Code § 22-1511 (Fraudulent advertising).

[53] For example, a plastic bottle may muffle the sound of a firearm discharging.

[54] "Firearm muffler or silencer" appears in the current definition of "firearm." "Silencer" appears in the definition of "assault weapon."

RCC § 22E-4102. Carrying a Dangerous Weapon.

Explanatory Note. *This section establishes the carrying a dangerous weapon offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes carrying a firearm without a license. It also proscribes carrying another dangerous weapon with intent to use it in a manner likely to cause death or a serious bodily injury. The revised offense replaces D.C. Code §§ 22-4502.01 (Gun free zones; enhanced penalty) and 22-4504(a) and (a-1).*

Subsection (a) punishes carrying a firearm, unlicensed pistol, or restricted explosive in a prohibited location[1] as first degree carrying a dangerous weapon.[2]

Paragraph (a)(1) specifies that a person must knowingly possess a weapon.[3] "Knowingly" is a defined term[4] and applied here means that the person must be practically certain that they possess the weapon. "Possesses" is a defined term and includes both actual and constructive possession.[5] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[6] The person must know they possess a weapon[7] or that they possess component parts that could be arranged to make a whole firearm.[8] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[9]

Subparagraphs (a)(1)(A) – (C) specify that a person commits the offense by having a firearm other than a pistol, a pistol without a license, or a restricted explosive. "Firearm," and "pistol" are defined terms,[10] which include inoperable weapons that may be

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[1] *See Wrenn v. Dist. of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017) (stating, "'[W]hen a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places…' By contrast, a ban on owning or storing guns at home leaves no alternative channels for *keeping* arms." (Emphasis in original.) (Internal citations omitted.)).

[2] The revised first degree carrying a dangerous weapon offense replaces D.C. Code § 22-4502.01, which provides an enhanced penalty for illegally carrying a firearm in a gun free zone.

[3] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

[4] "Knowingly" is defined in RCC § 22E-206.

[5] RCC § 22E-701.

[6] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[7] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

[8] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

[9] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[10] RCC § 22E-701.

redesigned, remade or readily converted or restored to operability[11] but exclude antiques.[12] Pistols are a subset of firearms that are either designed to be fired by a single hand or have a barrel shorter than 12 inches.[13] District law allows civilians to apply for a license to carry a pistol,[14] however, carrying a larger firearm is categorically prohibited. The term "restricted explosive" is defined[15] to include Molotov cocktails, bombs, grenades, and missiles. However, the term does not include explosive and combustible objects lawfully and commercially manufactured for a lawful purpose, which may exclude liability for items such as lanterns, fireworks, pest exterminators, or demolition dynamite.[16]

Paragraph (a)(2) and subparagraph (a)(3)(A) explain that two elements must be proven to establish that a person "carried" a firearm or explosive. Paragraph (a)(2) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach.[17] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach. Subparagraph (a)(3)(A) requires that the person possess the weapon in a location other than their own home,[18] place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land.

Subparagraph (a)(3)(B) provides elevated liability for illegally carrying a firearm or explosive within 300 feet of a location that operates as a school, college, university, public swimming pool, public playground, public youth center, or public library, or children's day care center.[19] The 300-foot distance is calculated from the boundary line, not from the edge of a building.[20] Sub-subparagraph (a)(3)(B)(ii) requires that the location displays clear and conspicuous signage that indicates firearms or explosives are

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[11] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

[12] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

[13] RCC § 22E-701.

[14] D.C. Code § 22-4506; 24 DCMR §§ 2332 – 2342; *see also Wrenn v. Dist. of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

[15] RCC § 22E-701.

[16] A person who carries a lantern, fireworks, pest exterminators, or demolition dynamite with intent to injure another person may still commit Possession of a Dangerous Weapon to Commit Crime (RCC § 22E-4103) or third degree Carrying a Dangerous Weapon (RCC § 22E-4102). A person who uses fire or explosives to damage property or to injure another person may commit Arson (RCC § 22E-2501), Reckless Burning (RCC § 22E-2502), or Assault (RCC § 22E-1202).

[17] *See White v. United States,* 714 A.2d 115, 119 (D.C.1998); *Johnson v. United States*, 840 A.2d 1277, 1280 (D.C. 2004). For example, where there is an obstacle to a person's access to a weapon, such as a locked trunk, the person has not carried a weapon under the revised statute. *See, e.g., Henderson v. United States*, 687 A.2d 918, 922 (D.C. 1996); *Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952).

[18] Unlike the term "dwelling," which is defined in RCC § 22E-701, the word "home" refers to the person's own place of abode. It is not necessary to prove that the location is the person's *bona fide* residence or domicile. However, "home" does not include momentary sleeping quarters such as a guest room or hotel room. *See, e.g., Osterweil v. Bartlett*, 21 N.Y.3d 580 (2013).

[19] These locations include buildings or building grounds that are being used for the specified purpose. They do not include, for example, an address that is used only to receive mail for an online education program or a Free Little Library book exchange box.

[20] *See Jeffrey v. United States*, 892 A.2d 1122 (D.C. 2006).

prohibited.[21] Whether a sign is clear and conspicuous may depend on facts including its placement, legibility, and word choice.[22] Subparagraph (a)(3)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is in an appropriately identified school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children's day care center.

Subsection (b) punishes carrying a firearm, unlicensed pistol, or restricted explosive in any location anywhere other than the person's home, place of business, or land as second degree carrying a dangerous weapon.[23] This gradation of the offense does not require proof of a prohibited location (a "school zone") but otherwise has elements identical to first degree carrying a dangerous weapon.

Subsection (c) punishes carrying a dangerous weapon with intent to use the weapon in a manner likely to seriously injure or kill another person[24] as third degree carrying a dangerous weapon.[25] Paragraph (c)(1) specifies that a person must knowingly[26] possess a dangerous weapon.[27] "Possesses" is a defined term and includes both actual and constructive possession.[28] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[29] The person must be practically certain that the item is one of the objects that qualifies as a dangerous weapon.[30] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[31]

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[21] E.g., a sign reading, "Gun Free Zone."

[22] This is a more flexible standard than provided in the District's current municipal regulation of signage preventing entry onto private property with a concealed firearm. 24 DCMR § 2346 (requiring a sign at the that is at least eight (8) inches by ten (10) inches in size and contains writing in contrasting ink using not less than thirty-six (36) point type).

[23] The revised second and third degree carrying a dangerous weapon offenses replace D.C. Code §§ 22-4504(a) and (a-1), which criminalize carrying a pistol without a license, a deadly or dangerous weapon, or a rifle or shotgun.

[24] The revised third degree carrying a dangerous weapon offense differs from the revised third degree possession of a dangerous weapon during a crime offense RCC § 22E-4104(c) insofar as: (1) it does not include stun guns, (2) it requires carrying in a manner that is conveniently accessible and within reach, and (3) it criminalizes possession for purposes of non-immediate, conditional self-defense.

[25] The revised second and third degree carrying a dangerous weapon offenses replace D.C. Code §§ 22-4504(a) and (a-1), which criminalize carrying a pistol without a license, a deadly or dangerous weapon, or a rifle or shotgun.

[26] "Knowingly" is defined in RCC § 22E-206.

[27] *See, e.g., United States v. Matthews*, 480 F.2d 1191, 1192 (D.C. Cir. 1973).

[28] RCC § 22E-701.

[29] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[30] "Dangerous weapon" is defined in RCC § 22E-701 to include firearms, explosives, daggers, blackjacks, false knuckles and other items. It also includes any object, if the actual, attempted, or threatened use is likely to inflict a serious bodily injury. Consider, for example, a person who picks up a brick with intent to strike another person. The person commits carrying a dangerous weapon only if they intend to strike the person in a manner that will likely cause a serious bodily injury (e.g., a blow to the head).

[31] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even

Paragraphs (c)(2) and (c)(3) explain that two elements must be proven to establish that a person "carried" a dangerous weapon. Paragraph (c)(2) specifies that a person must carry the weapon in a manner that it is both conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the weapon is conveniently accessible and within reach. Subparagraph (c)(3) requires that the person possess the weapon in a location other than their own home, place of business, or land. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not their own home, business place, or land.

Paragraph (c)(4) specifies that the person must possess the dangerous weapon with intent to use the weapon in a manner that is likely to cause death or serious bodily injury to another person. "Intent" is a defined term,[32] which, applied here, means the accused must be practically certain that the intended use would cause a serious bodily injury or death. The government is not required to prove intent to use the weapon unlawfully,[33] but is required to prove intent to use the item as a dangerous weapon.[34] "Serious bodily injury" is defined in the RCC to require a substantial risk of death, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member or organ or protracted loss of consciousness.[35] The word "likely" clarifies that the danger of harm must be objectively more probable than not. Some dangerous weapons are of such limited lethality and dangerousness that they typically will not meet this standard.[36] Paragraph (c)(4) specifies that the intent to use the weapon may be conditional.[37] Although general defenses such as defense of self or another person[38] and defense of property[39] apply to this

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without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[32] RCC § 22E-206.

[33] *See In re S.P.*, 465 A.2d 823, 824 (D.C. 1983) (affirming a conviction for carrying a dangerous weapon where the defendant was swinging and twirling nunchaku in a crowd of onlookers); *see also Cooke v. United States*, 275 F.2d 887, 888 (D.C. Cir. 1960) (upholding a conviction for carrying a pistol in self-defense).

[34] *Strong v. United States*, 581 A.2d 383 (D.C. 1990); *see also Tuckson v. United States*, 77 A.3d 357, 361 (D.C. 2013) (finding no probable cause for possession of a prohibited weapon where a defendant possessed a collapsible police baton in his car, as the design and purpose of the instrument was not for use as a weapon, and defendant did not display, wield, or hold the baton in the presence of police officers).

[35] RCC § 22E-701.

[36] In most instances, use of a stun gun is unlikely to cause "serious bodily injury," which is defined in RCC § 22E-701 to require "protracted loss or impairment of the function of a bodily member or organ."

[37] Proof of an intent to use the weapon for an unlawful purpose is not an element of the offense. *Scott v. United States*, 243 A.2d 54, 56 (D.C. 1968) (citing *United States v. Shannon*, D.C.Mun.App., 144 A.2d 267 (1958)). Proof of intent to use the weapon for a dangerous purpose is sufficient. *See In re M.L.*, 24 A.3d 63, 68 (D.C. 2011) (citing *Lewis v. United States*, 767 A.2d 219, 222-23 (D.C. 2001); *Monroe v. United States,* 598 A.2d 439, 441 (D.C.1991)).

[38] *See* RCC § 22E-403; *see also Williams v. United States*, 90 A.3d 1124, 1127 (D.C. 2014); *Reid v. United States*, 581 A.2d 359, 367 (D.C. 1990); *Potter v. United States*, 534 A.2d 943, 946 (D.C. 1987); *McBride v. United States*, 441 A.2d 644, 649 (D.C. 1982); *Cooke v. United States*, 213 A.2d 508, 510 (D.C. 1965); *United States v. Christian*, 187 F.3d 663, 666 (D.C. Cir. 1999).

[39] *See* RCC § 22E-404; *see also Doby v. United States*, 550 A.2d 919 (D.C. 1988).

offense, carrying a dangerous weapon for purposes of non-imminent self-defense is prohibited.[40]

Subsection (d) cross-references applicable exclusions from liability for certain weapons offenses in the RCC. Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor satisfies the criteria in RCC § 22E-4118.

Subsection (e) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[41] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (f) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (g) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised carrying a dangerous weapon statute clearly changes current District law in five main ways.*

First, the revised offense applies only to people who are outside of their own home, place of business, or land. D.C. Code § 22-4504 distinguishes a higher penalty gradation for possession of a firearm outside of "the person's dwelling place, place of business, or on other land possessed by the person."[42] In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to inhibit the operability of a lawful firearm in the home for the purpose of immediate self-defense.[43] The Court required the District to permit the plaintiff to register his handgun and to issue him a license to carry it in the home, fully assembled, loaded, and without a trigger lock. The RCC does not separately punish carrying a lawfully registered firearm at home.[44] This change reduces unnecessary overlap between the possession and carrying offenses and may improve the constitutionality of the revised offense.

Second, the revised offense punishes carrying a firearm or a restricted explosive in a school zone. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person who carries a gun within 1000 feet of a school, playground, or public housing. The term "gun" is not defined in the statute and case law does not clarify whether it is intended to include air guns, spring guns, stun guns, imitation firearms, toys, or antiques. There is

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[40] For example, a person who carries a dagger in their purse to protect against any potential attackers commits third degree carrying a dangerous weapon. This is true even if the perceived threat is objectively reasonable under the circumstances.

[41] *See, e.g.,* D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991); *see also* RCC § 22E-502, Temporary Possession.

[42] D.C. Code § 22-4502.01 establishes a penalty enhancement for any person carries a gun within 1000 feet of a school, playground, or public housing, without any exception for a person whose dwelling, business or land is located inside a gun free zone.

[43] 554 U.S. 570 (2008).

[44] Mere possession of an unregistered firearm is punished under RCC § 7-2502.01A.

no clear rationale for excluding explosives—which may be as lethal or more lethal than firearms—from the reach of the enhancement. In contrast, the revised code defines the terms "firearm" and "restricted explosive"[45] and specifies that a person who unlawfully carries either class of weapon near a school, playground, or day care center is subject to a more severe penalty than a person who carries such a weapon in another location. This change clarifies the revised offense, eliminates an unnecessary gap in liability, and improves the proportionality of the revised offenses.

Third, the first degree of the revised offense requires that the person know that they are proximate to a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center. D.C. Code § 22-4502.01 does not specify a culpable mental state as to the location. It does, however, require that the location be "appropriately identified," that is, bearing "a sign that identifies the building or area as a gun free zone." In contrast, the revised offense applies the standard culpable mental state definition of "knowingly" used throughout the RCC.[46] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[47] This change improves the clarity and consistency of the revised offense.

Fourth, the revised statute narrows the list of locations that elevate a carrying a dangerous weapon offense from second degree to first degree. Current D.C. Code § 22-4502.01 establishes a 1000-foot radius for gun free zones and describes them to include any "video arcade" and "in and around public housing as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by the United States Department of Housing and Urban Development, or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority." Video arcades are considerably less common in modern times than when the statute became law in 1981. In fact, the District does not appear to have any arcades that are open to minor children presently advertised online. On the other hand, large sections of the District fall within a 1000-foot radius of public housing.[48] In contrast, the revised offense protects a

[45] RCC § 22E-701.
[46] RCC § 22E-206.
[47] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256-258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).
[48] At least one court has held that public housing tenants have a right to bear arms in common areas. *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014); *see also* Mo. Ann. Stat. § 571.107(1)(6) (explicitly exempting any building used for public housing by private persons from any restriction on the carrying or possession of a firearm); *but see People v. Cunningham*, 1-16-0709, 2019 WL 1429072 (Ill. App. Ct. Mar. 29, 2019) (holding that a ban in public housing is constitutional). The D.C. Department of Housing and

300-foot radius around every "school, college building, university building, public swimming pool, public playground, public youth center, or public library, or children's day care center." These locations are similarly protected from stun guns[49] and drug activity[50] under the revised code. This change improves the consistency of the revised offenses and eliminates an unnecessary gap in liability.

Fifth, the revised statute eliminates repeat offender penalty enhancements consistent with other nonviolent revised offenses. Current D.C. Code § 22-4504 provides that a first carrying a dangerous weapon offense is punishable by a maximum of one year in jail and a second carrying a dangerous weapon offense (or a carrying a dangerous weapon offense committed by a person who has been previously convicted of a felony) is punishable by a maximum of 10 years in prison. In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. The RCC also punishes possession of a firearm by a person who has previously convicted of a felony or weapons offense under RCC § 22E-4105. This change improves the consistency and proportionality of the revised statute.

Beyond these five changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised offense applies a heightened penalty for carrying a pistol in a school zone only if the pistol is carried without a license. Current D.C. Code § 22-4502.01 establishes a penalty enhancement for any person carrying a gun illegally in a prohibited location. The term "illegally" is not defined in the statute and District case law has not addressed its meaning.[51] The revised code attaches a location enhancement to the offense of carrying a firearm or explosive without permission only when a person carries a pistol without a license.[52] This change improves the clarity of the revised offenses.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses that are incorporated into the revised carrying a dangerous weapon offense by reference.[53] Current D.C. Code § 22-4504 does not include any exceptions for law enforcement officers, weapons dealers, government employees, and nonresidents who carry a dangerous weapon. In contrast, RCC § 22E-4118 provides a comprehensive list of exclusions from liability, accounting for these and other legitimate

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Community Development, along with Urban Institute, the Coalition for Non Profit Housing and Economic Development, and Code for D.C., produced an interactive tool at HousingInsights.org. The map illustrates that large portions of some neighborhoods—and much of an entire city ward—are subject to the current enhancement penalty.

[49] RCC § 7-2502.15.

[50] *See* RCC § 48-904.01b(g)(7)(C)(i).

[51] D.C. Code § 22-4502.01(c) provides an exception for licensees who live or work within 1000 feet of a gun free zone. This may indicate that licensees are otherwise included within the statute's intended reach.

[52] A person who has a license to carry but does so in an illegal manner per RCC § 7-2509.06A, carrying a pistol in an unlawful manner, is not liable for carrying a firearm or explosive without permission or its first degree gradation containing a location enhancement.

[53] RCC § 22E-4118.

circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[54] This change improves the clarity, consistency, and completeness of the revised code.

[54] RCC § 22E-402.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

Explanatory Note. *This section establishes the possession of a dangerous weapon with intent to commit crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having an explosive, imitation firearm or other dangerous weapon with intent to commit an offense against persons or specified property crimes. The revised offense replaces D.C. Code §§ 22-4514(b) (Possession of a dangerous weapon with intent to use unlawfully against another)[1] and 22-4515a(b) (Manufacture, transfer, use, possession, or transportation of Molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties).[2]*

Subsection (a) specifies the elements of first degree possession of a dangerous with intent to commit crime.

Paragraph (a)(1) specifies that a person must at least knowingly[3] possess an object designed to explode or produce uncontained combustion. "Possesses" is a defined term and includes both actual and constructive possession.[4] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[5] The person must be practically certain that the object is explosive. Evidence of knowledge of an object's location is required, but not necessarily sufficient, to demonstrate constructive possession.[6]

Paragraph (a)(2) specifies that the person must possess the explosive with intent to commit a crime. "Intent" is a defined term[7] which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or an offense against property. The intended conduct must be criminal.[8] The burden of proof rests with the government and does not shift to the defense to prove innocent possession.[9] Evidence of an actual attempt to do harm is not required.[10]

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[1] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4514(c) – (d).

[2] The revised possession of a prohibited weapon or accessory offense (RCC § 22E-4101) and the revised possession of a dangerous weapon with intent to commit crime offense (RCC § 22E-4103) together replace the penalty provisions in D.C. Code § 22-4515a(d) – (e).

[3] "Knowingly" is defined in RCC § 22E-206.

[4] RCC § 22E-701.

[5] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[6] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[7] RCC § 22E-206.

[8] General defenses under Chapter 4 in Subtitle I, such as defense of self or another person, are applicable to the offense.

[9] *United States v. Brooks*, 330 A.2d 245, 246 (D.C. 1974).

[10] *Jones v. United States*, 401 A.2d 473 (D.C. 1979).

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must intend to commit a criminal harm[11] that is either an offense against persons[12] or an offense against property.[13] Subparagraphs (a)(2)(A) and (a)(2)(B) use the term "in fact" to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or offense against property.[14] A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (a)(2)(A) and (a)(2)(B).[15]

Subsection (b) specifies the elements of second degree possession of a dangerous with intent to commit crime.

Subparagraphs (b)(1)(A) and (b)(1)(B) specify that a person must at least knowingly[16] possess an imitation firearm or a dangerous weapon. The terms "imitation firearm" and "dangerous weapon" are defined in the RCC. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[17] A dangerous weapon includes restricted explosives,[18] other enumerated weapons, and "any object, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."[19] It does not include attached fixtures.[20]

Paragraph (b)(2) specifies that the person must possess the imitation firearm or dangerous weapon with intent to commit a crime. "Intent" is a defined term[21] which, applied here, means the accused must be practically certain that they are engaging in the conduct that constitutes an offense against persons or burglary.[22] The intended conduct must be criminal.[23] The burden of proof rests with the government and does not shift to the defense to prove innocent possession.[24] There is no requirement of evidence of an attempt to do harm.[25]

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[11] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.
[12] Subtitle II of Title 22E.
[13] Subtitle III of Title 22E.
[14] RCC § 22E-207.
[15] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).
[16] "Knowingly" is defined in RCC § 22E-206.
[17] RCC § 22E-701.
[18] Second degree possession of a dangerous weapon with intent to commit crime is a lesser-included offense of first degree possession of a dangerous weapon with intent to commit crime. The term "dangerous weapon" broadly includes objects designed to explode or produce uncontained combustion and other "restricted explosives." RCC § 22E-701.
[19] RCC § 22E-701.
[20] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).
[21] RCC § 22E-206.
[22] The person must intend to use the object unlawfully against another person. *See* D.C. Code § 22-4514(b); *In re M.L.*, 24 A.3d 63 (D.C. 2011); *Mihas v. United States*, 618 A.2d 197 (D.C. 1992); *Reid v. United States*, 581 A.2d 359 (D.C. 1990).
[23] General defenses such as defense of self or another person under RCC § 22E-403 are applicable to the offense.
[24] *United States v. Brooks*, 330 A.2d 245, 246 (D.C. 1974).
[25] *Jones v. United States*, 401 A.2d 473 (D.C. 1979).

Subparagraphs (b)(2)(A) and (b)(2)(B) specify that the person must intend to commit either an offense against persons[26] or a burglary.[27] Subparagraphs (b)(2)(A) and (b)(2)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the intended harm meets the definition of an offense against persons or burglary.[28] A person is strictly liable as to the intended conduct being of the variety described in paragraph subparagraphs (b)(2)(A) and (b)(2)(B).[29]

Subsection (c) provides limitations to attempt liability. Under this subsection, attempt liability as defined under RCC § 22E-301 does not apply unless the actor actually possesses an item with intent to use it to commit an offense under Subtitle II or III of this title. If an actor merely comes dangerously close to possessing an item designed to explode or produce uncontained combustion, a dangerous weapon, or imitation firearm, attempt liability is barred. However, if an actor actually possesses an item falsely believing it is an explosive, dangerous weapon, or imitation firearm, with intent to use it to commit an offense, attempt liability may apply.

Subsection (d) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised possession of a dangerous weapon with intent to commit crime statute clearly changes current District law in two main ways.*

First, he revised statute specifies the intended harm required for the offense must be a particular type of District crime. D.C. Code § 22-4514(b) disallows possession of a weapon "with intent to use [it] unlawfully against another."[30] D.C. Code § 22-4515a(b) disallows possession of a weapon "with the intent that the same may be used unlawfully against any person or property." District case law has explained that the phrase "unlawfully against another" requires the accused carry the object with the purpose of using it "as a weapon."[31] However, case law has not specifically ruled whether "as a weapon" is limited to criminal infliction of bodily injury or also property damage or threatening conduct. In contrast, the revised offense cross-references all RCC offenses against persons and either offenses against property (for first degree) or burglary (for second degree). This change clarifies the revised offense and may eliminate an unnecessary gap in liability.

Second, the revised statute bars attempt liability in cases in which the actor does not actually possess an item with intent to use it to commit an offense. The current D.C.

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[26] Subtitle II of Title 22E.
[27] RCC § 22E-2701.
[28] RCC § 22E-207.
[29] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).
[30] Similarly, D.C. Code § 22-4515a(b) disallows possession of an explosive "with the intent that the same may be used unlawfully against any person or property."
[31] *See Peay v. United States,* 597 A.2d 1318, 1321 (D.C. 1991) (explaining the test to be applied in determining whether an item is a "deadly or dangerous weapon" is whether, under the circumstances, the purpose of carrying the item was its use as a weapon) (citing *Nelson v. United States*, 280 A.2d 531, 533 (D.C.1971) (per curiam); *Clarke v. United States*, 256 A.2d 782, 786 (D.C.1969)).

Code does not specifically limit attempt liability for possession of a prohibited weapon under § 22-4514(b). The D.C Court of Appeals (DCCA) has never held whether a person may be convicted of attempted possession of a prohibited weapon if the defendant never actually possesses a weapon or item with intent to use it unlawfully.[32] By contrast, the revised statute specifies that attempt liability does not apply if the actor never actually possesses a weapon or item with intent to use it to commit a criminal offense. This change improves the clarity and proportionality of the revised criminal code.

Beyond these two changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute requires the accused know that they possess the weapon. The current statutes[33] do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.[34] The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[35] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised statute does not include an explicit reference to manufacturing, transferring, using, or transporting an explosive. D.C. Code § 22-4515a(b) makes it unlawful to manufacture, transfer, use, possess, or transport any device, instrument, or object designed to explode or produce uncontained combustion. This conduct is also prohibited by D.C. Code §§ 7-2502.01[36] and 7-2505.01.[37] In contrast, the RCC's definition of possess[38] includes actual possession and constructive possession. A person who knowingly manufactures, transfers, uses, or transports an explosive appears to either violate the revised statute by having the ability and desire to exercise control over the

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[32] The DCCA has stated that "In a prosecution for attempted possession of a prohibited weapon, the government must prove, beyond a reasonable doubt, that the defendant possessed the weapon with the specific intent to use it unlawfully." *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005). However, in this case the defendant actually possessed the alleged weapon.

[33] D.C. Code §§ 22-4514(b); 22-4515a(b).

[34] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

[35] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[36] "[N]o person or organization…shall…transfer, offer for sale, sell, give, or deliver any destructive device." *See also* D.C. Code § 7-2501.01 (defining the term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[37] "No person or organization shall sell, transfer or otherwise dispose of any…destructive device…except as provided in § 7-2502.10(c), § 7-2505.02, or § 7-2507.05." *See also* D.C. Code § 7-2501.01 (defining the term "destructive device" to include "[a]n explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device," such as a Molotov cocktail).

[38] RCC § 22E-701.

object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[39] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised code defines "possession" in its general part.[40] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[41] The RCC definition of "possession,"[42] with the requirement in the offense that the possession be "knowing,"[43] matches the meaning of possession in current DCCA case law.[44] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Second, the revised statute applies the RCC's standardized definition of "with intent." D.C. Code § 22-4514(b) disallows possession of a weapon "with intent to use [it] unlawfully against another."[45] D.C. Code § 22-4515a(b) disallows possession of a weapon "with the intent that the same may be used unlawfully against any person or property." The current statutes do not define "with intent." In contrast, the RCC defines all culpable mental states in its general part.[46] This change improves the clarity and consistency of the revised statutes.

Third, the revised offense applies a standardized definition of "dangerous weapon" used throughout the RCC. D.C. Code § 22-4514(b) prohibits possession of "an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other

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[39] *See* D.C. Code § 22-1511 (Fraudulent advertising).
[40] RCC § 22E-202.
[41] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[42] RCC § 22E-701.
[43] RCC § 22E-206.
[44] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").
[45] Similarly, D.C. Code § 22-4515a(b) disallows possession of an explosive "with the intent that the same may be used unlawfully against any person or property."
[46] RCC § 22E-206.

dangerous weapon." The term "dangerous weapon" is not defined in Chapter 45.[47] However, District case law has held that an object is a dangerous weapon if it is detached[48] and "known to be 'likely to produce death or great bodily injury' in the manner it is used, intended to be used, or threatened to be used."[49] The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

[47] *See* D.C. Code § 22-4501 (Definitions).
[48] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).
[49] *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (citing *Harper v. United States*, 811 A.2d 808, 810 (D.C.2002)); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005);

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

Explanatory Note. *This section establishes the possession of a dangerous weapon during a crime offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes having a firearm or other dangerous weapon in furtherance of an offense against persons. In conjunction with the revised Trafficking of a Controlled Substance statute,[1] the revised offense replaces D.C. Code § 22-4502 (Additional penalty for committing crime when armed). The revised offense also replaces D.C. Code §§ 22-4504(b) (Possession of a firearm during a crime of violence or dangerous crime).*

Subsection (a) specifies the elements of first degree possession of a dangerous weapon during a crime. Paragraph (a)(1) specifies that a person must knowingly possess a firearm.[2] "Knowingly" is a defined term[3] and applied here means that the person must be practically certain that they possess the firearm. "Possesses" is a defined term and includes both actual and constructive possession.[4] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[5] The person must know they possess a firearm[6] or that they possess component parts that could be arranged to make a whole firearm.[7] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[8] "Firearm" is a defined term,[9] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[10] but excludes antiques.[11]

Paragraph (a)(2) requires that the person possess the firearm in furtherance of and while committing a crime. The phrase "in furtherance of" has the same meaning as in 18

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[1] RCC § 48-904.01b.

[2] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

[3] "Knowingly" is defined in RCC § 22E-206.

[4] RCC § 22E-701.

[5] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[6] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

[7] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

[8] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[9] RCC § 22E-701.

[10] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).

[11] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

U.S.C. § 924(c)(1).[12] This requires specific evidence of a nexus between the weapon and the defendant's intent to advance or facilitate the underlying criminal activity.[13] The mere presence of a firearm near a criminal act, criminal proceeds, or contraband is insufficient.[14] The phrase "while committing" requires that the person must engage in the conduct constituting the underlying offense at the same time as they possess the firearm. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is acting in furtherance of the predicate crime.

Subparagraphs (a)(2)(A) and (a)(2)(B) specify that the person must commit[15] an offense against persons.[16] Some offenses against persons also provide for a heightened penalty gradation if a firearm or other dangerous weapon is displayed or used.[17] Possession of a firearm in furtherance of a drug crime is punished under RCC § 48-904.01b.

Subsection (b) punishes possession of an imitation firearm or a dangerous weapon in furtherance of a crime as second degree possession of a dangerous weapon during a crime under Subtitle II of the RCC. The terms "imitation firearm" and "dangerous weapon" are defined in RCC § 22E-701. An imitation firearm is "any instrument that resembles an actual firearm, closely enough, that a person observing it might reasonably believe it to be real."[18] A dangerous weapon includes firearms, other enumerated weapons, and "any object, other than a body part, that in the manner of its actual, attempted, or

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[12] Another aspect of this statute was recently held to be unconstitutionally vague. *United States v. Davis*, 18-431, 2019 WL 2570623 (U.S. June 24, 2019).

[13] *See* H.R. Rep. No. 105-344, 1997 WL 668339 (reporting that the "fact that drug dealers in general often carry guns for protection is insufficient to show possession in furtherance of drug activity"; rather, the government must clearly show through "specific facts that tie the defendant to the firearm," that a weapon was possessed to advance or promote the commission of the underlying offense, and the "mere presence of a firearm in an area where a criminal act occurs" is not a sufficient basis for imposing a sentence under this provision).

[14] Most circuits have identified specific factors that allow a court to distinguish guilty possession from innocent "possession at the scene," including: the accessibility of the firearm, the type of weapon, whether the possession is illegal, whether the gun is loaded, and the time and circumstances under which the gun is found. *United States v. Renteria*, 720 F.3d 1245, 1255 (10th Cir. 2013); *see also United States v. Brown*, 715 F.3d 985, 993-94 (6th Cir. 2013); *United States v. Gill*, 685 F.3d 606, 611 (6th Cir. 2012); *United States v. Johnson*, 677 F.3d 138, 143 (3d Cir. 2012); *United States v. Eller*, 670 F.3d 762, 766 (7th Cir. 2012); *United States v. London*, 568 F.3d 553, 559 (5th Cir. 2009); *United States v. Lopez-Garcia,* 565 F.3d 1306, 1322 (11th Cir. 2009); *United States v. Perry*, 560 F.3d 246, 254 (4th Cir. 2009); *see also United States v. Chavez*, 549 F.3d 119, 130 (2d Cir. 2008); *but see United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007)(internal citations omitted)("Although the Fifth Circuit has developed a non-exclusive list of factors…we have concluded that this approach is not particularly helpful in close cases…In our most recent case addressing the 'in furtherance question,' we reiterated the importance of the factual inquiry. We declined once again to adopt a checklist approach to deciding this issue and held that it is the totality of the circumstances, coupled with a healthy dose of a jury's common sense when evaluating the facts in evidence, which will determine whether the evidence suffices to support a conviction").

[15] Here, the word "commit" includes an attempt to commit and a conspiracy to commit. *See, e.g., Morris v. United States*, 622 A.2d 1116 (D.C. 1993) (sustaining a conviction for possession of a firearm during an attempted armed robbery).

[16] Subtitle II of Title 22E.

[17] RCC §§ 22E-1201 (robbery); 22E-1202 (assault); 22E-1204 (criminal threats); 22E-1301 (sexual assault); 22E-1401 (kidnapping).

[18] RCC § 22E-701.

threatened use is likely to cause death or serious bodily injury to a person."[19] It does not include attached fixtures.[20] This gradation of the offense does not require proof of an actual firearm but otherwise has elements identical to first degree possession of a dangerous weapon during a crime.

Subsection (c) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised possession of a dangerous weapon during a crime statute clearly changes current District law in two main ways.*

First, the revised offense generally expands the number of crimes that are a predicate for possession of a dangerous weapon during a crime liability. Current D.C. Code §§ 22-4502 and 22-4504 prohibit possession of a weapon only during a "crime of violence" which is defined in D.C. Code § 22-4501 to include felony offenses enumerated in D.C. Code § 23-1331(4).[21] In contrast, the revised offense punishes possession of a weapon during any offense against persons—including misdemeanor assault or misdemeanor sex offenses. It is not clear that the *potential* risk in possessing (but not displaying or using) a dangerous weapon when engaged in an offense against persons varies significantly between misdemeanor and felony level conduct. In a few instances, changes to offenses against persons in the RCC may narrow liability for possession of a dangerous weapon during a crime.[22] This change improves the proportionality of the revised statute and eliminates an unnecessary gap in liability.

Second, the revised offense does not require proof that the weapon is readily available. Current D.C. Code § 22-4502 requires evidence that a firearm was "in close proximity or easily accessible" during the commission of the underlying offense.[23]

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[19] RCC § 22E-701.

[20] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).

[21]

> The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

[22] For example, the RCC robbery statute, RCC § 22E-1201, is narrower than the current D.C. Code robbery statute, D.C. Code § 22-2801, insofar as some of the current statute's conduct (sudden and stealthy snatching) is criminalized as third degree theft, RCC § 22E-2101(c), which is not within the scope of the revised offense of possession of a dangerous weapon during a crime.

[23] *Clyburn v. United States*, 48 A.3d 147, 153-54 (D.C. 2012).

However, D.C. Code § 22-4504(b) does not include a similar proximity requirement. In contrast, liability under the revised statute turns only on the relationship between the weapon and the unlawful activity instead of ease of access.[24] That is, the revised offense requires that the weapon—wherever it is located—be possessed "in furtherance of" the underlying crime. This change improves the consistency and proportionality of the revised offenses.

Beyond these two changes to current District law, two other aspects of the revised offense may constitute substantive changes to current District law.

First, the revised statute requires the accused know that they possess the weapon. The current statutes[25] do not specify a culpable mental state, however, District case law requires knowledge for the actual or constructive possession of any item.[26] The revised statute requires that the person know that they possess the item and that the person know that the item is a weapon or imitation firearm. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[27] This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised offense does not include possession of a firearm in furtherance of a drug crime. Current D.C. Code §§ 22-4502(a) and 22-4504(b) punish possession of a firearm during a dangerous crime. The term "dangerous crime" is defined in D.C. Code § 22-4501 to mean "distribution of or possession with intent to distribute a controlled substance." In contrast, the RCC reorganizes the controlled substances statutes to include an enhancement for drug trafficking while armed.[28] The enhancement requires that the firearm is "readily available," which is consistent with D.C. Code § 22-4502(a)[29] but

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[24] Compare for example, Person A who carries a pocketknife for self-defense but does not use it during a simple assault and Person B who threatens to retrieve a firearm from the trunk of his car while committing a robbery. *See Strong v. United States*, 581 A.2d 383, 387 (D.C. 1990) (explaining "The prevention of coercion is at the heart of enhancement provisions which include imitation weapons within their scope" and holding "Convictions under the 'while armed' statute will stand only if a defendant (1) has committed some violent crime, and (2) has used the threat of injury by a dangerous weapon to force his victims to comply with his illegal requests") (citing *Paris v. United States,* 515 A.2d 199 (D.C.1986)).

[25] D.C. Code §§ 22-4502; 22-4504(b).

[26] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

[27] *See*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[28] RCC § 48-904.01b(g)(7)(B).

[29] "Armed with" means "actual physical possession of the pistol or other firearm." *Cox v. United States*, 999 A.2d 63, 69 (D.C. 2010). "Readily available" means "in close proximity or easily accessible during the commission of the underlying PWID offense, as evidenced by lay or expert testimony (and reasonable inferences) describing the distance between the appellant and the firearm, and the ease with which the appellant can reach the firearm during the commission of the offense." *Clyburn v. United States*, 48 A.3d 147, 153-54 (D.C. 2012).

possibly narrower than § 22-4504(b).[30] This change logically reorders and improves the consistency of the revised offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised code defines "possession" in its general part.[31] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[32] The RCC definition of "possession,"[33] with the requirement in the offense that the possession be "knowing,"[34] matches the meaning of possession in current DCCA case law.[35] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Second, the revised offense applies a standardized definition of "dangerous weapon" used throughout the RCC. D.C. Code § 22-4502 prohibits possession of "any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)." The term "dangerous weapon" is not defined in Chapter 45.[36] However, District case law has held that an object is a dangerous weapon if it is detached[37] and "known to be 'likely to produce death or great bodily injury' in the manner it is used, intended to be used, or threatened to be used."[38] The RCC codifies a common definition to be applied to all revised offenses. This change improves the clarity and consistency of the revised offenses.

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[30] D.C. Code § 22-4504(b) makes it unlawful to possess any firearm or imitation firearm "while committing a crime."
[31] RCC § 22E-202.
[32] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[33] RCC § 22E-701.
[34] RCC § 22E-206.
[35] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").
[36] *See* D.C. Code § 22-4501 (Definitions).
[37] *Edwards v. United States*, 583 A.2d 661, 667 (D.C. 1990).
[38] *Alfaro v. United States*, 859 A.2d 149, 160 (D.C. 2004) (citing *Harper v. United States*, 811 A.2d 808, 810 (D.C.2002)); *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005);

RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

Explanatory Note. *This section establishes the possession of a firearm by an unauthorized person offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes knowing possession of a firearm by a person who has been previously been involved in criminal activity or is subject to a relevant court order. The revised offense replaces D.C. Code § 22-4503 (Unlawful Possession of a Firearm) and a minimum statutory penalty for the offense.*[1]

Subsection (a) generally punishes possession of a firearm by a person who previously has been convicted of a crime of violence as first degree possession of a firearm by an unauthorized person.

Paragraph (a)(1) specifies that a person must knowingly possess a firearm.[2] "Knowingly" is a defined term[3] and applied here means that the person must be practically certain that they possess the firearm. "Possesses" is a defined term and includes both actual and constructive possession.[4] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[5] The person must know they possess a firearm[6] or that they possess component parts that could be arranged to make a whole firearm.[7] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[8] RCC § 22E-203 requires that a person commit the offense voluntarily.[9] "Firearm" is a defined term,[10] which includes inoperable

[1] D.C. Code § 24-403.01(f)(2) ("The sentence imposed under this section shall not be less than 1 year for a person who was over 18 years of age at the time of the offense and was convicted of . . . (2) Illegal possession of a pistol in violation of § 22-4503, occurring after the person has been convicted of violating that section.").

[2] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).

[3] "Knowingly" is defined in RCC § 22E-206.

[4] RCC § 22E-701.

[5] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[6] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

[7] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).

[8] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990). However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are somewhere in a set of drawers constructively possesses their keys.

[9] A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person is convicted of a disqualifying offense. Consider, for example, a person who is awaiting a verdict in a case alleging a disqualifying offense. The person does not commit an offense the instant the verdict is delivered.

[10] RCC § 22E-701.

weapons that may be redesigned, remade or readily converted or restored to operability[11] but excludes antiques.[12]

Paragraph (a)(2) requires that the person has a prior conviction. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have a prior conviction. The term "prior conviction" is defined in RCC § 22E-701 to mean a finding of guilt for a criminal offense committed by an adult, with limited exceptions. Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether the prior conviction was for a crime of violence or comparable offense.[13] A person is strictly liable as to the prior conviction being of the variety described in paragraph (a)(2).[14] Paragraph (a)(2) requires that the prior offense is a crime of violence other than conspiracy. The term "crime of violence" is defined in the RCC's general part as consisting of specified crimes and otherwise would include convictions for conspiracy to commit those specified crimes.[15] Whether a prior conviction is for conspiracy is based upon how the crime is charged, not based on the theory of liability that is described in the charging documents or advanced at trial.[16] The term "comparable offense" is defined in RCC § 22E-701 and means "a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime." The determination of whether a conviction in another jurisdiction is for a "comparable offense" is a matter of law.

Subsection (b) establishes five classes of persons who are subject to second degree liability for possession of a firearm by an unauthorized person.

Subparagraph (b)(2)(A) criminalizes gun ownership by any person who is presently a fugitive from justice. The term "fugitive from justice" is defined in paragraph (e)(2). Per the rules of interpretation in RCC § 22E-207, the culpable mental state of "knowingly" in paragraph (b)(1) applies to subparagraph (b)(2)(A) and a person must know—that is, be practically certain—that they are avoiding apprehension. RCC § 22E-203 requires that a person commit the offense voluntarily.[17]

The next three classes are persons with recent prior convictions for crimes. Just as in the first degree offense, the defendant must be practically certain that they possess a firearm and practically certain that they have a prior conviction. "Prior conviction," "possess," and "firearm" are defined in RCC § 22E-701. Subparagraph (b)(2)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the

[11] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[12] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[13] RCC § 22E-207.
[14] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).
[15] RCC § 22E-701.
[16] *See Bland v. United States*, 153 A.3d 78, 81 (D.C. 2016).
[17] A person who lawfully owns a firearm does not necessarily commit possession of a firearm by an unauthorized person at the moment the person becomes a fugitive from justice.

prior conviction was for one of the predicate offenses.[18] A person is strictly liable as to the prior conviction being of the variety described in sub-subparagraphs (b)(2)(B)(i) – (iii).[19]

Sub-subparagraph (b)(2)(B)(i) generally criminalizes gun ownership by any person who has been convicted of a District felony, i.e. a crime punishable by more than a year of incarceration.[20] The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[21] The term "comparable offense" does not mean any offense in another jurisdiction that is punishable by more than a year of incarceration. Sub-subparagraph (b)(2)(A)(i) specifies that the prior conviction must be for an offense that occurred within 10 years of the current firearm possession.

Sub-subparagraph (b)(2)(B)(ii) criminalizes gun ownership by any person who has been convicted of a weapon offense under Chapter 41. The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[22] Sub-subparagraph (b)(2)(B)(ii) specifies that the prior conviction must be for an offense that occurred within 5 years of the current firearm possession.

Sub-subparagraph (b)(2)(B)(iii) criminalizes gun ownership by any person who has been convicted of violence against a family member, i.e. an intrafamily felony or misdemeanor[23] offense involving confinement, a sexual act, a sexual contact, bodily injury, or threats. This includes convictions for inchoate versions of such an offense (e.g., attempt, solicitation). The term "intrafamily offense" is defined in D.C. Code § 16-1001 to include interpersonal, intimate partner, or intrafamily violence. "Interpersonal violence," "intimate partner violence," and "intrafamily violence" are also defined in § 16-1001 and broadly include relationships between blood relatives,[24] current and former roommates,[25] and people who have previously shared the same romantic partner.[26] The term "comparable offense" is defined to require elements that would necessarily prove the elements of a corresponding RCC offense.[27] With respect to out-of-state intrafamily offenses, it is not required that the comparable statute include an identical definition of "intrafamily offense." However, the familial relationship must be proven beyond a reasonable doubt in the prosecution of the second degree possession of a firearm by an unauthorized person

[18] RCC § 22E-207.
[19] Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).
[20] *See* RCC § 22E-601. Current District law has both misdemeanors that are punishable by more than one year and felonies that are punishable by less than one year. D.C. Code § 5-115.03 (two-year misdemeanor); D.C. Code § 16-1024(b)(1) (six-month felony). Other jurisdictions also have misdemeanors that are punishable by more than one year. *See*, *e.g.*, Md. Code, Criminal Law § 3-211 (three-year misdemeanor).
[21] RCC § 22E-701.
[22] RCC § 22E-701.
[23] *See, e.g., United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010).
[24] D.C. Code § 16-1001(9).
[25] D.C. Code § 16-1001(6)(A).
[26] D.C. Code § 16-1001(6)(B).
[27] RCC § 22E-701.

offense.[28] Sub-subparagraph (b)(2)(B)(iii) specifies that the prior conviction must be for an offense that occurred within 5 years of the current firearm possession.

Subparagraph (b)(2)(C) criminalizes gun ownership by any person who is subject to a final civil protection order issued in D.C. Code § 16-1005 or a final anti-stalking order issued under D.C. Code § 16-1064.[29] Subparagraph (b)(2)(C) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person is subject to a final civil protection or anti-stalking order.[30]

Subsection (c) provides that the actor does not commit possession of a firearm by an unauthorized person at the moment a conviction or civil protection order occurs. Rather, a 24-hour grace period normally applies unless a judicial officer specifies a shorter amount of time. Within the 24-hour period or, when specified by a judicial officer, a shorter period, the actor is not liable for possessing the firearm under RCC § 22E-4105. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, which here is the fact that the actor possesses a firearm within the first 24 hours of the prior conviction or service of the protection order, or within the shorter time specified by the judicial officer.

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or federal voluntary surrender statute or rule.[31] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (f) cross-references applicable definitions in the RCC and provides a definition for the term "fugitive from justice."

Paragraph (f)(2) specifies three types of fugitives from justice. The term refers to people who are presently avoiding apprehension, prosecution, or other government action. It does not include people who have previously been subject to a warrant that is now closed or a subpoena that was never enforced by a court of law.

Subparagraph (f)(2)(A) specifies that a person is classified as a fugitive from justice if they have fled to avoid prosecution for a crime. This classification is not limited by jurisdiction.[32]

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[28] *See United States v. Hayes*, 555 U.S. 415 (2009) (A domestic relationship, although it must be established beyond a reasonable doubt in an 18 U.S.C. § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense).

[29] D.C. Code § 16-1064 is a statute under a recently enacted law, with a projected law date of May 24, 2021.

[30] RCC § 22E-207. Although a person is strictly liable, justification defenses may apply, under Chapter 4 in Subtitle I. *See Blades v. United States*, 200 A.3d 230 (D.C. 2019).

[31] *See, e.g.,* D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

[32] For example, a person who is subject to a non-extraditable arrest warrant from another state is a fugitive from justice.

Subparagraph (f)(2)(B) specifies that a person is classified as a fugitive from justice if they have fled to avoid giving testimony in a criminal proceeding. The phrase "criminal proceeding" refers to formal hearings and presentations of evidence, such as a trial or an appearance before a grand jury. It does not include witnesses who have refused to participate in a criminal investigation or negotiation. This classification is not limited by jurisdiction.[33]

Subparagraph (f)(2)(C) specifies that a person is classified as a fugitive from justice if they have committed an escape, as defined in RCC § 22E-3401.[34]

Relation to Current District Law. *The revised possession of a firearm by an unauthorized person statute clearly changes current District law in six main ways.*

First, a prior conviction for a nonviolent offense is a predicate for unauthorized possession liability only if it is for an offense that occurred within ten years.[35] Current D.C. Code § 22-4503 generally[36] imposes a five-year time limit for misdemeanor convictions[37] and no time limit for felonies. There is no District case law on the constitutionality of these provisions insofar as they involve non-violent offenses, however the matter has been litigated in other jurisdictions. Some courts have held that Second Amendment rights can be curtailed based on a prior conviction only if the conviction indicates a propensity for gun violence.[38] Other courts have held that a person may prove themselves "unvirtuous" of Second Amendment protections by committing any serious

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[33] For example, a person who is subject to a non-extraditable bench warrant from another state is a fugitive from justice.

[34] This offense includes jailbreaks and escaping a law enforcement officer. It does not include resisting or eluding.

[35] In the RCC (and under the current D.C. Code, excepting drug crimes) there are few offenses other than crimes of violence that carry a 10-year or more imprisonment penalty.

[36] Current District law has both misdemeanors that are punishable by more than one year and felonies that are punishable by less than one year. D.C. Code § 5-115.03 (two-year misdemeanor); D.C. Code § 16-1024(b)(1) (six-month felony). Other jurisdictions also have misdemeanors that are punishable by more than one year. *See*, *e.g.*, Md. Code, Criminal Law § 3-211 (three-year misdemeanor).

[37] D.C. Code § 22-4504(a)(6).

[38] *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 348 (3d Cir. 2016) (citing *Skoien*, 614 F.3d at 642; *Voisine*, 136 S.Ct. at 2280; *Heller v. District of Columbia*, 554 U.S. at 626; *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1363–64 (2009); *Vongxay*, 594 F.3d at 1115); *see also Halloway v. Sessions*, 349 F. Supp. 3d 451, 460-61 (M.D. Pa. 2018) (holding that federal FIP statute 18 U.S.C. § 922(g) was, per the Second Amendment, unconstitutional as applied to a DUI-offender plaintiff because the government failed to prove, under intermediate scrutiny, that applying the statute to offenders like plaintiff sufficiently furthered the compelling interest of "preventing armed mayhem"); *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012), cert. denied, 133 S. Ct. 962 (2013) (dispossession would be improper if a litigant could demonstrate that he fell within "the scope of Second Amendment protections for 'law-abiding responsible citizens to use arms in defense of hearth and home'"); *United States v. Barton,* 633 F.3d 168, 173 (3d Cir. 2011)("As the Government concedes, Heller's statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge."); *United States. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) ("[T]here must exist the possibility that [a firearm] ban could be unconstitutional in the face of an as-applied challenge."); *see also United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons.").

crime.[39] In contrast, the revised offense generally imposes a five-year time limit from the time of the offense for misdemeanor convictions, a ten-year time limit from the time of the offense for felonies, and maintains no time limit for crimes of violence. This change improves the proportionality and, perhaps, the constitutionality of the revised offense.

Second, an intrafamily misdemeanor conviction is a predicate for unauthorized possession liability only if it required proof of confinement, sexual act, sexual contact, bodily injury, or threats and offense occurred within 5 years of the firearm possession. Current D.C. Code § 22-4503(6) disallows gun possession within 5 years of any intrafamily misdemeanor conviction. As a result, a person loses their constitutionally protected right to bear arms if they commit a minor nonviolent crime against someone known to them[40] but not if they commit a violent offense against a stranger.[41] In contrast, the revised offense aligns its unauthorized person criteria with the District's firearm registration requirements, which define "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force, or the threatened use of a deadly weapon."[42] The revised offense also sets the five year time window based on the time of the offense, not the time of the conviction. This change improves the consistency and proportionality of the revised offense and may better ensure constitutional applications.[43]

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[39] *See U.nited States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), cert. denied, 131 S. Ct. 1674, 179 L. Ed. 2d 645 (2011) (en banc) (explaining why §922(g) may constitutionally be applied to an individual repeatedly convicted of misdemeanor domestic violence). *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 727-28 (2009).

[40] For example, one roommate who is short on rent may commit misdemeanor check fraud against another roommate. *See* D.C. Code § 22-1510.

[41] For example, a person may commit simple assault in violation of D.C. Code § 22-404(a)(1) or misdemeanor sexual abuse in violation of D.C. Code § 22-3006.

[42] *See* 24 DCMR § 2309; *see also United States v. Castleman*, 572 U.S. 157, 162-63 (2014) (holding that Congress incorporated the common-law meaning of "force"—namely, offensive touching—in § 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence").

[43] There is a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens. *See United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 727-28 (2009). Conversely, a conviction for an offense that is neither violent nor serious may be an improper basis for dispossession. *See Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 348 (3d Cir. 2016) (citing *Skoien*, 614 F.3d at 642; *Voisine*, 136 S.Ct. at 2280; *Heller v. District of Columbia*, 554 U.S. at 626; *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004); Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations & Criminological Considerations*, 60 Hastings L.J. 1339, 1363–64 (2009); *Vongxay*, 594 F.3d at 1115); *see also Halloway v. Sessions*, 349 F. Supp. 3d 451, 460-61 (M.D. Pa. 2018) (holding that federal FIP statute 18 U.S.C. § 922(g) was, per the Second Amendment, unconstitutional as applied to a DUI-offender plaintiff because the government failed to prove, under intermediate scrutiny, that applying the statute to offenders like plaintiff sufficiently furthered the compelling interest of "preventing armed mayhem"); *United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012), cert. denied, 133 S. Ct. 962 (2013) (dispossession would be improper if a litigant could demonstrate that he fell within "the scope of Second Amendment protections for 'law-abiding responsible citizens to use arms in defense of hearth and home'"); *United States v. Barton,* 633 F.3d 168, 173 (3d Cir. 2011)("As the Government concedes, Heller's statement regarding the presumptive validity of felon gun dispossession statutes does not foreclose Barton's as-applied challenge."); *United States. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) ("[T]here must exist the possibility that [a firearm] ban could be unconstitutional in the face of an as-applied challenge."); *see also United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons.").

Third, an out-of-state conviction is a predicate for unauthorized possession liability if it has elements that would necessarily prove the elements of a corresponding District crime. Current D.C. Code § 22-4503(a)(1) disallows gun ownership by any person who has "been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." There are instances in which the District punishes conduct more harshly than other states[44] and vice versa.[45] There are also many instances in which other states punish the same conduct differently. As a result, there are cases in which the current statute punishes constitutionally protected activity based on the location instead of the seriousness of the conduct. The revised offense applies to any person who has been convicted of an offense that would be punished by one year if committed in the District, basing liability on the District's specific legislative views on the seriousness of the conduct, irrespective of the maximum penalty in the other jurisdiction. This change reduces an unnecessary gap in liability and improves the consistency[46] and proportionality of the revised offense.

Fourth, a person's dependency on a controlled substance is not a predicate for unauthorized possession liability. Current law punishes possession of a firearm by a person who is "addicted to any controlled substance."[47] The term "addicted" is not defined in Chapter 45 and case law has not interpreted its meaning.[48] Other considerations of fitness to safely store and use gun—such as age, intellectual disabilities, psychiatric disorders—appear in the District's registration requirements[49] and not in the current unlawful possession of a firearm offense. In contrast, the revised statute eliminates a vague reference to addiction to a controlled substance. The boundaries of addiction are amorphous,[50] making the current provision nearly impossible to enforce evenhandedly and inviting

But see U.S. v. Skoien, 614 F.3d 638 (7th Cir. 2010), cert. denied, 131 S. Ct. 1674, 179 L. Ed. 2d 645 (2011) (en banc) (explaining why §922(g) may constitutionally be applied to an individual repeatedly convicted of misdemeanor domestic violence).

[44] For example, inciting a riot currently carries a maximum penalty of 10 years in the District but carries a maximum penalty of one year in New York. *See* D.C. Code § 22-1322(c); N.Y. Penal Law § 240.08.

[45] For example, possession of 50 grams of marijuana is legal in the District but carries a maximum penalty of 18 months in New Jersey (equivalent to recklessly causing bodily injury with a deadly weapon). *See* D.C. Code § 48-904.01(a)(1)(A); N.J. Stat. Ann. § 2C:35-10.

[46] Current D.C. Code § 22-4503(a)(6) disallows gun ownership by any person who has "been convicted…of an intrafamily offense, *as defined in D.C. Official Code § 16-1001(8)*, or any similar provision in the law of another jurisdiction." (Emphasis added.)

[47] D.C. Code § 22-4503(a)(4).

[48] D.C. Code § 23-1331(5) defines "addict" to mean any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare. D.C. Code § 48-902.01(24) defines "addict" to mean any individual who habitually uses any narcotic drug or abusive drug so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drug or abusive drug as to have lost the power of self-control with reference to his addiction.

[49] *See, e.g.*, D.C. Code §§ 7-2502.03 and 22-4507; 24 DCMR §§ 2308; 2313.8; and 2332(d).

[50] For example, it is unclear whether a person who is predisposed to chemical dependency but is currently drug-free qualifies as an addict.

challenges on due process grounds.[51] This change improves the consistency of the revised code and may ensure the constitutionality of the revised statute.

Fifth, the revised offense applies to any person who is subject to a final civil protection order issued under D.C. Code § 16-1005 or a final anti-stalking order issued under D.C. Code § 16-1064.[52] Current D.C. Code § 22-4503(a)(5) describes "a court order that: (A)(i) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate; or (ii) Remained in effect after the person failed to appear for a hearing of which the person received actual notice; (B) Restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order; and (C) Requires the person to relinquish possession of any firearms…" Reference to "petitioner" in D.C. Code § 22-4503(a)(5)(B) suggests that the orders referred to are in civil cases only. In contrast, the revised statute applies to any final civil protection order issued under D.C. Code § 16-1005, or a final anti-stalking order issued under D.C. Code § 16-1064. The current D.C. Code § 22-4503(a)(5) definition appears to be underinclusive, as some civil protection orders restrain a person from coming within close physical proximity of a petitioner, without specifying that they may not assault, harass, stalk, or threaten. It is also potentially overinclusive, to the extent that it could be read to apply to court orders in criminal, civil, and family court cases, instead of only to civil protection order cases. By specifying that the protection order must be final, the RCC statute ensures that there was actual notice and a hearing at which the person had an opportunity to participate. The RCC statute also includes final anti-stalking orders, civil orders issued by a mechanism that also requires appropriate notice and a hearing. This change eliminates a gap in liability and clarifies the revised statute.

Sixth, the revised statute normally provides a 24-hour grace period between the time the person is convicted or served with a protection order, unless a judicial officer specifies a shorter period. The current D.C. Code § 22-4503(a)(5) provides no exception for having a reasonable opportunity to safely dispose of a firearm after a protection order goes into effect. In contrast, the revised statute ensures that a law-abiding gun owner does not commit an offense the moment their status changes to a someone who is now unauthorized to possess a firearm. The person may retrieve and safely transport the firearm and relinquish ownership within 24 hours or, when the judicial officer specifies a shorter time, within the timeframe established by the judicial officer. This change improves the proportionality of the revised statute.

Beyond these six changes to current District law, two other aspects of the revised offense may constitute substantive changes to current District law.

First, the revised offense requires that the accused know that they have a prior conviction or open warrant. D.C. Code § 22-4503 does not specify a culpable mental state for any element of the current unlawful possession of a firearm offense. The District of

[51] The current statute does not provide a procedure for notifying a person that they are considered an addict for purposes of D.C. Code § 22-4503 or for providing that person with a hearing.
[52] D.C. Code § 16-1064 is a statute under a recently enacted law, with a projected law date of May 24, 2021.

Columbia Court of Appeals ("DCCA") has held that a person must know that they possess a firearm or component parts that can be pieced together to make a firearm.[53] However, the court has not clearly held whether a person must know that they have a conviction, warrant, or civil protection order.[54] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[55] At least one federal court considering a similar federal statute has noted that it would be sensible to require the government to prove that the defendant had knowledge of the only fact (his felony status) separating criminal behavior from not just permissible, but constitutionally protected, conduct.[56] The United States Supreme Court recently interpreted the penalty provision for the same federal offense[57] to require exactly that.[58] The revised statute does not require that a person know of their felony status,[59] but does require that the person know that they have a prior conviction, open warrant, or order to not possess any firearms.[60] This change improves the consistency and proportionality of the revised offense.

Second, the revised offense holds the accused strictly liable for the existence of a court order to relinquish all firearms. Current D.C. Code § 22-4503(a)(5) does not specify a culpable mental state. However, the statute specifies that it applies only if the order was issued after the person received actual notice of a hearing and either had an opportunity to participate during the hearing or failed to appear. Although applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal

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[53] *Myers v. United States*, 56 A.3d 1148, 1152 (D.C. 2012).

[54] *But see Goodall v. United States,* 686 A.2d 178 (D.C. 1996) (permitting the parties to stipulate to the existence of a prior felony at trial); *Bland v. United States*, 153 A.3d 78, 79 (D.C. 2016) (finding that whether a crime is a "crime of violence" for purposes of the statute's sentencing enhancement is a legal question, not a factual question) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

[55] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256-258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[56] *United States v. Games-Perez*, 667 F.3d 1136, 1144-45 (10th Cir. 2012) (Gorsuch, J., concurring) (interpreting 18 U.S.C. § 922(g)).

[57] 18 U.S.C. § 924(a)(2).

[58] *Rehaif v. United States*, 17-9560, 2019 WL 2552487 (U.S. June 21, 2019).

[59] The phrase "in fact" in RCC §§ 22E-4105(a)(2) and (b)(2)(A) holds an actor strictly liable as to a conviction being disqualifying. *See* RCC § 22E-207.

[60] To require actual knowledge that the prior conviction is disqualifying may impose an insurmountable evidentiary burden in some cases, creating an unnecessary gap in liability. For example, the government might be required to prove that the person was not intoxicated, knew the date of their conviction was within the proscribed period, or knew that they conviction was for conduct that is legally considered an act of domestic violence. *See Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *8 (U.S. June 21, 2019) (J. Alito, dissenting).

behavior is a well-established practice in American jurisprudence,[61] a person who fails to appear for a hearing may not have actual knowledge of the relinquishment order. The revised statute nevertheless holds a person strictly liable, provided that the person had notice of their right to appear at the hearing. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised code defines "possession" in its general part.[62] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[63] The RCC definition of "possession,"[64] with the requirement in the offense that the possession be "knowing,"[65] matches the meaning of possession in current DCCA case law.[66] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[61] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[62] RCC § 22E-202.

[63] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[64] RCC § 22E-701.

[65] RCC § 22E-206.

[66] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

RCC § 22E-4106. Negligent Discharge of Firearm.

Explanatory Note. *This section establishes the negligent discharge of a firearm offense for the Revised Criminal Code (RCC). The offense proscribes discharging a firearm without permission to do so.*[1] *The revised offense replaces D.C. Code § 22-4503.01 (Unlawful discharge of a firearm) and 24 DCMR §§ 2300.1 – 2300.3 (Discharge of weapons).*

Paragraph (a)(1) specifies that the person must discharge a projectile from a firearm outside of a licensed firing range.[2] Per its ordinary meaning,[3] a "discharge" does not require aiming a weapon. "Firearm" is a defined term that refers to a weapon "which will, or is designed or redesigned, made or remade, readily converted, restored, or repaired, or is intended to, expel a projectile or projectiles by the action of an explosive" and excludes antiques.[4] Paragraph (a)(1) specifies that to be criminally liable for discharging a projectile firearm, a person must act at least negligently, a defined term.[5] That is, at a minimum, the person should be aware of a substantial risk that the object is a firearm and that it has discharged in a location other than a licensed firing range. Negligence also requires that the risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances person is aware of, the person's failure to perceive that risk is a gross deviation from the ordinary standard of care.[6]

Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has lawful authority to discharge a firearm.[7]

Subparagraph (a)(2)(A) provides that a person may discharge a firearm if the Metropolitan Police Department ("MPD") grants written permission to do so. MPD may permit the discharge of a firearm by a particular person, in a particular location, or at a specified time.

Subparagraph (a)(2)(B) provides that a person may discharge a firearm if they have any other permission to do so under District or federal law. If a discharge is permitted by law a person does not violate this section.

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

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[1] RCC § 22E-4120, endangerment with a firearm, punishes knowingly discharging a firearm outside a licensed firing range and either doing so in a location open to the general public or creating a substantial risk of death or bodily injury to another.

[2] The District of Columbia does not currently have any firing ranges or hunting grounds.

[3] *See, e.g.,* Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/discharge ("to relieve of a charge, load, or burden").

[4] RCC § 22E-701. Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).

[5] RCC § 22E-206.

[6] RCC § 22E-206.

[7] RCC § 22E-207.

Relation to Current District Law. *The revised negligent discharge of a firearm statute clearly changes current District law in five main ways.*

First, the revised statute requires that the accused act at least negligently with respect to discharge of a firearm outside a firing range. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[8] even though it is highly unusual to provide criminal liability for merely negligent conduct.[9] This change improves the clarity, consistency, and proportionality of the revised offense.

Second, the revised statute includes only one offense and one penalty gradation for negligent discharge of a firearm. A violation of current D.C. Code § 22-4503.01 is subject to a maximum penalty of specifies a maximum penalty of 1 year of incarceration and a $2,500 fine.[10] A violation of 24 DCMR §§ 2300.1 – 2300.3 is subject to a fine of $300 and is not punishable by jail time.[11] In contrast, the revised statute provides a single offense gradation. This change logically reorders and improves the consistency proportionality of the revised statutes.

Third, the revised offense does not punish discharge of an air gun, spring gun, or torpedo. Current 24 DCMR § 2300.1 prohibits the discharge of any "gun, air gun, rifle, air rifle, pistol, revolver, or other firearm, cannon, or torpedo" without the written permission of the Chief of Police. The term "gun" is not defined in the statute or in District case law and may broadly include spring guns, paintball guns, cap guns, water guns, and other toys. The revised code defines the term "firearm" to include a rifle, pistol, revolver, and cannon,[12] however, it does not include air rifles or torpedo. Discharging an air rifle outside a building is punished as carrying an air or spring gun.[13] Releasing a torpedo—or any other restricted explosive—is punished as possession of a prohibited weapon or

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[8] RCC § 22E-206.

[9] *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples,* 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich,* 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries,* 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States,* 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[10] D.C. Code §§ 22-4515; 22-3571.01.

[11] 24 DCMR § 100.6.

[12] RCC § 22E-701.

[13] RCC § 7-2502.17.

accessory.[14] This change improves the logical organization and proportionality of the revised offenses.

Fourth, the revised offense does not allow firearms to be discharged in theaters. Current 24 DCMR § 2300.3 states, "This section shall not apply to the discharge of firearms or explosives in a performance conducted in or at a regular licenses [sic.] theater or show." The statute does not specify the type of license required and District case law has not addressed the issued. Under the revised code, a person must obtain written permission to discharge a firearm in a theater or during a show. An air or spring gun may be used as part of a lawful theatrical performance or athletic contest.[15] Other common stage props such as block-barreled guns designed for movie or theatrical use, block-barreled starter guns, and percussion (cap) guns do not constitute firearms in the RCC or under current D.C. Code definitions in Title 7 or Title 22, and could be used in theaters and shows. This change eliminates an unnecessary gap in the revised offenses.

Fifth, the revised offense clarifies that a person may discharge a firearm if lawful authority to do so exists under District or federal law. Current 24 DCMR § 2300.1 requires "special" written permission from the Chief of Police to discharge a weapon. The revised offense notes that either written permission or other lawful authority is sufficient.

Beyond these five changes, two other aspects of the statute may constitute substantive changes to current District law.

First, the revised statute holds an actor strictly liable as to whether they have permission to discharge a firearm. The current statutes do not specify any culpable mental states and District case law has addressed their meaning. The revised statute nevertheless holds a person strictly liable as to whether there is permission under District or federal law to fire a gun. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[16] and legal experts[17] for any non-regulatory crimes, the negligent discharge of a firearm offense is largely

[14] RCC § 22E-4101.

[15] E.g., an actor in a play may use an air or spring gun to simulate a firearm in a shooting scene, a referee may use an air or spring gun to signal the start of a race. *See* RCC § 7-2502.17(b)(1)(A) and corresponding commentary.

[16] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[17] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

regulatory in nature. This change clarifies the revised statute and may eliminate an unnecessary gap in law.

Second, the revised offense uses the phrase "firing range" instead of "shooting gallery." Current 24 DCMR § 2300.2 provides, "This section shall not apply to licensed shooting galleries between 6:00 a.m. and 12:00 midnight on Monday through Saturday, or between the hours of 2:00 p.m. and 11:00 p.m. on Sundays." This term "licensed shooting gallery" is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to "shooting galleries," but do refer to "firing ranges."[18] The time restriction does not correspond with any District regulations for firing ranges and are incongruent with District regulations of loud noise.[19] The revised offense uses the Title 7 terminology and deletes the time restriction.[20] This change improves the clarity of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised offense does not include a self-defense provision. Current D.C. Code § 22-4503.01 provides that a person may discharge a firearm "as otherwise permitted by law, including legitimate self-defense." In contrast, under the RCC, where a person acts in defense of one's self, a third person, or property, a general defense may apply.[21] This change improves the consistency of the revised offenses.

[18] D.C. Code § 7-2507.03.
[19] Loud noise that recklessly or negligently disturbs others may be punished under 20 DCMR § 2701, depending upon the volume and location.
[20] Additionally, Merriam Webster defines "shooting gallery" to include "a building (usually abandoned) where drug addicts buy and use heroin." *See* Merriam-Webster Online Dictionary at https://www.webster-dictionary.org/definition/shooting%20gallery.
[21] RCC § 22E-403.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

Explanatory Note. *This section establishes the alteration of a firearm identification mark offense for the Revised Criminal Code (RCC). The offense proscribes knowingly altering or obscuring identifying marks on a firearm. The revised offense replaces D.C. Code §§ 22-4512 (Alteration of identifying marks of weapons prohibited) and 7-2505.03(d) (Microstamping).*

Paragraph (a)(1) requires that the accused knowingly alters or removes an identification mark. "Alters" is an undefined term, intended to be broadly construed. The term "firearm" is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that their conduct will alter or remove an identification mark.

Paragraph (a)(2) further specifies that the accused must alter a mark "with intent to" conceal or misrepresent the identity of the firearm. "Intent" is a defined term in RCC § 22E-206 which, applied here, means the accused must be practically certain that the alteration would conceal or misrepresent[1] the identity of the firearm. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the accused actually concealed or misrepresented the identity of the firearm, only that the accused was practically certain that he or she would do so.

Subsection (b) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised alteration of a firearm identification mark statute clearly changes current District law in three main ways.*

First, the revised alteration of a firearm identification mark statute applies to any firearm. The current D.C. Code statutes apply only to a pistol, machine gun, or sawed-off shotgun.[2] In contrast, the revised offense applies to any firearm, as defined in RCC § 22E-701, which includes other long guns, such as shotguns and rifles. There is no apparent reason to exclude liability for long guns which may be legally purchased and possessed by law enforcement officers. This change eliminates an unnecessary gap in liability.

Second, the revised statute requires that the accused have intent to conceal or misrepresent the identity of the firearm. The current D.C. Code statutes do not specify a culpable mental state,[3] and it appears that a person commits an offense by any alteration or removal of a mark, including by accident, unless the purpose is experimental work by a

[1] The government is not required to prove that the accused intended to mislead a specific person, only that the markings are removed or altered.
[2] D.C. Code §§ 22-4512 and 7-2505.03(d).
[3] *But see* D.C. Code § 7-2505.03 which provides an exception for "normal wear."

government officer or agent,[4] safety, or sporting.[5] No case law exists as to whether a person would be guilty under the current statutes for altering an identification mark for some other purpose. In contrast, the revised statute eliminates liability for a person who alters a mark by accident or for purposes other than concealing or misrepresenting the identity of the weapon. The RCC contains similar language for the revised alteration of bicycle identification number[6] and alteration of a motor vehicle identification number[7] offenses. This change clarifies and improves the consistency and proportionality of the revised offenses.

Third, the revised alteration of a firearm identification mark statute is prosecutable only by the Office of the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code § 22-4512 (Alteration of identifying marks of weapons prohibited) is prosecutable by USAO. However, current D.C. Code § 7-2505.03(d) (Microstamping) is prosecutable by the Office of the Attorney General for the District of Columbia. In contrast, the revised statute includes only a single gradation of a single offense prosecutable by USAO. This change reduces unnecessary overlap between the revised statutes.

Beyond these three changes, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute requires that the accused act knowingly with respect to removal or alteration of the identification mark. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. To resolve this ambiguity, the revised offense requires at least knowledge as to the conduct of removing or altering the mark. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[8] A knowledge culpable mental state is also consistent with similar offenses in the D.C. Code[9] and RCC. This change clarifies the revised statute.

[4] D.C. Code § 22-4512.
[5] D.C. Code § 7-2505.03(d)(2).
[6] RCC § 22E-2404.
[7] RCC § 22E-2403.
[8] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).
[9] See, e.g., § 22–3233, Altering or removing motor vehicle identification numbers ("It is unlawful for a person to knowingly remove, obliterate, tamper with, or alter any identification number on a motor vehicle or a motor vehicle part.").

Second, the revised offense does not specify exceptions for normal wear,[10] experimental work by a government officer or agent,[11] safety, or sporting.[12] These exceptions are not required because the revised offense requires knowledge and intent, as defined in RCC § 22E-206. The RCC also includes standardized general defenses, including a defense for execution of public duty.[13]

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the current statutes make it a crime to "alter, remove, or obliterate" an identifying mark.[14] The revised statute only uses the words "alter" and "remove," which are intended to be broadly construed to cover removing or obliterating a mark. The change is not intended to narrow the scope of the offense.

Second, the revised offense does not include a permissive inference. Current D.C. Code § 22-4512 states, "Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia." The D.C. Court of Appeals held that this inference is "irrational" or "arbitrary," and hence unconstitutional, because it cannot be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[15]

[10] D.C. Code § 72505.03(d)(1).
[11] D.C. Code § 22-4512.
[12] D.C. Code § 7-2505.03(d)(2).
[13] RCC § 22E-403.
[14] D.C. Code §§ 22-4512 and 7-2505.03(d).
[15] *Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States,* 395 U.S. 6, (1969); *Turner v. United States,* 396 U.S. 398 (1970)); *see also United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (noting it would be constitutional to instead criminalize possession of a firearm with an obliterated serial number).

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for prohibits of firearms on public or private property for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4503.02, (Prohibition of firearms from public or private property). The revised civil provisions for prohibition of firearms on public or private property statute does not clearly change current District law, however two aspects of the revised statute may constitute substantive changes to current District law.*

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4503.02 does not explicitly prohibit or affirmatively require any particular conduct.[1] However, § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised code defines "law enforcement officer" and "property" in its general part.[2] D.C. Code § 22-4503.02 does not define the terms "law enforcement personnel" or "property" and District case law has not addressed their meaning. It is unclear which employees of which agencies and private businesses qualify as "law enforcement personnel." In contrast, the revised statute applies standardized definitions for "firearm," "law enforcement officer," and "property," used throughout the revised code.

[1] The statute does not explicitly require a person carrying a firearm to stay off of premises where firearms are disallowed, it merely describes when persons may disallow firearms. If the statute does create a misdemeanor offense, it largely overlaps with D.C. Code § 7-2509.07, which prohibits carrying a pistol with a license in 15 different locations. It is unclear what, if any, impact the signage requirements in 24 DCMR § 2346 have on a person's liability under either statute.
[2] RCC § 22E-202.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for lawful transportation of a firearm or ammunition for the Revised Criminal Code (RCC). These provisions establish a right to possess and transport a firearm in a specified manner.*[1] *The revised statute replaces D.C. Code § 22-4504.02 (Lawful transportation of firearms).*

The revised civil provisions for lawful transportation of a firearm or ammunition statute does not clearly change current District law, however two aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute operates as a civil provision and does not, of itself, create criminal liability for non-compliance. Current D.C. Code § 22-4504.02(a) does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4504.02(b)(1) states (in the passive voice), "neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible…" and § 22-4504.02(b)(2) states (in the active voice), "the firearm or ammunition shall be contained…" and "the firearm shall be unloaded." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The District of Columbia Court of Appeals has not published any opinion interpreting this statute. Legislative history for the current provision in D.C. Code § 22-4504.02 does not clearly indicate whether or not the provision was intended to create criminal liability by itself. However, predecessor statutes suggest that D.C. Code § 22-4504.02 may have been intended to create an exclusion from liability for carrying a concealed weapon in violation of D.C. Code § 22-4504(a) and (a-1) rather than a misdemeanor offense.[2] The revised

[1] *See also* 18 U.S.C. § 926A.

[2] In 1932, much like current D.C. Code § 22-4504, the District's carrying a concealed weapon statute stated, "No person shall within the District of Columbia carry concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon." In addition to the exceptions that appear in current D.C. Code § 22-4505(a)(1), (3), and (5), the 1932 legislation specified that the prohibition did not apply to "any person while carrying a pistol unloaded and in a secure wrapper" to and from the locations specified in the contemporary § 22-4505(a)(6). The 1932 "unloaded and in a secure wrapper" exception language was most recently changed to a cross-reference to § 22-4504.02, which largely mirrors 18 U.S.C. § 926A (Firearm Owners Protection Act), establishing a right and not a criminal offense. Consequently, it appears that D.C. Code § 22-4504.02 may have been intended merely as an exception to the District's carrying statute.

On the contrary, if current D.C. Code § 22-4504(a) were construed to create a misdemeanor offense, it may run afoul of D.C. Code § 23–101(a) and case law on Home Rule limitations on assignment of prosecutorial authority. Prior to home rule, the only stand-alone offense regarding transportation of firearms appears to have been a police regulation delegated to the Office of the Office of the Attorney General for the District of Columbia. *See* Police Traffic and Motor Vehicle Regulations of the District of Columbia, Art. 52, Sec. 8(b), August 12, 1968 (establishing an offense prosecutable by Corporation Counsel that states, "Any pistol carried by any person not having a licensed issued under these Regulations shall be carried In a closed container or securely wrapped and while being carried shall be kept unloaded. Containers of such pistols or such securely wrapped pistols shall be carried in open view."). The District is

statute establishes the transportation requirements as a right instead of an offense. This change clarifies the revised statute.

Second, the revised statute clarifies that there is a lawful means of transportation whether or not the ammunition is transported at the same time. Current D.C. Code § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating "neither the firearm nor any ammunition being transported shall be readily accessible." This change clarifies the revised statute.

barred from reassigning prosecutorial authority over a crime that is a police regulation to the United States Attorney by D.C. Code § 23-101(a). *See In re Hall*, 31 A.3d 453, 458 (D.C. 2011).

RCC § 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol.

Explanatory Note and Relation to Current District Law. *This section establishes the issuance of a license to carry a pistol civil provision for the Revised Criminal Code (RCC). The provision specifies the requirements for obtaining a carry license in the District. The revised provision replaces D.C. Code § 22-4506 (Issue of a license to carry a pistol). The current statute has been copied verbatim, with the exception of applying standardized RCC definitions and striking a phrase that was held to be unconstitutional in 2016.*[1]

[1] The District's requirement that applicants for a license to carry a concealed firearm demonstrate a "good reason to fear injury to his or her person or property" or "any other proper reason for carrying a pistol," as further defined by District law and regulations (collectively "the 'good reason' requirement"), is inconsistent with the individual right to bear arms under the Second Amendment and therefore unconstitutional. *Grace v. Dist. of Columbia*, 187 F. Supp. 3d 124 (D.D.C. 2016).

RCC § 22E-4111. Unlawful Sale of a Pistol.

Explanatory Note. *This section establishes the unlawful sale of a pistol offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4507 (Certain sales of pistols prohibited).*

Paragraph (a)(1) requires that the accused knowingly sells a pistol. "Sells" is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The term "pistol" has the meaning specified in D.C. Code § 7-2501.01. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which, applied here, requires that the accused must be practically certain that they are selling and practically certain that the item is a pistol.

Paragraph (a)(2) further specifies that the accused must sell a pistol reckless as to the fact that the purchaser is one of three types of people who are legally unfit to own a firearm. "Reckless" is a defined term in RCC § 22E-206 which, applied here, means the person must consciously disregard a substantial risk that the purchaser is not of sound mind, prohibited from possessing a firearm under RCC § 22E-4105, or under 21 years of age, , except when the purchaser is a child or ward of the actor. The risk must be of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the ordinary standard of conduct.[1]

Subsection (b) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised unlawful sale of a firearm statute clearly changes current District law in one main way.*

The revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Beyond this change to current District law, three aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4507 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any

[1] RCC § 22E-206.

violation of any provision of this chapter." The revised statute clearly establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to selling a pistol. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[2] This change clarifies the revised statute.

Third, the revised statute requires that a person be at least reckless as to the status of the purchaser. Current D.C. Code § 22-4507 requires that a person have "reasonable cause to believe" that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age, except when the purchaser is a child or ward of the person. There is no case law construing the meaning of this language. To resolve this ambiguity, the revised statute applies the RCC's standard mental state definition for recklessness[3] which requires that a person consciously disregard a substantial risk that the purchaser is legally barred from having a weapon. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[4] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[5] This change improves the consistency of the revised offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised code defines "possession" in its general part.[6] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed

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[2] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[3] RCC § 22E-206.

[4] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X-citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[5] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[6] RCC § 22E-202.

an unlawful item.[7] The RCC definition of "possession,"[8] with the requirement in the offense that the possession be "knowing,"[9] matches the meaning of possession in current DCCA case law.[10] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

[7] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[8] RCC § 22E-701.
[9] RCC § 22E-206.
[10] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

RCC § 22E-4112. Unlawful Transfer of a Firearm.

Explanatory Note. *This section establishes the unlawful transfer of firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4508 (Transfers of firearms regulated).*

Paragraph (a)(1) requires that a person knowingly deliver a firearm to a purchaser. "Delivers" is an undefined term, intended to be broadly construed. The term "firearm" is defined in RCC § 22E-701. Paragraph (a)(1) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are delivering an item and practically certain that the item they are delivering is a firearm.

Subparagraph (a)(1)(A) specifies that a transfer that occurs in fewer than 10 days of purchase is an unlawful transfer, unless the purchaser is a law enforcement officer. The term "law enforcement officer" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the transfer occurred within 10 days of the sale.

Subparagraph (a)(1)(B) specifies that a transfer that occurs in a manner other than the manner specified in RCC § 22E-4109 is an unlawful transfer. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is transporting it in the manner that fails to comply with RCC § 22E-4109.

Alternatively, paragraph (a)(2) requires that a person knowingly fail to deliver a written statement with certain information, when purchasing a firearm. The writing must be duplicated and include the purchaser's full name, address, occupation, date and place of birth. It must also include the date of purchase, the caliber, make, model, and manufacturer's number of the firearm. And, it must also include a statement that the purchaser is not prohibited from possessing a firearm by RCC § 22E-4105. Paragraph (a)(2) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are purchasing a firearm.

Alternatively, paragraph (a)(3) requires that a person knowingly fail to deliver a completed purchase statement to the Metropolitan Police Department, when selling a firearm. The writing must be duplicated, include the seller's signature and address, and be retrained for 6 years. Paragraph (a)(3) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that they are failing to deliver the required writing when they are selling a firearm.

Alternatively, paragraph (a)(4) applies to a person who knowingly sells an assault weapon, machine gun, or sawed-off shotgun. A "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused be practically certain that the item they are selling is an assault weapon, machine gun, or sawed-off shotgun.

Subparagraph (a)(4)(A) prohibits selling an assault weapon, machine gun, or sawed-off shotgun to any person other than the persons designated in RCC § 22E-4118(b)

as entitled to possess the same. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are selling an assault weapon to someone who qualifies as an unauthorized person.

Subparagraph (a)(4)(B) prohibits selling an assault weapon, machine gun, or sawed-off shotgun without prior permission to make such sale obtained from the Chief of the Metropolitan Police Department ("MPD"). Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are not authorized to sell the assault weapon, machine gun, or sawed-off shotgun.

Subsection (b) excludes liability for wholesalers. Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here that the actor is a wholesale dealer selling a firearm to a dealer licensed under RCC § 22E-4114.

Subsection (c) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised unlawful transfer of a firearm offense clearly changes current District law in four main ways.*

First, paragraph (a)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4508 provides that "No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514…" The revised statute does not address transfers of blackjacks, but does address transfers of assault weapons,[1] the possession of which—like machine guns and sawed-off shotguns—is prohibited as contraband under RCC § 22E-4101. It is unclear why blackjacks, as compared to other non-firearm dangerous weapons, are regulated in this manner. The statute's failure to cover sales of assault weapons may be an oversight during recent legislative changes regarding the definition of a machine gun.[2] This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Second, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a

[1] The term "assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

[2] Before 2009, the term "machine gun" was defined in D.C. Code § 7-2501.01 to include "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot…[s]emiautomatically, more than 12 shots without manual reloading." The District of Columbia Court of Appeals interpreted this language to include a handgun fitted with a magazine that holds more than twelve rounds of ammunition (even if the magazine is defective). *See Moore v. United States*, 927 A.2d 1040, 1054 (D.C. 2007); *United States v. Woodfolk*, 656 A.2d 1145, 1147–48 (D.C. 1995). In 2009, the D.C. Council redefined "machine gun" to include only fully automatic weapons and simultaneously criminalized possession of a large capacity ammunition feeding device under D.C. Code § 7-2506.01(b). D.C. Law 17-372, Firearms Control Amendment Act of 2008.

Firearm by an Unauthorized Person consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Third, the revised statute includes a cross-reference to the persons described in RCC § 22E-4118(b), Exclusions from Liability for Weapon Offenses. Current D.C. Code § 22-4508 cross-references "the persons designated in § 22-4514." The revised code replaces the exceptions in Chapter 45 of current D.C. Code Title 22 with a single, comprehensive list of exclusions from liability in RCC § 22E-4118 and changes current District law as described in the commentary. Each change affects the scope of the revised unlawful transfer of a firearm offense. These changes improve the consistency and proportionality of the revised offenses.

Fourth, the revised statute applies a standardized definition of "law enforcement officer." Current D.C. Code § 22-4508 except sales to "sales to marshals, sheriffs, prison or jail wardens or their deputies, policemen, or other duly appointed law enforcement officers." The word "policemen" is not defined in the statute and District case law has not addressed its meaning. In contrast, the RCC defines the term "law enforcement officer" with specificity[3] and applies this definition to all revised offenses. This change improves the clarity and consistency of the revised offense.

Beyond these four changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4508 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute more clearly frames the statute as establishing an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[4] This change clarifies the revised statute.

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[3] RCC § 22E-701.

[4] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

RCC § 22E-4113. Sale of Firearm Without a License.

Explanatory Note. *This section establishes the sale of a firearm without a license offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4509 (Dealers of weapons to be licensed).*

Paragraph (a)(1) applies to retail dealers. Subparagraph (a)(1)(A) requires that a retail dealer knowingly sell, expose for sale, or possess with intent to sell a firearm. "Sells" is an undefined term, intended to include any exchanging of pistol for monetary remuneration. The terms "possess" and "firearm" are defined in RCC § 22E-701. Subsection (a) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are selling, exposing for sale, or possessing with intent to sell a firearm. Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are not licensed to sell, expose for sale, or possess with intent to sell a firearm.

Paragraph (a)(2) applies to wholesalers. Paragraph (a)(2) requires that a wholesale dealer not sell, expose for sale, or possess with intent to sell a firearm to someone other than a licensed dealer licensed under RCC § 22E-4114. Per the rules of interpretation in RCC § 22E-207, subparagraph (a)(1)(B) requires that a retail dealer also know—that is, be practically certain—that they are selling, exposing for sale, or possessing with intent to sell. The person must also be practically certain that the item is a firearm. The person must also be practically certain that the purchaser is not a dealer licensed under RCC § 22E-4114.

Subsection (b) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised sale of a firearm without a license offense clearly changes current District law in one main way.*

The revised statute applies to all firearms. Current D.C. Code § 22-4509 restricts the sale of any "pistol, machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address sales of blackjacks but does address sales of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Beyond this change to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4510 cross-references § 22-4509 and states that

a breach "shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute more establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[1] This change clarifies the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised code defines "firearm," "assault weapon," "machine gun," "sawed-off shotgun," and "possession" in its general part.[2] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[3] The RCC definition of "possession,"[4] with the requirement in the offense that the possession be "knowing,"[5] matches the meaning of possession in current DCCA case law.[6] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[1] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[2] RCC § 22E-202.

[3] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[4] RCC § 22E-701.

[5] RCC § 22E-206.

[6] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re*

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4509 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

T.M., 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for licenses of firearms dealers for the Revised Criminal Code (RCC). Together with RCC § 22E-4115, the revised statute replaces D.C. Code § 22-4510 (Licenses of weapons dealers).*

The revised civil provisions for licenses of firearms dealers clearly changes current District law in five main ways.

First, the revised statute regulates all firearms. Current D.C. Code § 22-4510 restricts the sale of any "pistol, machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address sales of blackjacks, but does address transfers of all firearms. There is no clear rationale for not including long guns such as rifles and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Second, paragraph (b)(4) of the revised offense restricts the sale of an assault weapon, machine gun, or sawed-off shotgun. Current D.C. Code § 22-4510(a)(3) provides that "No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-4514…" The revised statute does not include address sales of blackjacks, but does address sales of assault weapons,[1] which—like machine guns and sawed-off shotguns—are prohibited as contraband under RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Third, the revised statute includes a cross-reference to RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person. Current D.C. Code § 22-4507 cross-references § 22-4503, Unlawful possession of firearm. In contrast, the revised code replaces the reference to current D.C. Code § 22-4503 with the RCC version of that offense. However, each change in District law effected by RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person, consequently affects the scope of the revised unlawful sale of a pistol offense. These changes improve the consistency and proportionality of the revised offenses.

Fourth, the revised statute replaces the word "business" with the phrase "firearm sales." Current D.C. Code § 22-4510(a)(1) states, "The business shall be carried on only in the building designated in the license." The word "business" is not defined in the statute and District case law has not addressed its meaning. Read literally, "business" may be understood to include work unrelated to firearm transactions, such as accounting, marketing, and banking. In contrast, the revised statute limits only the sales to the physical confines of the building designated in the license. This change clarifies and may improve the proportionality of the revised statute.

[1] The term "assault weapon" has the meaning specified in D.C. Code § 7-2501.01.

Fifth, the revised statute does not require a firearms dealer to record a purchaser's color. Current D.C. Code § 22-4510(a)(5) requires a firearms dealer to record this information. In contrast, the revised statute does not include "color," which is a protected trait under the District's Human Rights Act.[2] This change improves the consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute defines the terms "assault weapon," "building," "firearm," "imitation firearm," "machine gun," "manufacturer," "possess," and "sawed-off shotgun," using standardized definitions in current law and the RCC. The revised statute also updates the phrase "Chief of Police for the District of Columbia" with "Chief of the Metropolitan Police Department," consistent with more recent provisions in current law and in the RCC.

Second, the revised statute uses the phrase "clearly and conspicuously displayed" instead of "displayed on the premises where it can be read," consistent with more recent provisions in current law and in the RCC.[3] These changes clarify the revised statute and improve the consistency of the revised code.

Third, the revised statute replaces the word "book" with the phrase "in a form proscribed by the Mayor," to make clear that electronic records may be used. This change clarifies the revised statute.

[2] D.C. Code § 2-1401.01 et. seq.
[3] *See* RCC §§ 7-2502.15(a)(1)(C); 22E-4102(a)(2)(C)(ii).

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

Explanatory Note. *This section establishes the unlawful sale of a firearm by a licensed dealer offense for the Revised Criminal Code (RCC). Together with RCC § 22E-4114, the revised statute replaces D.C. Code § 22-4510 (Licenses of weapons dealers).*

Paragraph (a)(1) specifies that the revised statute applies to anyone who is a dealer licensed under RCC § 22E-4114. Paragraph (a)(1) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has a dealer's license.[1]

Paragraph (a)(2) requires that a dealer recklessly violate one or more of the licensure requirements in RCC § 22E-4114(b). "Reckless" is a defined term,[2] which, applied here, means the person must consciously disregard a substantial risk that their conduct violates a licensure requirement. The risk must be of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the ordinary standard of conduct.[3]

Subsection (b) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised unlawful sale of a firearm by a licensed dealer statute does not clearly change current District law, however two aspects of the revised statute may constitute substantive changes to current District law.*

First, the revised statute requires that the accused act at least recklessly with respect to violating a licensure requirement. Current D.C. Code § 22-4510(a)(3) requires that a person have "reasonable cause to believe" that the purchaser is not of sound mind, prohibited from possessing a firearm under § 22-4503, or under 21 years of age. Other provisions in the current statute do not specify a requisite mental state and District case law has not addressed the issue. To resolve this ambiguity, the revised statute applies the RCC's standard mental state definition of recklessness[4] which, applied here, requires that a person consciously disregard a substantial risk that they are engaging in the prohibited conduct and that the conduct violates the District's licensing rules. The revised civil provisions for licenses of firearms dealers no longer include the phrase "reasonable cause to believe."[5] This change improves the consistency of the revised offenses.

Second, the revised statute holds an actor strictly liable as to the existence of a dealer's license. Current D.C. Code § 22-4510 does not specify any culpable mental states. District case law has not interpreted the statute's meaning. The revised statute nevertheless holds a person strictly liable as to this offense element. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly

[1] RCC § 22E-207.
[2] RCC § 22E-206.
[3] RCC § 22E-206.
[4] RCC § 22E-206.
[5] RCC § 22E-4114.

disfavored by courts[6] and legal experts[7] for any non-regulatory crimes, the unlawful sale of a firearm by a licensed dealer offense is largely regulatory in nature and requires recklessness as to the violation of a licensure requirement. This change clarifies the revised statutes and may eliminate an unnecessary gap in law.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4510 does not itself provide a criminal penalty, however, it states that a licensee shall be "subject to punishment as provided in this chapter." D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute does not provide liability for violations of D.C. Code § 22-4509. Current D.C. Code § 22-4510 cross-references § 22-4509 and states that a breach "shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter." The revised code replaces § 22-4509 with RCC § 22-4112. This change logically reorders and clarifies the revised statutes.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4510 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

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[6] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[7] *See* § 5.5(c) Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

RCC § 22E-4116. Use of False Information for Purchase or Licensure of a Firearm.

Explanatory Note. *This section establishes the use of false information for purchase or licensure of a firearm offense for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4511 (False information in purchase of weapons).*

Subsection (a) specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206 which, applied here, requires that the accused must be practically certain that they are giving false information or false evidence. Paragraph (a)(1) requires the false information or evidence be given to purchase a firearm. "Purchase" is an undefined term, intended to include any exchanging of firearm for monetary remuneration. The term "firearm" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, paragraph (a)(1) requires that the person also know—that is, be practically certain—that they are giving the information in order to purchase a firearm.

Alternatively, paragraph (a)(2) requires the false information or evidence be given to apply for a license to carry a pistol. Paragraph (a)(2) requires that a person know—that is, be practically certain—that they are giving the information in order to apply for a license to carry a pistol under RCC § 22E-4110. The term "pistol" has the meaning specified in D.C. Code § 7-2501.01.

Subsection (b) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised use of false information for purchase or licensure of a firearm offense clearly changes current District law in one main way.*

The revised statute applies to all firearms. Current D.C. Code § 22-4511 prohibits using false information to purchase "a machine gun, sawed-off shotgun, or blackjack." In contrast, the revised statute does not include address purchases of blackjacks, but does address purchases of all firearms. There is no clear rationale for not including other firearms, such as pistols, rifles, and shotguns. There is also no clear rationale for including blackjacks, which bear a closer relationship to blunt force weapons, such as billy clubs, slungshots, sand clubs, sandbags, than to firearms. This change improves the consistency of the revised statutes and eliminates and unnecessary gap in liability.

Beyond this change to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute establishes a criminal offense and is not merely a civil provision. Current D.C. Code § 22-4509 does not itself provide a criminal penalty, however, D.C. Code § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as an offense instead of a civil provision. This change clarifies the revised statute.

Second, the revised statute requires that the accused act at least knowingly with respect to each element of the revised offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[1] This change clarifies the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised statute defines the terms "firearm" and "pistol" using standardized definitions in current law and the RCC. These changes clarify the revised statute and improve the consistency of the revised code.

Second, the revised offense does not include a statement of jurisdiction. Current D.C. Code § 22-4511 restricts the sale of firearms "within the District of Columbia." This statement is superfluous and may cause confusion as to whether other offenses must also occur within the District's boundaries. The revised offense removed this phrase to improve the clarity of the revised offense.

[1] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

Explanatory Note and Relation to Current District Law. *This section establishes the civil provisions for taking and destruction of dangerous articles for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 22-4517 (Dangerous articles; definition; taking and destruction; procedure).*

The revised civil provisions for taking and destruction of dangerous articles statute does not clearly change current District law, however four aspects of the revised statute may constitute substantive changes to current District law.

First, the revised provision clarifies that the statute operates as a civil provision and does not create a misdemeanor offense. Current D.C. Code § 22-4517 does not explicitly prohibit or affirmatively require any particular conduct. However, § 22-4515 provides a criminal penalty for "any violation of any provision of this chapter." The revised statute establishes the statute as civil provisions instead of an offense. This change clarifies the revised statute.

Second, the revised statute updates the definition of "dangerous article" to align with the definitions in the revised criminal code. Current D.C. Code § 22-4517 defines the term "dangerous article" to mean "(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or (2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms." The term "weapon" is not defined in the statute and District case law has not addressed its meaning. In contrast, the revised statute defines the term "dangerous article" to include a firearm,[1] a restricted explosive,[2] firearm silencer, a bump stock,[3] or a large-capacity ammunition feeding device.[4] Although bump stocks and large-capacity ammunition feeding devices do not necessarily constitute weapons, like silencers they are designed to make firearms more lethal. The phrase "any weapon such as" in current District law may be broader or narrower than the revised definition. This change clarifies and improves the consistency of the revised statutes.

Third, the revised statute authorizes both prosecutors' offices to decide when evidence is destroyed. The current statute refers only to the United States Attorney for the District of Columbia. However, the Attorney General for the District of Columbia serves a similar function in other cases. This change improves the completeness of the revised statute.

Fourth, the revised statute uses the RCC's defined term "law enforcement agency" instead of the phrase "law enforcing agency," which is undefined. This change clarifies the revised statute.

[1] Defined in RCC § 22E-701.
[2] Defined in RCC § 22E-701.
[3] Defined in RCC § 22E-701.
[4] Defined in RCC § 22E-701.

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

Explanatory Note. *This section establishes exclusions from liability for specified weapons offenses in the Revised Criminal Code (RCC). The provision excludes liability for legal duties and activities that necessarily require possessing or carrying dangerous weapons. The revised statute replaces D.C. Code §§ 22-4504.01 (Authority to carry firearm in certain places and for certain purposes) and 22-4505 (Exceptions to § 22-4504). The revised statute also effectively replaces the exclusion clauses within D.C. Code §§ 7-2502.15(c) (Possession of stun guns);[1] 7-2506.01(a)(1), (2), and (5) (Persons permitted to possess ammunition); 22-4514(a) (Possession of certain dangerous weapons prohibited; exceptions);[2] and 22-4502.01(c) (Gun Free Zones).[3]*

Subsection (a) specifies that the exclusions from liability apply only to certain offenses in Chapter 41 of Title 22E. The exclusions apply to possession of an unregistered firearm, destructive device, or ammunition;[4] possession of a stun gun;[5] carrying an air or spring gun;[6] carrying a pistol in an unlawful manner;[7] possession of a prohibited weapon or accessory,[8] and carrying a dangerous weapon.[9] The exclusions do not apply to unlawful storage of a firearm;[10] possession of a dangerous weapon with intent to commit crime;[11] possession of a dangerous weapon during a crime;[12] possession of a firearm by an unauthorized person;[13] negligent discharge of firearm;[14] alteration of a firearm

[1] "…[E]xcept a law enforcement officer as defined in § 7-2509.01."
[2] "…[M]achine guns, or sawed-off shotgun, knuckles, and blackjacks may be possessed by the members of the Army, Navy, Air Force, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law enforcement officers, including any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under § 22-4510."
[3] "The provisions of this section shall not apply to…members of the Army, Navy, Air Force, or Marine Corps of the United States; the National Guard or Organized Reserves when on duty; the Post Office Department or its employees when on duty; marshals, sheriffs, prison, or jail wardens, or their deputies; policemen or other duly-appointed law enforcement officers; officers or employees of the United States duly authorized to carry such weapons; banking institutions; public carriers who are engaged in the business of transporting mail, money, securities, or other valuables; and licensed wholesale or retail dealers."
[4] RCC § 7-2502.01A.
[5] RCC § 7-2502.15.
[6] RCC § 7-2502.17.
[7] RCC § 7-2509.06A.
[8] RCC § 22E-4101.
[9] RCC § 22E-4102.
[10] RCC § 7-2507.02A.
[11] RCC § 22E-4103.
[12] RCC § 22E-4104.
[13] RCC § 22E-4105.
[14] RCC § 22E-4106.

identification mark,[15] or any other weapons offense. However, other exclusions under federal law may apply to these latter offenses.[16]

Subsection (b) excepts from liability 10 classes of professionals who handle dangerous weapons as a part of their work. Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" specified in subsection (b) applies to all requirements of the exclusion in paragraphs (b)(1) through (b)(10), and there is no culpable mental state requirement for these requirements.

Paragraph (b)(1) excludes liability for a member of the Army, Navy, Air Force, or Marine Corps of the United States.[17] Paragraph (b)(2) excludes liability for a member of the National Guard or Organized Reserves when on duty.[18] Paragraph (b)(3) excludes liability for a qualified law enforcement officer as defined in 18 U.S.C. § 926B.[19] Paragraph (b)(4) excludes liability for a qualified retired law enforcement officer as defined in 18 U.S.C. § 926C, who carries a concealed pistol that is registered under D.C. Code § 7-2502.07 in a location that is conveniently accessible and within reach.[20] Paragraph (b)(5) excludes liability for an on-duty licensed special police officer or campus police officer, who possesses or carries a firearm registered under D.C. Code § 7-2502.07 in accordance with D.C. Code § 5-129.02 and all rules promulgated under that section.[21] Paragraph (b)(6) excludes liability for an on-duty director, deputy director, officer, or employee of the District of Columbia Department of Corrections who possesses or carries a firearm registered under D.C. Code § 7-2502.07.[22] Paragraph (b)(7) excludes liability for an employee of the District or federal government, who is on duty and acting within the scope of those duties.[23] Paragraph (b)(8) excludes liability for a person who is lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense.[24] The word "lawfully" should be construed to require that the person is authorized

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[15] RCC § 22E-4107.
[16] *See, e.g.,* 18 U.S.C. §§ 926A, B, and C.
[17] D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).
[18] D.C. Code §§ 22-4514(a); 22-4502.01(c); 22-4505(a)(3).
[19] *See* D.C. Code §§ 7-2502.15(c); 22-4514(a); 22-4502.01(c); 22-4505(a)(1) and (3) (IRS and OIG agents appear to meet the definition of a "qualified law enforcement officer" in 18 U.S.C. 926B(c)).
[20] D.C. Code § 22-4505(b).
[21] D.C. Code §§ 7-2502.15(c); 22-4514(a) ("other duly-appointed law enforcement officers"); 22-4505(a)(2).
[22] D.C. Code §§ 22-4514(a) ("prison or jail wardens, or their deputies"); 22-4502.01(c) ("prison or jail wardens, or their deputies"); 22-4505(a)(1) ("prison or jail wardens, or their deputies").
[23] *See* D.C. Code §§ 7-2506.01(a)(2) ("an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties"); 22-4514(a) ("any designated civilian employee of the Metropolitan Police Department, or officers or employees of the United States duly authorized to carry such weapons"); 22-4502.01(c) ("officers or employees of the United States duly authorized to carry such weapons"); 22-4505(a)(4) ("Officers or employees of the United States duly authorized to carry a concealed pistol"). For example, an Assistant United States Attorney may inspect or transport a weapon to court as evidence in a criminal trial.
[24] D.C. Code §§ 7-2506.01(a)(1) ("a licensed dealer pursuant to subchapter IV of this unit"); 22-4505(a)(5) ("Any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business").

by law to manufacture, repair, or sell weapons. Paragraph (b)(9) excludes liability for a person who is lawfully acting as a public carrier.[25] The word "lawfully" should be construed to require that the person is authorized by law to ship or deliver weapons.[26] Paragraph (b)(10) excludes liability for a person who is acting within the scope of authority granted by the Metropolitan Police Department[27] or a competent court.[28]

Subsection (c) applies to registered firearm owners. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of construction in RCC § 22E-207, the term "in fact" specified in subsection (c) applies to all requirements of the exclusion in paragraphs (c)(1), (c)(2), and its subparagraphs and subparagraphs, and there is no culpable mental state requirement for these requirements.

Subparagraph (c)(2)(A) provides that a registered owner may carry their firearm or ammunition where the firearm is registered.[29] Subparagraph (c)(2)(B) provides that a registered owner may carry their firearm or ammunition in accordance with RCC § 22E-4109 to or from their home or business,[30] a place of sale,[31] a place of repair,[32] a training class,[33] or a recreational activity.[34] Subparagraph (c)(2)(C) provides that a registered owner may carry their firearm while transporting it for any other lawful purpose expressly authorized by a District or federal statute, provided that it is transported in accordance with the requirements of that statute.[35]

Subsection (d) applies to any person who is participating in a class taught by a firearm instructor.[36] Subsection (d) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here the requirements in subsection (d). The term "firearm instructor" has the meaning specified in D.C. Code § 7-2501.01.

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

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[25] D.C. Code §§ 22-4514(a); 22-4502.01(c) ("the Post Office Department or its employees when on duty… [or] public carriers who are engaged in the business of transporting mail, money, securities, or other valuables").

[26] For example, if a particular FedEx store is out of compliance with the noise regulations in 20 DCMR § 2701, the exclusion from liability nevertheless extends to each carrier in the store.

[27] For example, MPD may authorize a defense investigator to view a weapon or authorize a fingerprint expert to inspect a weapon at its evidence control office.

[28] *See, e.g.,* Model Penal Code § 3.03(1)(c).

[29] D.C. Code § 22-4504.01(1). In *Heller I*, the United States Supreme Court explained that it violates the Second Amendment to forbid carrying a lawful firearm in the home for the purpose of immediate self-defense. 554 U.S. 570 (2008).

[30] D.C. Code §§ 22-4504.01(1) and (3); 22-4505(a)(6).

[31] *See* D.C. Code § 22-4505(a)(6) ("place of purchase"). The phrase "place of sale" includes the place where the registrant bought the firearm and the place where the registrant sells the firearm to a licensed dealer, pursuant to D.C. Code § 7-2505.02.

[32] D.C. Code § 22-4505(a)(6).

[33] D.C. Code § 22-4505(c).

[34] D.C. Code §§ 22-4504.01(2); 22-4505(a)(6).

[35] D.C. Code §§ 22-4504.01(4); 22-4504.02(a).

[36] D.C. Code § 7-2506.01(a)(5).

Relation to Current District Law. *The revised exclusions from liability for weapons offenses provision clearly changes current District law in six main ways.*

First, the revised statute applies standardized exclusions from liability to all possessory weapons offenses. Under current law, there is considerable inconsistency between the exclusionary provisions. The following three examples provide an illustrative, though inexhaustive, list. First, a person who participates in a firearms training and safety class is not liable for transporting a registered firearm to or from the class[37] and is not liable for possessing ammunition during the class,[38] however, there is no exception in current law for possessing a firearm during a firearm training and safety class. Second, a member of the military avoids prosecution for possession of an assault weapon, machine gun, or sawed-off shotgun,[39] however, there is no military exception for possession of a large-capacity ammunition feeding device.[40] Third, consistent with 18 U.S.C. 926C, D.C. Code § 22-4505(b) provides that a retired Metropolitan Police Officer who carries a registered firearm is not liable for carrying a dangerous weapon, however, D.C. Code § 22-4514(a) does not include a similar exception for possession of a prohibited weapon. In contrast, the revised statute applies identical exclusions to all weapons offenses that do not involve some other criminal intent or harm. This change logically reorders the revised statutes and improves the consistency and proportionality of the revised code.

Second, the revised statute excludes liability for a public carrier only if that person is acting within the scope of their professional duties. Current D.C. Code §§ 22-4515(a) (Possession of certain dangerous weapons prohibited; exceptions) and 22-4502.01(c) (Gun Free Zones) exclude from liability "the Post Office Department or its employees when on duty" as well as "public carriers who are engaged in the business of transporting mail, money, securities, or other valuables." The Post Office Department was subsequently abolished and all its functions, powers, and duties were transferred to the United States Postal Service.[41] Although a carrier should not be liable for possession of an object it has been hired to ship and deliver, there is no clear rationale for a blanket exception that allows a postal worker to carry their own assault weapon or machine gun while on duty. The revised statute specifies that the exclusion applies only if the person is lawfully engaging in the business of shipping or delivering the weapon involved in the offense. This change eliminates an unnecessary gap in liability.

Third, the revised statute narrows the exclusion from liability for the subclass of law enforcement officers who do not have arrest authority. Current D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) exclude from liability "prison or jail wardens, or their deputies." District case law has held that a Department of Corrections employee may carry a firearm whether on or off duty.[42] Current D.C. Code §§ 7-2502.15(c)

[37] *See, e.g.*, D.C. Code § 22-4504.02(a); 22-4505(c).
[38] D.C. Code § 7-2506.01(a)(5).
[39] D.C. Code § 22-4514(a).
[40] D.C. Code § 7-2506.01(b).
[41] § 4(a) of the Act of August 12, 1970, 84 Stat. 773, Pub.
[42] *See United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972).

(concerning possession of stun guns);[43] 22-4514(a) (concerning possession of a prohibited weapon);[44] and 22-4505(a)(2) (concerning carrying a dangerous weapon)[45] each include an exclusion for special police officers and campus police officers. D.C. Code § 22-4505(a)(2) specifies that its exclusion applies only to special police officers and campus police officers who are carrying a firearm and only if they are acting within the scope of their deputization.[46] Although an officer should not be liable for possession of a service weapon while on duty, there is no clear rationale for a blanket exception that allows a special police officer or Department of Corrections ("DOC") employee to carry their own firearm, prohibited weapon, or dangerous weapon under other circumstances. The revised statute effectively limits special police officers, campus police officer, and DOC employees to the firearms they are authorized to use in the course of their duties. This change reduces an unnecessary gap in liability.

Fourth, the revised statute excludes from liability any person who is acting within the scope of authority granted by the Metropolitan Police Department ("MPD") or a competent court. Current D.C. Code §§ 22-4514(a) and 22-4502.01 exclude liability for "any designated civilian employee of the Metropolitan Police Department." Although an unsworn administrative staff member may be tasked with ordering weapons or organizing inventory, there is no clear rationale for fully exempting—while on duty and off duty—approximately 600 employees who serve a variety of functions including software development, policy writing, and community outreach. On the other hand, this provision appears to be underinclusive, failing to reach non-employees (e.g., firearms instructors, forensic experts, defense investigators) who are temporarily authorized to handle weapons at a firing range or through the evidence control branch. The revised provision specifies that any person who is authorized by the police chief or a court to possess or carry a weapon may not be prosecuted for any offense listed in subsection (a). This change eliminates an unnecessary gap in liability and improves the proportionality of the revised offenses.

Fifth, the exclusion for manufacturing, repairing, or dealing applies to all weapons, not only firearms. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business." There is no similar exclusion under current law for the producers and retailers of other weapons, such as stun guns or ammunition. In contrast, the revised statute provides a safe harbor for anyone who is "lawfully engaging in the business of manufacturing, repairing,

[43] D.C. Code § 7-2502.15(c) excludes liability for "a law enforcement officer as defined in § 7-2509.01." The definition that appears in § 7-2509.01 includes "a special police officer appointed pursuant to § 5-129.02, and a campus and a university special police officer appointed pursuant to the College and University Campus Security Amendment Act of 1995, effective October 18, 1995 (D.C. Law 11-63; 6A DCMR § 1200 et seq.)." However, 6A DCMR § 1200 was repealed on September 6, 2016.
[44] D.C. Code § 22-4514(a) excludes "other duly-appointed law enforcement officers."
[45] D.C. Code § 22-4505(a)(2) excludes "Special police officers and campus police officers who carry a firearm in accordance with D.C. Official Code § 5-129.02, and rules promulgated pursuant to that section."
[46] *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979) (explaining a special police officer will be considered a policeman or law enforcement officer only to the extent that he acts in conformance with the regulations governing special officers).

or dealing the weapon involved in the offense." This change improves the consistency and proportionality of the revised offenses.

Sixth, the revised statute does not provide an exclusion for bankers. Current D.C. Code §§ 22-4514(a) and 22-4502.01 explicitly exclude "banking institutions." There is no clear rationale for the categorical exception for banks. Where a bank or other public storage provider permits a customer to keep a weapon a safe deposit box, the institution does not meet the revised definition of "possession," which requires the ability and desire to exercise control over the object and to guide its destiny.[47] The revised statute eliminates the exception for banking institutions and thereby eliminates an unnecessary gap in liability.

Beyond these six changes, six other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute uses standardized definitions of "qualified law enforcement officer" and "qualified retired law enforcement officer" in Title 18 of the United States Code. Current D.C. Code § 7-2502.15(c), by cross reference to § 7-2509.01, provides an exception for members of a law enforcement agency operating in the District of Columbia. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for "policemen," an undefined term. D.C. Code § 7-2506.01(a)2) provides an exception for "an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties." D.C. Code § 22-4505(b) provides an exception for retired MPD officers. The definitions of "qualified law enforcement officer" in 18 U.S.C. § 926B and "qualified retired law enforcement officer" in 17 U.S.C. § 926C appear to be broader than District-operating officers but narrower than "policemen." The revised statute aligns the revised statutes with federal law. This change improves the consistency and proportionality of the revised offenses.

Second, the revised statute includes an exception for DOC employees. D.C. Code §§ 22-4514(a); 22-4502.01(c); and 22-4505(a)(1) provide an exception for "prison or jail wardens, or their deputies." The term "deputy" is not defined in the statute, however, District case law explains that it includes, not only the warden's direct supervisees, but also corrections officers.[48] Case law has not addressed whether other DOC employees, such as administrative staff, are also included. Consistent with the definition of "law enforcement officer" in RCC § 22E-701, the revised statute applies to a "Director, deputy director, officer, or employee of the District of Columbia Department of Corrections." This change improves the clarity and consistency of the revised statute.

Third, the revised statute clarifies and possibly narrows the exclusion for transporting a firearm. D.C. Code § 22-4505(a)(6) provides an exception for someone who is transporting a pistol "from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business or in moving goods from one place of abode or business to another, or to or from any lawful recreational firearm-related activity." The current statutory language does not specify that the pistol

[47] RCC § 22E-701; *see also In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[48] *United States v. Pritchett*, 470 F.2d 455, 456 (D.C. Cir. 1972).

must be lawfully purchased or registered. There is no clear rationale for excluding people who purchase firearms illegally from the reach of the carrying a dangerous weapon statute.[49] The current statutory language includes transportation from "place of purchase" but does not mention transportation to a licensed firearms dealer for the purpose of reselling the firearm pursuant to D.C. Code § 7-2505.02.[50] The current statutory language does not define the phrase "moving goods from one place of abode to or business to another." The statute could be read narrowly to mean changing one's residence or business address. Or, the statute could be read broadly to include traveling from one's own residence or business to another person's residence or business. In contrast, the revised exclusion in RCC § 22E-4118(c)(2) applies only to registered owners and only to transportation to or from a place of sale, the person's home or business, a place of repair, a training and safety class, or a lawful recreational firearm-related activity. These changes improve the clarity and consistency of the revised statutes and may eliminate an unnecessary gap in liability.

Fourth, the revised statute clarifies that the exclusion only applies to a person who is manufacturing, repairing, or dealing in weapons if that person is doing so lawfully. D.C. Code § 22-4505(a)(5) provides that §§ 22-4504(a) and 22-4504(a-1) do not apply to "[a]ny person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business." District case law has clarified, however, that this exception does not categorically apply to all persons engaged in manufacturing, repairing, or dealing. For this exception to apply the person's activity must be more than a hobby[51] and the conduct in question must coincide with the actual performance of a business duty.[52] To capture the limitations in District case law and ensure only legitimate business activities are excluded, the revised statute requires that the dealer—or the dealer's designee—be "lawfully engaging in the business of manufacturing, repairing, or dealing the weapon involved in the offense." There is no clear rationale for excepting illegal arms dealers from the carrying a dangerous weapon offense. This change clarifies the revised statute and may reduce an unnecessary gap in liability.

Fifth, the revised statute clarifies that a person who may carry or transport a firearm may also carry or transport ammunition for that firearm. D.C. Code § 22-4504.01 begins, "Notwithstanding any other law, a person holding a valid registration for a firearm may carry the firearm…" D.C. Code § 22-4504.02(a) begins, "Any person who is not otherwise

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[49] In contrast, current D.C. Code § 22-4504.01(4) permits a registrant to carry their firearm "While it is being transported for a lawful purpose as expressly authorized by District or federal statute and in accordance with the requirements of that statute." And, D.C. Code § 22-4504.02(a) more broadly permits any person to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm." Current D.C. Code § 7-2502.01(b)(3) requires that "possession or control of such firearm is lawful in the jurisdiction in which [the defendant] resides."

[50] *But see* D.C. Code § 22-4504.02(a), which more broadly permits any person to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm."

[51] *Cormier v. United States*, 137 A.2d 212, 215 (D.C. 1957).

[52] *Bsharah v. United States*, 646 A.2d 993, 998 (D.C. 1994).

prohibited by the law from transporting, shipping, or receiving a firearm shall be permitted to transport a firearm…" There is no clear rationale for failing to include ammunition within the scope of each exclusion. In fact, § 22-4504.01(b)(1) appears to assume that the firearm will be accompanied by ammunition, stating "neither the firearm nor any ammunition being transported shall be readily accessible." However, there is no case law construing this provision. This change clarifies the revised statute and may improve the proportionality of the revised offenses.

Sixth, the revised statute does not contain a specific exclusion for members of an organization duly authorized to purchase or receive weapons from the United States. Current D.C. Code § 22-4505(a)(3) excludes "the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States; provided, that such members are at or are going to or from their places of assembly or target practice." It is not clear who would meet this classification other than members of the military,[53] qualified law enforcement officers as defined in 18 U.S.C. 926B,[54] and persons acting within the acting within the authority of the Chief of Police or a competent court,[55] each of which is excluded under the revised statute. Accordingly, this exception is removed as superfluous. This change improves the logical ordering and clarity of the revised statute and may eliminate an unnecessary gap in liability.

[53] Excepted under RCC § 22E-4118(b)(1).
[54] Excepted under RCC § 22E-4118(b)(3).
[55] Excepted under RCC § 22E-4118(b)(10).

RCC § 22E-4119. Merger of Related Weapons Offenses.

Explanatory Note and Relation to Current District Law. *This section establishes a merger provision specifically for weapons offenses in the Revised Criminal Code (RCC). The provision limits the number of convictions that can be entered for a single instance of possessing, carrying, and using a weapon.*[1] *There is no corresponding provision in current District law.*

The revised statute tracks the language in the general merger provision of RCC § 22E-214, and specifically requires the sentencing court to follow the procedures in subsections (b) and (c) of RCC § 22E-214. The offenses enumerated in subsection (a) involve similar social harms. Namely, each offense requires that a person possess or carry one or more weapons without permission to do so. The offenses enumerated in subsection (b) are also related by the social harm involved, namely, the possession or carrying of a weapon in order to perpetrate another crime.[2]

The revised statute, by omission, allows for multiple convictions and possible consecutive sentences: unlawful storage of a firearm;[3] carrying a pistol in an unlawful manner;[4] possession of a prohibited weapon or accessory;[5] possession of a firearm by an unauthorized person;[6] negligent discharge of firearm;[7] alteration of a firearm identification mark;[8] and any other offense.

The revised merger of related weapons offenses statute clearly changes current District law in two main ways.

First, under the RCC, a conviction for possession of an unregistered firearm, destructive device, or ammunition will merge with a conviction for other possessory weapons offenses arising out of the same course of conduct. The current D.C. Code does not address merger of these offenses. Under current District law, there are different units of prosecution for possessing than for carrying multiple weapons without permission.[9]

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[1] The limitation applies to convictions for the enumerated offenses without regard to the theory of liability under which the conviction was obtained. For example, the limitation prevents the court from entering judgments of conviction for possession of a dangerous weapon during a crime and for *attempted* first degree robbery.

[2] *See Hawkins v. United States*, 119 A.3d 687, 703 (D.C. 2015) (explaining that carrying a pistol without a license does not merge with possession of a firearm during a crime of violence because the latter does not require proof that the person was unlicensed to carry the weapon).

[3] RCC § 7-2507.02A.

[4] RCC § 7-2509.06A.

[5] RCC § 22E-4101.

[6] RCC § 22E-4105.

[7] RCC § 22E-4106.

[8] RCC § 22E-4107.

[9] *Hammond v. United States*, 77 A.3d 964, 968 (D.C. 2013) (the unit of prosecution for possessing an unregistered firearm is each weapon); *Cormier v. United States*, 137 A.2d 212, 217 (D.C.1957) (simultaneously carrying two pistols, each of which was unlicensed, is a single offense); *Little v. United States*, 709 A.2d 708, 715 (D.C. 1998); *see also Headspeth v. Dist. of Columbia*, 53 A.3d 304, 307 (D.C. 2012); *Chapman v. United States*, 493 A.2d 1026 (1985) (permitting the government to charge one count of possession of an *unregistered* firearm for one gun and one count of carrying pistol without *license* for another gun possessed at the same time).

However, possession of an unregistered firearm[10] does not merge with carrying a pistol without a license.[11] In contrast, the revised statute merges possession of an unregistered firearm with carrying without a license as both statutes are directed at similar social harms. This change improves the proportionality of the revised statutes.

Second, under the RCC, a conviction for possession of a dangerous weapon with intent to commit crime[12] and a conviction for possession of a dangerous weapon during a crime[13] merge with any offense against persons that accounts for the display or use of a dangerous weapon in its gradation structure. Under current law, a conviction for possession of a prohibited weapon with intent to commit crime ("PPW-b")[14] and a conviction for possession of a firearm during a crime of violence or dangerous crime ("PFCV")[15] do not merge.[16] Further, under current law, a crime of violence that includes as an element possession of a firearm—e.g., armed kidnapping, armed burglary, armed robbery, assault with a dangerous weapon—does not merge with PFCV, even though a person who commits the predicate offense necessarily commits PFCV also.[17] In contrast, the RCC prevents stacking weapons-based penalty enhancements in the Subtitle II with penalties for weapons possession in Chapter 41, as these statutes are directed at similar social harms.[18] This change improves the proportionality of the revised offenses.

[10] D.C. Code § 7-2507.06.
[11] D.C. Code § 22-4504(a); *Tyree v. United States*, 629 A.2d 20 (D.C. 1993).
[12] RCC § 22E-4103.
[13] RCC § 22E-4104.
[14] D.C. Code § 22-4514(b).
[15] D.C. Code § 22-4504(b).
[16] *Bell v. United States*, 950 A.2d 56, 73 (D.C. 2008) (finding each offense requires an element that the other does not).
[17] *See, Thomas v. United States,* 602 A.2d 647 (D.C. 1992); *see also Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000) (affirming convictions for armed robbery, armed burglary, and one count of PFCV for each); *Sanders v. United States*, 809 A.2d 584, 603 (same); *Hanna v. United States*, 666 A.2d 845, 855 (D.C. 1995).
[18] Consider, for example, a person who carries a concealed, licensed firearm when the person assaults and breaks a person's finger—the firearm never being used or displayed. Under current law, such a person faces a mandatory minimum of 5 years and a maximum penalty of 48 years imprisonment: 3 years for felony assault (D.C. Code § 22-404(a)(2)) based on the harm of breaking the finger, plus an additional 5-15 years for possessing a firearm during the assault (D.C. Code § 22-4504(b)), plus an additional 5-30 years for having a firearm readily available during the robbery (D.C. Code § 22-4502). The liability for committing the offense while armed but not using the firearm is 16 times the maximum penalty a person would otherwise face for the harm done to the victim under D.C. Code § 22-404(a)(2).

RCC § 22E-4120. Endangerment with a Firearm.

Explanatory Note. *This section establishes the endangerment with a firearm offense for the Revised Criminal Code (RCC). The offense prohibits knowingly discharging a projectile from a firearm without special permission to do so. The offense does not exist under current District law but is similar to conduct already punished in D.C. Code §§ 22-4503.01 (Unlawful discharge of a firearm)[1] and 22-1321 (Disorderly Conduct),[2] as well as the conduct constituting penalty enhancements for "drive-by" or "random" shootings in D.C. Code §§ 22-2104.01(b)(5) and 24-403.01 (b-1)(2)(E).*

Paragraph (a)(1) specifies that the person must discharge a projectile from a firearm outside of a licensed firing range.[3] Per its ordinary meaning,[4] a "discharge" does not require aiming a weapon. "Firearm" is a defined term that refers to a weapon "which will, or is designed or redesigned, made or remade, readily converted, restored, or repaired, or is intended to, expel a projectile or projectiles by the action of an explosive" and excludes antiques.[5] Paragraph (a)(1) specifies that to be criminally liable for discharging a firearm, a person must act at least knowingly. The term "knowingly" is defined in RCC § 22E-206 and here means that the person must be practically certain that that they discharge a projectile from a firearm and that the discharge occurs in a location other than a licensed firing range.

Paragraph (a)(2) enumerates two circumstances in which knowingly discharging a projectile from a firearm is prohibited under this section.[6]

Subparagraph (a)(2)(A) punishes shooting (in any location, private or public) in a manner that creates a substantial risk of death or bodily injury to another person.[7] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that they are endangering someone else.

Subparagraph (a)(2)(B) punishes shooting in a referenced public place (irrespective of whether any person or property is endangered) without lawful authority to do so.[8] Subparagraph (a)(2)(B) uses the term "in fact" to specify that a person is strictly liable as to being in a prohibited location and as to lacking lawful authority.[9]

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[1] RCC § 22E-4106, Negligent Discharge of a Firearm.
[2] RCC § 22E-4201.
[3] The District of Columbia does not currently have any firing ranges or hunting grounds.
[4] *See, e.g.,* Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/discharge ("to relieve of a charge, load, or burden").
[5] RCC § 22E-701. Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[6] *See also* RCC § 22E-4106, Negligent Discharge of a Firearm.
[7] Consider, for example, a person who is shooting targets in their backyard, in a manner that creates a substantial risk that a neighbor in an adjacent yard will be struck by a bullet.
[8] Consider, for example, a person who is shooting in the air outside of an embassy to make a political statement. *See, e.g.*, Peter Hermann and Spencer S. Hsu, *Man ordered detained after police say he fired 32 rounds at Cuban Embassy*, WASHINGTON POST (May 4, 2020). Consider also a person who is hunting animals.
[9] RCC § 22E-207.

Sub-subparagraph (a)(2)(B)(i) specifies that the prohibited locations are: places that are open to the general public at the time of the offense, a communal area of multi-unit housing, a public conveyance, and a rail transit station. The terms "open to the general public,"[10] and "public conveyance"[11] are defined in RCC § 22E-701 and "rail transit station" has the meaning specified in D.C. Code § 35-251. Either the person or the discharged ammunition may be in a public place.[12] This includes any part of the bullet's flight path.[13]

Sub-subparagraph (a)(2)(B)(ii) provides that a person may discharge a projectile from a firearm if the Metropolitan Police Department ("MPD") grants written permission to do so. MPD may permit the discharge of a firearm by a particular person, in a particular location, or at a specified time. Sub-subparagraph (a)(2)(B)(ii) also provides that a person may discharge a projectile from a firearm if they have any other permission to do so under District or federal law.

Subsection (b) specifies the penalties for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) provides that a conviction for endangerment with a firearm will merge with a conviction for a crime that already accounts the use or display of a firearm in the offense definition or penalty enhancement.[14] Subsection (c) does not apply, however, to crimes involving only the possession or attempted possession of a firearm, imitation firearm, or dangerous weapon.

Subsection (d) specifically requires the sentencing court engaged in merger under subsection (c) of this section to follow the procedures in subsections (b) and (c) of RCC § 22E-214.

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised endangerment with a firearm statute is a new offense and, in that sense, all aspects of the revised statute are substantive changes to District law. Compared to current District crimes, the revised endangerment with a firearm statute clearly changes current District law in two main ways.*

First, the revised statute accounts for the distinctly terrifying nature of public shootings that are not otherwise part of a crime against property or persons. The current D.C. Code provides significant liability for possessing or carrying a weapon illegally, irresponsibly, or during a crime but very little additional liability for firing a gun. Except

[10] "Open to the general public" is defined to mean no payment, membership, affiliation, appointment, or special permission is required to enter.
[11] "Public conveyance" means any government-operated air, land, or water vehicle used for the transportation of persons, including any airplane, train, bus, or boat.
[12] For example, a person commits an offense by shooting out of a private moving motor vehicle into a public way. A person also commits an offense by shooting from a public sidewalk into a private building.
[13] For example, a person commits an offense by shooting from one private building across an alleyway into another private building.
[14] *See also* RCC § 22E-214. The fact that subsection (c) requires merger in specified circumstances is not intended to preclude the court from merging endangerment with a firearm with another conviction in other circumstances under RCC § 22E-214.

for murders,[15] under the current D.C. Code there is just one way to prosecute a shooting that does not amount to an assault or cause property damage and goes beyond a possession or carrying charge.[16] Namely, the D.C. Code punishes "unlawful discharge of a firearm" as a misdemeanor offense.[17] However, this statute is regulatory in nature and punishes negligently mishandling a firearm. Consequently, the current D.C. Code has no crime that distinctly addresses intentional discharge of a firearm where only emotional harm to individuals or the community results. In contrast, the RCC punishes knowingly discharging a firearm as a distinct crime, even where there is no intent to harm a person or property. This change eliminates a gap in liability and improves the logical organization of the revised statutes.

Second, the RCC logically reorganizes gun offenses, drawing meaningful grading and penalty distinctions based on how a firearm is possessed, carried, or used. Under the current D.C. Code, severe penalties are available for possession or carrying a firearm, without differentiation as to whether that firearm was used or displayed in any manner. A person who is charged with a crime of unlawfully possessing a firearm (actually or constructively) under the current D.C. Code may be subject to longer incarceration than a person who is charged with a crime of unlawfully carrying, brandishing, shooting, assaulting another with, or injuring another with a firearm.[18] In contrast, the RCC generally organizes and penalizes firearm crimes progressively more seriously, from mere possessory crimes, to carrying offenses that may endanger others, to actual use or display of a firearm during a crime that harms persons or property. This graduated approach is consistent with the CCRC's public opinion research,[19] which indicates that mere possession of a firearm during an offense is less relevant to the seriousness of the offense

[15] This statute deters gun owners from maintaining a weapon irresponsibly, in a manner that could prove dangerous at some later time. *See also* RCC §§ 7-2507.02 (Unlawful Storage of a Firearm); 7-2509.06 (Carrying a Pistol in an Unlawful Manner); D.C. Code 7-2509.06 (Carrying a pistol while impaired).

[16] Consider, for example, a drug turf war in which one seller drives through the contested block, shooting in the air, to send a message that no other seller may do business there. Consider also a person who is shooting in the air outside of an embassy to make a political statement. *See, e.g.*, Peter Hermann and Spencer S. Hsu, *Man ordered detained after police say he fired 32 rounds at Cuban Embassy*, WASHINGTON POST (May 4, 2020).

[17] D.C. Code § 22-4503.01; RCC § 22E-4106.

[18] *Compare* D.C. Code § 7-2502.01 (1 year or 5 years for possession of an unregistered firearm) *with* D.C. Code § 22-4503.01 (1 year for unlawful discharge). *Compare* D.C. Code § 22-4503(b)(1) (10 years or 15 years for unlawful possession) *with* D.C. Code §§ 22-4504(a)(2) (10 years for carrying), 22-402 (10 years for assault with a dangerous weapon), and 22-404.01 (10 years for assault causing serious bodily injury).

[19] Respondents agreed that causing even a minor injury by using a firearm should be punished more severely than causing a more serious injury without one. *See* Advisory Group Memo #27 Appendix A - Survey Responses at 23 (showing the presence of a gun significantly increased the perceived severity, but whether the gun is used or displayed is critical in impressions of severity). For instance, shooting someone with a gun and causing an injury requiring immediate medical treatment was perceived as being two severity levels higher (8.2) than the Level 6 milestone offense of causing the same type of injury without a gun. Similarly, threatening to kill someone face-to-face while displaying a gun was ranked as nearly two severity levels higher (7.6) than making the same threat while unarmed (5.6). In contrast, secretly carrying, but not displaying or shooting a gun, in the process of an attempted robbery was ranked as only somewhat more serious than gun-free attempted robbery (5.0 versus 4.3).

than use or display of the firearm and the resulting harm to complainants. This change improves the logical organization and proportionality of the revised statutes.

RCC § 22E-4201. Disorderly Conduct.

Explanatory Note. *This section establishes the disorderly conduct offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that disrupts or potentially disrupts a public place and is not protected by the First Amendment or District law. The RCC disorderly conduct statute addresses conduct that: causes a person reasonably to believe a specified criminal harm is likely to occur to them; directs someone present to engage in a specified criminal harm where the harm is likely to occur; directs abusive speech to a person that is likely to provoke a specified retaliatory criminal harm; or involves continued fighting after receiving a law enforcement officer's order to cease. The disorderly conduct statute uniquely addresses inchoate conduct that may not constitute an attempted criminal threat, menace, assault, destruction of property, or theft. The revised offense replaces subsection (a) and, in concert with other provisions of the RCC,[1] subsection (g) of D.C. Code § 22-1321, the District's disorderly conduct statute.[2] The revised offense also replaces the District's affrays statute in D.C. Code § 22-1301[3] and the prosecution provision in D.C. Code § 22-1809.*

Paragraph (a)(1) provides that the accused's conduct must occur in a place that is either open to the general public, a public conveyance or a rail transit station, or the communal area of multi-unit housing. The terms "open to the general public," "public conveyance," and "rail transit station" Are defined terms that generally refer to locations where no payment or special permission is needed to enter, government-run transportation vehicles, Metro station passenger areas, and common areas of multi-unit housing.[4] "In fact," a defined term,[5] is used to indicate that there is no culpable mental state requirement as to whether the location is open to the general public, a public conveyance, a rail transit station, or a communal area of multi-unit housing.

Paragraph (a)(2) specifies four basic types of disorderly conduct: causing fear of crime, inciting crime, provoking crime, and public fighting.

Subparagraph (a)(2)(A) punishes reckless conduct other than speech that causes another person to fear that they will sustain a criminal[6] bodily injury, taking of property, or damage to property. The accused's conduct must actually cause another person to

[1] *See* commentary regarding theft from a person RCC § 22E-2101(c)(4) and RCC § 22E-1205 offensive physical contact.
[2] Other subsections of D.C. Code § 22-1321, concerning nuisance and stealthily looking into a dwelling where there is an expectation of privacy, are addressed in different sections of the RCC. *See* RCC §§ 22E-4202 (Public Nuisance) and 22E-4205 (Breach of Home Privacy).
[3] D.C. Code § 22-1301 ("Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both.").
[4] RCC § 22E-701. Note that, for example, a restaurant and bar may be open to the general public during the day but impose an age limit and require identification late at night. Locations for which the general public always needs special permission to enter, such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public" for the purposes of this statute.
[5] RCC § 22E-207.
[6] The word "criminal" modifies the words that follow.

reasonably believe[7] that one of those dangers is likely to occur immediately and that he or she will be the victim.[8] "Speech" is a defined term and means oral or written language, symbols, or gestures.[9] "Bodily injury" is a defined term and means physical pain, illness, or any impairment of physical condition.[10] "Property" is a defined term and means anything of value. The affected person must be placed in fear of a criminal harm.[11] The affected person must fear that the criminal harm will occur immediately, not in the future. And, the affected person's fear must be objectively reasonable.[12]

Subparagraph (a)(2)(A) also specifies the culpable mental state required is recklessness, a term defined in RCC § 22E-206. As applied here, the accused must be aware that there was a substantial risk that the conduct will cause another person to be afraid of suffering a criminal harm.[13] The risk must be of such a nature and degree that, considering the nature and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the ordinary standard of conduct. A person does not commit disorderly conduct when he or she exercises reasonable caution or where he or she deviates only slightly from the ordinary standard of care.[14]

Subparagraph (a)(2)(B) punishes publicly inciting others to violence consisting of a criminal harm involving bodily injury, taking of property, or damage to property. It also must be proven that the harm is likely[15] to occur. This provision requires two culpable mental states. First, the person must act purposely, a defined term,[16] which here means the person must consciously desire to cause another person to immediately engage in criminal harm. The person's statement must be a specific directive to act now, not merely general encouragement of violence against a particular group or in the name of a particular cause. Second, the person must be reckless as to the fact that the solicited harm is likely to occur.

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[7] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[8] "We hold that § 22-1321 (a)(1) requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person." *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).

[9] RCC § 22E-701.

[10] RCC § 22E-701.

[11] Consider, for example, a person who becomes afraid that a repossession officer will tow away their car, due to delinquent payments. That harm (alone) is not a criminal taking of property and, without more, the officer's conduct is not disorderly.

[12] For example, a fear of theft or violence based on prejudicial beliefs about race or sex is not objectively reasonable.

[13] For example, a person who enters an area of a park that, on inspection, appears to be vacant. She then swings a stick wildly while screaming obscenities, scaring someone who walks into the area, thinking they are being attacked. She has not committed disorderly conduct because she was not aware of a substantial risk that any person could see her or hear her.

[14] For example, a person playing kickball in a public park who chases the ball near a group of uninvolved bystanders, alarming them. However agile or clumsy the athlete might be, it is unlikely that her movements will rise to the level of disorderly conduct because a person of ordinary caution would likely chase after the ball in the same manner, under the same circumstances.

[15] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.

[16] RCC § 22E-206.

"Recklessness" is defined in the revised code,[17] and here means that the person must be aware of a substantial risk that the listener will follow the command and the person's conduct must be a gross deviation from the ordinary standard of conduct.

Subparagraph (a)(2)(C) punishes directing abusive speech[18] to someone in a public place, which are likely[19] to provoke immediate, violent retaliation. To commit disorderly conduct by abusive speech, a person must act with the purpose of directing the speech to another person.[20] "Purposely" is a defined term[21] and here means that the speaker must consciously desire that the manner of the speech be seriously upsetting the listener.[22] The term "speech" is defined in RCC § 22E-701 to mean oral or written language, symbols,[23] or gestures.[24] The person must also be reckless as to the fact that the speech is likely to provoke a violent response. "Recklessness" is also defined in the revised code,[25] and here means that the person must be aware of a substantial risk that the listener will retaliate[26] and the person's conduct must be a gross deviation from the ordinary standard of conduct.

Subparagraph (a)(2)(D) prohibits public fighting after receiving a law enforcement officer order to stop. The term "fighting" is not statutorily defined, and is not restricted to the infliction of bodily injury required for assault offenses[27] or offensive touching as is required for offensive physical contact.[28] Unlike certain degrees of assault and offensive physical contact, effective consent is not an available defense to public fighting that violates subparagraph (a)(2)(D).[29] The government must prove that the accused received a law enforcement order to stop fighting and that the accused continued or resumed fighting

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[17] RCC § 22E-206.

[18] "Abusive speech" has the same meaning as "fighting words:" "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942).

[19] Whether a harm is likely to occur is a fact-sensitive inquiry. For example, where a person commands one unarmed person to "attack" a group of four well-armed police officers, it may not be likely that the listener will heed the command. Consider also, a person who tries to persuade a group of pacifist protestors to burn down the city.

[20] The intended recipient of the speech may be a particular individual or a large and amorphous group of people near enough to see or hear the speaker.

[21] RCC § 22E-206.

[22] No particular word or image categorically qualifies as abusive speech. A word's connotation and denotation may change over time. The offensiveness of a word may depend on the identity of speaker, the audience, or the sensitivity of the moment.

[23] For example, a sign with a swastika, a car decal bearing a Redskins logo, a red hat with the initials "MAGA," or a noose as a prop, could be considered an abusive symbol, depending on the time, place, and manner of their use.

[24] Some gestures (e.g., a raised middle finger) are widely understood to carry a particular verbal meaning. Whether a gesture is abusive and whether provocation is likely depends on the time, place, and manner in which the gesture is used, not the content of the verbal translation alone.

[25] RCC § 22E-206.

[26] Whether a listener is likely to be provoked to immediate, retaliatory criminal harm is a fact-sensitive inquiry.

[27] RCC § 22E-1202.

[28] RCC § 22E-1205.

[29] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally); *see also* D.C. Code § 22-1301 (criminalizing affrays).

in disregard of that directive. "Knowingly" is a defined term[30] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[31] "Law enforcement officer" is a defined term.[32] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order to cease. A person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop fighting.[33] Where a person is uncertain as to whether they can safely comply with the order, a justification defense also may apply.

Subsection (b) establishes two exclusions from liability for the revised disorderly conduct offense. Paragraphs (b)(1) and (b)(2) categorically exclude as a basis for disorderly conduct liability behaviors that frighten, offend, or provoke a law enforcement officer in the course of his or her official duties. Both paragraphs (b)(1) and (b)(2) specify "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here the requirements in paragraphs (b)(1) and (b)(2), respectively.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised disorderly conduct statute clearly changes current District law[34] in three main ways.*

First, the revised statute specifies that conduct that frightens, offends, or provokes a law enforcement officer can never be the basis for disorderly conduct.[35] Subsection (a) of the current disorderly conduct statute punishes three basic types of misconduct in public: causing fear of crime,[36] inciting crime,[37] and provoking crime.[38] Only the third type of conduct, criminalized by paragraph (a)(3) of the statute, explicitly excludes from liability

[30] RCC § 22E-206.
[31] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit disorderly conduct by public fighting.
[32] RCC § 22E-701.
[33] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).
[34] The current disorderly conduct statute, D.C. Code § 22-1321, was revised in 2011 to significantly change the scope and language.
[35] RCC §§ 22E-4201(b)(2) and (b)(3).
[36] D.C. Code §22-1321(a)(1).
[37] D.C. Code §22-1321(a)(2).
[38] D.C. Code §22-1321(a)(3).

language or gestures directed at a law enforcement officer while acting in his or her official capacity. Conduct criminalized under subsections (a)(1) and (a)(2) of the current statute does not provide an exception for conduct directed at law enforcement officers.[39] In contrast, the RCC codifies an exception to liability for engaging in conduct other than speech that causes a law enforcement officer to reasonably believe that he or she is likely to suffer an immediate criminal harm involving bodily injury, taking of property, or damage to property. Unlike other citizens, law enforcement officers regularly confront alarming behavior, are specially trained to resist provocation and determine what behavior is criminal or an attempted crime, and have the power to arrest where they reasonably believe a crime or attempted crime is occurring. Consequently, it is not necessary to criminalize conduct that falls short of such an attempted crime, and that is merely alarming to the law enforcement officer. On the other hand, when a person's conduct indicates that they are about to assault a law enforcement officer or harm the officer's property, a more serious punishment than disorderly conduct is warranted. This revision may better reflect recent Council determinations about the proper scope of the assault on a police officer statute,[40] and the Council's rationale for the current disorderly statute's exception[41] for fighting words directed at a law enforcement officer. This change improves the clarity, consistency, and proportionality of the offense.

Second, the revised disorderly conduct statute limits liability for consensual public fighting to continuing or resuming such conduct after a law enforcement order to cease. The current D.C. Code codifies a penalty for committing an "affray,"[42] however, no elements of the offense are codified.[43] There are no published cases where an individual has been convicted under the codified 'affray' statute in the District, however, a District court opinion from the mid-1800s references the fact that a common law affray occurs

[39] To the extent that the current subsections (a)(1) and (a)(2) of the disorderly conduct statute, which do not explicitly exclude behavior directed at a law enforcement officer, include conduct also addressed by subsection (a)(3), the three provisions are in apparent conflict. For example, consider an actor, with a group of like-minded companions nearby, shouts racial slurs and gestures with his middle finger at an on-duty law enforcement officer. Depending on the facts, such conduct may satisfy the objective elements of subsection (a)(1) (causing the officer to be in reasonable fear he is about to be assaulted), subsection (a)(2) (provoking others to attack the officer), and (a)(3) (provoking immediate physical retaliation, although only subsection (a)(3) says that it cannot be applied to an on-duty officer).

[40] *See generally* Report on Bill 21-360, "Neighborhood Engagement Achieves Results Act of 2015," Council of the District of Columbia Committee on Public Safety and the Judiciary (January 28, 2016).

[41] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8 ("[T]he crime of using abusive or offensive language must focus on the likelihood of provoking a violent reaction by persons other than a police officer to whom the words were directed, because a police officer is expected to have a greater tolerance for verbal assaults and is especially trained to resist provocation by verbal abuse that might provoke or offend the ordinary citizen." And, "it seems unlikely at best that the use of bad language toward a police officer will provoke immediate retaliation or violence, not by him, but by someone else.").

[42] D.C. Code § 22-1301 provides, "Whoever is convicted of an affray in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both."

[43] The offense is an example of a "common law" offense whose elements are defined wholly by courts in past case opinions rather than in legislative acts.

when two persons fight in public.[44] Dicta in District assault case law has stated that a public assault is punishable to the extent that it breaches public peace and order,[45] perhaps indirectly referring to the crime of affrays. In contrast, the revised disorderly conduct statute specifically punishes participating in public fighting only after a law enforcement officer has ordered the fight to end. This change eliminates liability for mutually-consensual horseplay or low-level fighting that does not involve significant bodily injury. The RCC disorderly conduct statute, under subparagraph (a)(2)(A), also provides liability for public fighting whenever a person recklessly causes another to reasonably believe that there is likely to be immediate and unlawful bodily injury—covering public fighting that involves infliction of significant bodily injury and non-consensual public fighting.[46] This change clarifies and improves the clarity, consistency, and proportionality of District laws, and reduces unnecessary overlap.

Third, the revised statute repeals D.C. Code § 22-1809, which provides that a person who fails to pay a fine for a disorderly conduct offense shall be committed to a workhouse for up to six months. This change improves the consistency and proportionality of the revised statutes and eliminates an archaic provision in the D.C. Code.

Beyond these three changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies a culpable mental state for all offense elements other than the location, which is specified to be a matter of strict liability. The current disorderly conduct statute[47] begins with a prefatory clause "In any place open to the general public, and in the communal areas of multi-unit housing," but does not specify a culpable mental state for that circumstance. District case law does not address the matter. In paragraph (a)(1), the current statute specifies a mental state of "intentionally or recklessly." However, the current statute does not define "recklessly" and does not make clear whether a person must be reckless as to every result and circumstance in paragraph in (a)(1), or the following paragraphs (a)(2) and (3), which do not state any culpable mental states of their own. Again, District case law to date does not address culpable mental states for these provisions. The RCC resolves these ambiguities by clearly specifying the culpable mental states for all elements of the revised offense as being either strict liability (through use of the phrase "in fact") as to the location, or recklessly, purposely, or knowingly as to all other offense elements. These culpable mental state terms are defined in RCC § 22E-206.[48]

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[44] *Hedgpeth v. Rahim*, 213 F. Supp. 3d 211, 223 (D.D.C. 2016) (citing *United States v. Herbert*, 26 F. Cas. 287, 289, F. Cas. No. 15354a, 2 Hay. & Haz. 210 (D.C. Crim. Ct. 1856) ("In the case of sudden affray, where parties fought on equal terms, that is, at the commencement or onset of the conflict, it matters not who gave the first blow.")

[45] *See Woods v. United States*, 65 A.3d 667, 669-671 (D.C. 2013) (explaining consent is no defense to an assault that occurs in a public place because a public assault is a crime against the public generally).

[46] Some instances of mutual combat are lawful and others are not. RCC § 22E-1202 explains that a person may not consent to significant bodily injury or serious bodily injury or to use of a firearm. "Significant bodily injury" and "serious bodily injury" are defined in RCC § 22E-701. "Firearm" is defined in D.C. Code § 22-4501(2A).

[47] D.C. Code § 22-1321.

[48] The revised disorderly conduct statute makes clear that the actor must consciously disregard a substantial risk that her conduct will lead an onlooker to reasonably believe one of three harms is likely to immediately

Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[49] However, recklessness is required for assault liability in RCC § 22E-1202, which criminalizes conduct closely related to paragraph (a)(2)(A) in the revise disorderly conduct offense. The heightened culpable mental state of purposely in paragraphs (a)(2)(B)-(a)(2)(C) distinguishes the use of speech which the actor does not know, or knows but does not wish, to be construed as provoking violence. This change improves the clarity, completeness, and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[50]

Second, the revised code uses the defined terms "open to the general public," "public conveyance," and "rail transit station."[51] The current disorderly conduct statute uses the phrase "open to the general public" and refers to a "public conveyance," but does not define thee terms, and there are no District of Columbia Court of Appeals ("DCCA") published opinions construing the terms. The legislative intent behind the phrase is particularly unclear as to "open to the general public,"[52] and case law does not directly address its meaning.[53] To resolve any ambiguity, the RCC uses defined terms that delineate the scope of the offense. The defined term "open to the general public" generally means that no payment or permission is required to enter. The revised definition of "open to the general public" effectively excludes public conveyances, private event arenas, schools, and detention facilities from the purview of the disorderly conduct statute; however, the revised statute specifically includes public conveyances and passenger areas of Metro stations (through the term "rail transit station"). What amounts to disorderly conduct in any of these locations may result in other criminal liability under current law and the RCC,[54]

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occur. The RCC also makes clear that the risk must be of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the ordinary standard of conduct. Finally, the RCC makes clear that a person is strictly liable with respect to whether she is located in a place that is open to the general public or is the communal area of multi-unit housing.

[49] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted.)).

[50] Were a person strictly liable for conduct that causes a breach of peace per D.C. Code § 22-1321(a)(2) and (a)(3), even mistakes or accidents by a defendant could be the basis of criminal liability for disorderly conduct. For example, a person who reasonably believes themselves to be alone in a park and recites provocative song lyrics containing "fighting words" may be guilty of disorderly conduct.

[51] RCC § 22E-701.

[52] In an earlier draft of the disorderly conduct legislation, before the Council formed the Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, Bill 18-151 defined "public" as "affecting or likely to affect persons in a place to which the public has access; including but not limited to highways, streets, sidewalks, transportation facilities, schools, places of business or amusement."

[53] The District of Columbia Court of Appeals has not addressed the meaning of the phrase "open to the general public," however, it has required that disorderly conduct occur in a location and under circumstances in which a breach of public peace and tranquility could occur. *See Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[54] Current law separately punishes minor conduct that is disruptive to riders on public conveyances and authorizes the Washington Metropolitan Area Transit Authority ("WMATA") to refuse service to any rider

giving law enforcement officers authority to immediately intervene and arrest when necessary to restore public order.[55] This change clarifies and improves the consistency and proportionality of the revised statute and reduces unnecessary overlap.

Third, the revised statute, in concert with other RCC statutes, eliminates separate, distinct liability for jostling, crowding, and placing a hand near someone's purse or wallet. Subsection (g) of the current disorderly conduct statute provides, "It is unlawful, under circumstances whereby a breach of the peace may be occasioned, to interfere with any person in any public place by jostling against the person, unnecessarily crowding the person, or placing a hand in the proximity of the person's handbag, pocketbook, or wallet." DCCA case law interpreting a prior version of the disorderly conduct statute stated that "jostling against" "contemplates rough physical touching of one individual by another."[56] However, in the RCC, jostling, crowding, and reaching toward a wallet that actually places a person in fear of an immediate unlawful taking[57] is criminalized by the disorderly conduct statute subparagraph (a)(2)(A). Other RCC offenses such as offensive physical contact[58] and attempted theft from a person[59] also criminalize aspects of the current disorderly statute's jostling provision. It is unclear whether the current jostling provision in the D.C. Code covers any further conduct.[60] This change clarifies and reduces unnecessary overlap in the revised offenses.

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who violates its rules of conduct. *See* D.C. Code §§ 22-1321(c) and 35-251 - 53. Additionally, any person who remains on a public conveyance without WMATA's effective consent is guilty of trespass and subject to arrest on that basis. *See generally* RCC § 22E-2601. Similarly, a private arena may eject any patron from their premises at any time and failure to leave as directed amounts to a trespass. The Central Detention Facility ("D.C. Jail") and the Central Treatment Facility ("CTF") are empowered to quell any threat of public alarm or breach of peace by immediately separating inmates, placing inmates in protective custody, and placing inmates in disciplinary detention. *See* D.C. Department of Corrections Inmate Handbook 2015-2016. Public and private schools also have authority to remove and suspend rulebreakers. *See* Tex. Penal Code § 42.01 (providing that its disorderly conduct statute categorically "do[es] not apply to a person who, at the time the person engaged in conduct prohibited under the applicable subdivision, was a student younger than 12 years of age, and the prohibited conduct occurred at a public school campus during regular school hours.").

[55] "Disorderly conduct is distinct from many other statutes in that most criminal prohibitions are intended to punish and deter crimes, whereas disorderly conduct is meant to give police the power to defuse a situation that disturbs the public. The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Committee on Public Safety and the Judiciary Report on Bill 18-425 at Page 3.

[56] *Matter of A. B.*, 395 A.2d 59, 62 (D.C. 1978).

[57] The revised statute may be narrower than the current jostling provision in D.C. Code § 22-1321(g). Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," the DCCA recently explained that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 9).

[58] RCC § 22E-1205;

[59] RCC § 22E-2101; RCC § 22E-301.

[60] Although the statutory language requires "circumstances whereby a breach of peace may be occasioned," legislative history cited in dicta by the DCCA suggests that this provision also reaches instances in which the victim is unaware of the offensive behavior. *See Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018) (citing Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 9).

Fourth, the revised statute more precisely defines committing disorderly conduct by means of incitement to violence. Paragraph (a)(2) of the current disorderly conduct statute explicitly provides that it is unlawful to, "Incite or provoke violence where there is a likelihood that such violence will ensue."[61] The term "incite" is not defined by in the statute, and case law has not interpreted the term. Legislative history provides no indication of the term's intended meaning.[62] "Incites," however, is also predicate conduct in the current D.C. Code rioting statute.[63] To resolve ambiguities about the scope and meaning of disorderly conduct by incitement, subparagraph (a)(2)(B) of the revised statute punishes a person who "[p]urposely commands, requests, or tries to persuade any person present to cause immediate criminal harm involving bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to occur." Similar language appears in the provision governing liability for criminal solicitation in the general part of the revised code.[64] The terms "bodily injury," "property," and "reckless" each have standardized definitions in RCC §§ 22E-701 and 22E-206. This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute replaces the words "reasonable fear" with "reasonably believe" that that there will be immediate and unlawful harm. The current disorderly conduct statute states that it is unlawful for a person to "cause another person to be in reasonable fear" of specified harms that generally appear to entail immediate acts.[65] The statute does not define the term "fear." A recent DCCA opinion held that the statute "requires proof that the defendant's charged conduct placed another person in fear of harm to his or her person."[66] The revised disorderly conduct statute specifies that the observer must reasonably believe that they will suffer an immediate and unlawful[67] harm. This word choice clarifies that it is the observer's reasoned judgment, not their emotion that matters

[61] D.C. Code § 22-1321(a)(2).
[62] Legislative adoption of the "incite" language in subsection (a)(2) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE) and included language identical to the current subsection (a)(2). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report") at Page 16. The CCE recommendations did not provide an explanation for the meaning or significance of the "incite" language in their recommendation beyond a general statement that that and other language was a reformulation of the "catchall" provision in the disorderly conduct statute prior to 2011, which referred to "acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others." CCE Report at 9.
[63] D.C. Code § 22-1322(c).
[64] RCC § 22E-302.
[65] D.C. Code § 22-1321(a)(1).
[66] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).
[67] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.

as to liability. It also clarifies, through the requirement of immediacy, that the harm must be imminent.

Second, the revised statute explicitly distinguishes between speech and non-speech conduct, consistent with standard definitions that apply throughout the RCC. Current D.C. Code § 22-1321(a) uses the verb "act" in paragraph (1), "[i]ncite or provoke" in paragraph (2), and "[d]irect abusive or offensive language" in paragraph (3). The D.C. Code does not define the word "act" in the disorderly conduct statute or provide a general definition. District case law has not addressed the issue. The RCC uses standardized definitions of "act"[68] and "speech,"[69] which provide that an act includes verbal speech, and that speech includes certain non-verbal conduct. Consistent with these definitions, and to clarify that the intended meaning of paragraph (a)(1) of the current disorderly statute is intended to not include verbal speech, the revised statute uses different terminology. The revised statute replaces the word "act" with the phrase "conduct other than speech"[70] in subparagraph (a)(2)(A) and uses the defined term "speech" in subparagraph (a)(2)(C).

Third, the revised statute clarifies that conduct that raises concerns about self-injury,[71] other than provoking an injury to oneself by abusive language, is not disorderly conduct. The current disorderly conduct statute states that it is unlawful for a person to "intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that *a person* or property in *a person*'s immediate possession is likely to be harmed or taken" (emphasis added).[72] The DCCA recently interpreted this language as requiring that the conduct cause fear of harm to the observer's own person.[73] The RCC accordingly clarifies that conduct raising concerns solely about self-injury, other than provoking an injury to oneself by abusive language, is not a basis for disorderly conduct liability.[74]

Fourth, the revised statute replaces the phrase "abusive or offensive" with the term "abusive," which has the same general meaning.[75]

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[68] RCC § 22E-202 ("'Act' means a bodily movement.").
[69] RCC § 22E-701 ("'Speech' means oral or written language, symbols, or gestures.").
[70] RCC § 22E-4201(a)(2)(A).
[71] Examples include a person angrily kicking the fender of their broken-down car which is parked on the street, and a skate-boarder doing jaw-dropping tricks at a public park.
[72] D.C. Code §22-1321(a)(1).
[73] *Solon v. United States*, 196 A.3d 1283, 1288 (D.C. 2018).
[74] There is separate authority for an officer to detain and transport for emergency medical care any person believed to be mentally ill and likely to injure herself. *See* D.C. Code § 21-521.
[75] *See* Merriam-Webster Online Dictionary at https://www.merriam-webster.com/dictionary/abusive (defining "abusive" as "harsh and insulting").

RCC § 22E-4202. Public Nuisance.

Explanatory Note. *This section establishes the public nuisance offense for the Revised Criminal Code (RCC). The offense proscribes a broad range of conduct that deliberately disturbs others and is not protected by the First Amendment or District law relating to freedom of assembly. The revised offense replaces subsections (b), (c), (c-1), (d), and (e) of D.C. Code § 22-1321 (Disorderly Conduct).*[1]

Subsection (a) requires that there be a significant interruption to others' activities.[2] This interruption must be committed purposely, a term defined in RCC § 22E-206. The accused must consciously desire that his or her conduct cause a significant interruption of specified activity.[3] Determination of whether a particular interruption is "significant" is an objective, fact-sensitive inquiry that, in part, must take into account the time, place, and manner of the conduct, as well as account public norms about what kinds of behavior should reasonably be expected and tolerated.[4]

Paragraphs (a)(1)-(4) list four specific types of nuisance that are prohibited. Paragraph (a)(1) replaces D.C. Code § 22-1321(c-1) and prohibits interference with the orderly conduct of a District or federal public body's meeting. The culpable mental state of "purposely" applies to the fact that the event is a public body meeting, requiring that it be the actor's conscious object to interrupt such an event. The terms "public body" and "meeting" are defined in the District's Open Meeting Act,[5] which includes hearings of record and excludes chance or social meetings of councilmembers.[6]

Paragraph (a)(2) replaces D.C. Code § 22-1321(d) and prohibits causing a significant interruption of any person's objectively reasonable quiet enjoyment of their dwelling between 10:00 p.m. and 7:00 a.m., and continuing or resuming such conduct after receiving oral or written notice to stop. "Dwelling" is a defined term[7] and means a structure

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[1] Subsections (a) and (g) of D.C. Code § 22-1321 are replaced wholly or in part by RCC § 22E-4201 (Disorderly Conduct). Subsection (f) of D.C. Code § 22-1321 is replaced by RCC § 22E-4205.

[2] As the Council observed during its recent rewrite of the disorderly conduct statute, "Freedom of speech permits loud and annoying language, which some people might find 'threatening' or 'abusive,' so more is required. The speech should have *both* the 'intent and effect' of impeding or disrupting a gathering. In this regard, 'disturbing' is too subjective." *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.

[3] Persisting in disruptive conduct after receiving a law enforcement officer's warning may be evidence of that person's purposeful conduct.

[4] For example, loud church bells at 12:00 p.m. may be reasonable, whereas knocking on a private door at 1:00 a.m. may not be.

[5] D.C. Code § 2-574.

[6] Legislative adoption of the "public building" language in subsection (c-1) of the current disorderly statute occurred as part of the Council's 2011 amendments that were in significant part based on recommendations by the Council for Court Excellence (CCE). *See* Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation Prepared by The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence (October 14, 2010) ("CCE Report"). While D.C. Code § 22-1321 does not define a "public building," the CCE recommendations encouraged the Council to enact a provision that forbids disruption of the D.C. Council or other public meetings, comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress. CCE Report at Page 11.

[7] RCC § 22E-701.

that is either designed or actually used for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public. An interruption of reasonable quiet enjoyment means a significant interference with the in-home activities of a person of ordinary sensitivity.[8] The intrusion may be a noise, smell, light, disturbing image or otherwise.[9] The notice to stop may be given by any person and is not limited to notice from a law enforcement officer.[10] The culpable mental state of "purposely" applies to the fact that the effect of the conduct is a disturbance of a person's quiet enjoyment of their residence from 10:00 p.m. to 7:00 a.m.[11] The "purposely" culpable mental state requirement also applies to the fact that the accused continued or resumed the conduct after previously receiving notice, directly or indirectly, to cease the conduct. The person must be afforded a reasonable opportunity to comply with the notice to cease.[12] Where a person is uncertain as to whether they can safely comply with the notice, a justification defense may apply.

Paragraph (a)(3) replaces D.C. Code § 22-1321(c) and prohibits interruption of any person's lawful use of a public conveyance. RCC § 22E-701 defines a public conveyance as any government-operated air, land, or water vehicle used for the transportation of persons, including but not limited to any airplane, train, bus, or boat. Such interruption may consist of diverting a passenger's pathway or the pathway of the vehicle. The culpable mental state of "purposely" applies to the fact that the actor is interrupting another's lawful use of a public conveyance. Conduct intended to generally disrupt traffic in which a public conveyance operates is insufficient,[13] rather the conscious object of the actor must be to interrupt the use of the complainant's particular public conveyance.

Paragraph (a)(4) replaces D.C. Code § 22-1321(b) and prohibits the disruption of a lawful religious service, funeral.[14] The culpable mental state of "purposely" applies to the

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[8] What is reasonable, depends on the time, place, and manner of the activity. For example, at midnight on New Year's Day it may be reasonable to blare noisemakers for several seconds, but unreasonable to do so for several minutes.

[9] Intrusions into the enjoyment of one's home may be appropriately regulated without offending the First Amendment, under the captive audience doctrine. *See Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738 (1970); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

[10] For example, a private citizen may give notice by calling a noisy neighbor and asking them to, "Keep it down."

[11] Loud noise that recklessly or negligently disturbs others, or occurs at different hours or in different locations, may be punished under 20 DCMR § 2701.

[12] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[13] Such conduct may be punished as Blocking a Public Way, under RCC § 22E-4203.

[14] In the current D.C. Code disorderly conduct statute, subsection (b) prohibits impeding "a lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding." Legislative history indicates this provision was intended to broaden an 1892 law titled "Disturbing Religious Congregation" beyond churches to include other worship services and funerals. *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.

fact that the event is a lawful religious service, funeral, or wedding, requiring that it be the actor's conscious object to interrupt such an event. The event must occur in a location that is "open to the general public," a defined term that excludes locations that require payment or special permission to enter.[15] The word "lawful" requires that the gathering or event not violate another District or federal law.[16] The term "in fact" specifies that the accused is strictly liable[17] with respect to whether the event lawful and with respect to whether the event is in a public place. The accused's conduct must have the intent and effect of interrupting the event, not merely upsetting participants and onlookers.[18]

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised public nuisance statute clearly changes current District law in three main ways.*

First, the revised public nuisance statute potentially includes any type of offensive conduct, not just noise, that disturbs a person in his or her residence at night. The D.C. Code disorderly conduct statute currently makes it unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.[19] In contrast, the revised statute includes all nuisances that cause a significant interruption to any person's reasonable, quiet enjoyment of their dwelling at night, including noises, smells, and bright lights. This change clarifies the statute and eliminates an unnecessary gap in the law.

Second, the revised statute limits the residential intrusion provision to interactions that follow a notice to cease the interruption. The D.C. Code disorderly conduct statute currently does not limit liability for disturbing noises to situations where the accused has received notice to cease the disturbance, and it appears that a single loud noise "that is likely to annoy" may constitute a violation under the current statute. There is no case law on point. By contrast, the revised statute requires proof of prior notice to the actor to stop the conduct, followed by continuance or resumption of the conduct. Notice to cease makes future disturbances into an act of ignoring the victim's directive to be left alone and invading the victim's privacy. Having prior notice does not necessarily mean that continuance or resumption of the disruption is done with the purpose of disrupting the complainant, but it will typically show that the conduct is at least knowingly done with that effect. The revised statute more narrowly criminalizes behavior that is calculated to

[15] RCC § 22E-701.
[16] Consider, for example, a wedding that is blasting music in violation of the District's noise control regulations under 20 DCMR § 2701. A neighbor who disrupts the event by shouting, "Hey, keep it down!" does not commit a public nuisance offense.
[17] RCC § 22E-207.
[18] *See Snyder v. Phelps*, 562 U.S. 443, 445 (2011) (upholding First Amendment protections where there was no indication that the picketing interfered with the funeral service itself.)
[19] D.C. Code § 22-1321(d).

torment the complainant without reaching other legitimate or protected conduct.[20] This change improves the proportionality and, perhaps, the constitutionality of the revised statute.

Third, the revised public nuisance statute eliminates urinating and defecating in a public place as a distinct basis of criminal liability. Current District statutory law explicitly punishes public urination or defecation as a form of disorderly conduct[21] and as defacing property.[22] Legislative history indicates that when the Council revised the disorderly conduct statute in 2011, it retained a provision separately criminalizing public urination at subsection (e) only because the executive did not appear to have an adequate process for civil infraction enforcement.[23] In contrast, the RCC does not specifically criminalize urination or defecation. In the RCC there may still be liability for such conduct insofar as it causes property damage,[24] causes another person to reasonably believe that the conduct will cause property damage,[25] or involves publicly exposing genitalia.[26] Persons experiencing homelessness and mental illness may be disproportionately affected by criminal sanctions for defecation and urination,[27] and other, non-criminal remedies may address the problem as, or more, effectively. This change improves the proportionality of the revised offense.

Beyond these three changes to current District law, three additional aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies "purposely" as the required culpable mental state as to causing a significant interruption of lawful activity. Three of the four relevant subsections of the current disorderly conduct statute, D.C. Code § 22-1321, that are replaced by the revised public nuisance statute require that the accused act "with the intent and effect of impeding or disrupting" lawful activity.[28] However, the meaning of acting

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[20] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977).

[21] D.C. Code § 22-1321(e).

[22] D.C. Code § 22-3312.01 (making it unlawful to "place filth or excrement of any kind…upon…[a]ny structure of any kind or any movable property"); *see Scott v. United States*, 878 A.2d 486 (D.C. 2005).

[23] See Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-425 at Page 9 (stating, "The committee agrees that public urination would be better handled as a civil infraction punishable by a ticket and a fine.")

[24] RCC § 22E-2503(c)(5) would punish public urination and defecation as fourth degree criminal damage to property to the extent it causes a permanent, observable or measurable diminution in value to public or private property—however urination and defecation are not specifically referenced in the statute.

[25] *See* RCC § 22E-4201, Disorderly Conduct.

[26] *See* RCC § 22E-4206, Indecent Exposure.

[27] In 2011, Metropolitan Police Department statistics indicated that a large number of the 300-400 persons arrested for public urination each year were not homeless, however, a concern remains that persons experiencing homelessness are impacted disproportionately. *See* CCE Report at 12.

[28] D.C. Code §§ 22-1321(b), concerning worshippers; subsection (c), concerning public conveyances; and subsection (c-1), concerning public buildings.

"with intent" is not defined by the statute. The fourth relevant subsection of the current disorderly conduct statute, D.C. Code § 22-1321, that is replaced by the revised public nuisance statute does not specify any culpable mental state.[29] There is no relevant case law on the culpable mental states for any of these provisions.[30] To resolve this ambiguity, the RCC public nuisance offense requires proof that the defendant acted purposely, a defined term in the RCC that requires that it be the conscious object of an actor to cause a significant interruption.[31] A purposeful culpable mental state distinguishes interruptions to lawful activities that are deliberate and in committed in bad faith, from other common interruptions of such activities. This change clarifies and improves the consistency and proportionality of the revised statute.

Second, the revised statute replaces the phrase "lawful public gathering, or of a congregation of people engaged in any religious service or in worship, a funeral, or similar proceeding"[32] with "lawful religious service, funeral, or wedding, that is in a location that, in fact, is open to the general public." The current disorderly conduct statute does not define the term "public gathering," and there is no case law on point. The legislative history of D.C. Code § 22-1321(b) states that the Council intended to broaden an 1892 law titled "Disturbing Religious Congregation" so that it is "applicable to any religious service or proceeding, or any similar gathering engaged in worship, including a funeral."[33] The legislative history does not provide any examples of gatherings other than worship services that it intended to include. To resolve ambiguity about the scope of a "lawful public gathering," the revised statute includes only religious services, and funerals and weddings—which may be religious or secular—provided that they occur in a location open to the public.[34] A broad construction of a "lawful public gathering" would potentially reach any gathering of people[35] and may be vulnerable to challenges for vagueness or overbreadth.[36] This change clarifies the revised statute and may ensure its constitutionality.

Third, the revised statute replaces the phrase "disrupting the orderly conduct of business in that public building"[37] with significant interruption of "[t]he orderly conduct of a meeting by a District or federal public body" and the inclusion in the statute of cross-references to specific definitions of "public body" and "meeting" in the D.C. Code. The terms "orderly conduct," "business," and "public building" are not defined in the current disorderly conduct statute or in District case law. However, legislative history indicates

[29] D.C. Code § 22-1321(d), concerning disturbance of persons in their residences.
[30] Since the disorderly conduct statute was revised in 2011 to significantly change its scope and language, the D.C. Court of Appeals ("DCCA") has yet to publish an opinion interpreting the statute.
[31] RCC § 22E-206.
[32] D.C. Code § 22-1321(b).
[33] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 8.
[34] If a person disrupts a religious service, funeral, or wedding in a private place, that conduct may be punishable as a trespass. RCC § 22E-2601.
[35] For example, players in a game in a public park, a gathering of acquaintances at a street corner, or a couple on a sidewalk might all reasonably fall within the ambit of a broad construction of "a public gathering."
[36] Consider, for example, a counter-protest that aims to disrupt a lawful public demonstration.
[37] D.C. Code § 22-1321(c-1).

this provision was intended to forbid disruption of the D.C. Council or other public meetings, in a manner comparable to D.C. Code §10-503.15, which prohibits the disruption of Congress.[38] To resolve ambiguities about the scope of this provision, the revised statute clarifies that it is the nature of the meeting as one of a public decision-making body that is controlling, and not the ownership or operation of the building. The revised statute incorporates the definition of a public body meeting from the District's Open Meetings Act[39] to clarify what types of governmental decision-making bodies are included, be they federal or District. This change improves the clarity of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The RCC criminalizes public nuisances in a stand-alone offense. Under current District law, conduct constituting a public nuisance is criminalized in the disorderly conduct statute,[40] along with crimes such as stealthily looking into a dwelling where there is an expectation of privacy and engaging in conduct that puts someone in reasonable fear a crime is about to occur. The RCC separately groups and subjects to the same punishment public nuisance-type offenses.

[38] CCE Report at Page 11.
[39] D.C. Code § 2-574.
[40] D.C. Code § 22-1321.

RCC § 22E-4203. Blocking a Public Way.

Explanatory Note. *This section establishes the blocking a public way for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that renders impassable, without unreasonable hazard, public ways after receiving a law enforcement order to stop such conduct. The revised Blocking a Public Way offense and revised Unlawful Demonstration offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2] The revised blocking a public way offense also replaces the crime of Obstructing a Bridge Connecting Virginia to the District of Columbia[3] and also replaces several older District offenses.[4]*

Paragraph (a)(1) specifies that a person's conduct must block a street, sidewalk, bridge, path, entrance, exit, or passageway.[5] The location blocked may be a privately owned location, so long as the other requirements of the offense are met.[6] The term "blocks" is defined in RCC § 22E-701 to mean "render safe passage through a space difficult or impossible."[7] The revised offense does not include minor incommoding that poses no risk to passers-by.[8] However, a person is liable under the revised statute for conduct that, but for the intervention of a law enforcement officer, would render the public way impassable without unreasonable hazard.[9] Because the definition refers to "render impassable," no proof that a person actually attempted to make use of the public way and was unable to do so is required.[10] Paragraph (a)(1) also specifies the culpable mental state for subsection (a) to be knowledge, a term defined at RCC § 22E-206 and here requiring that the defendant must at least be aware to a practical certainty that his or her conduct "blocks" a street, sidewalk, bridge, etc.

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[1] RCC § 22E-4204.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 22-1323.
[4] D.C. Code §§ 22-1318; 22-3319; 22-3321; and 22-3322.
[5] The words "street" and "path" broadly encompass all roads, trails, tunnels, alleys, boulevards and avenues.
[6] For example, RCC § 22E-4203 is applicable when the actor is on a public sidewalk immediately abutting a private entrance on private land (or in a private building), effectively blocking the entrance to the private entrance (or building). The list of locations that may be blocked in paragraph (a)(1) is not limited to government property, however the actor must themselves be on government land or in a government building under paragraph (a)(2).
[7] For example, a person blocking a sidewalk such that pedestrians have to walk around onto a busy street in order to pass likely is an offense.
[8] For example, a person standing or sitting on part of a sidewalk that pedestrians have to step around likely is not committing an offense.
[9] For example, a person lying down and blocking two lanes of a highway, forcing police to redirect traffic around the person to avoid an unreasonable hazard, likely is an offense.
[10] For example, if a group of persons blocked off a street that was not currently in use by cars or pedestrians and refused to move after receiving a police order to do so, these persons would be guilty of completed blocking a public way.

Paragraph (a)(2) specifies that the area the person is on land or in a building that is owned by a government,[11] government agency,[12] or government-owned corporation.[13] This includes passageways through or within a park or reservation.[14] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), requiring the defendant to be at least aware to a practical certainty that they are in a government-owned space.

Paragraph (a)(3) requires the government to prove that the accused received a lawful law enforcement order to stop blocking and that the accused disregarded that directive. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to most elements in paragraph (a)(3). "Knowingly" is a defined term[15] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[16] "Law enforcement officer" is a defined term.[17] The order may be personalized to the individual or directed to an entire group and may be articulated in various ways so long as the meaning is clear. The order may be temporary or enduring in scope.[18] There is no requirement that the police order indicate the reasons for the order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop blocking.[19] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply.[20] The accused must also be practically certain that his or her action constitutes a continuance or resumption of the blocking conduct that was the

[11] E.g., District of Columbia, federal government.
[12] E.g., Washington Metropolitan Area Transit Authority.
[13] E.g., Amtrak.
[14] D.C. Code § 22-1307(a)(1)(D).
[15] RCC § 22E-206.
[16] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.
[17] RCC § 22E-701.
[18] For examples of when having a prior warning for blocking is sufficiently related to current conduct to provide for liability, see: Committee on the Judiciary and Public Safety, Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010 (Nov. 18, 2010) at 7 ("It is the Committee's intent that a person can be arrested if he or she reappears in the same place after warning, even if some time later - e.g., if the officer gives the warning, remains present, the person stops incommoding, but then the person resumes incommoding in the officer's presence. If a homeless person, as another example, is asked by the same officer to move day after day from blocking a store entrance, and then the officer says something to the effect that 'I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again you will be arrested,' the Committee expects that the person could be arrested without another warning.").
[19] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).
[20] *See* RCC § 22E-401, Lesser Harm.

object of the law enforcement officer order. The order itself must be lawful.[21] "In fact," a defined term,[22] is used to indicate that there is no culpable mental state requirement as to whether the order is lawful.[23]

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised blocking a public way statute clearly changes current District law in three main ways.*

First, the revised statute does not prohibit blocking use of or passage through a public conveyance. In addition to public land and buildings, the current D.C. Code § 22-1307(a)(1)(C) refers to "The use of or passage through any…public conveyance." The term "public conveyance" is not defined, and there is no case law on point. The District's disorderly conduct statute contains a similar provision relating to public conveyances.[24] In contrast, the RCC punishes purposely interrupting a person's lawful use of a public conveyance as a public nuisance crime.[25] This change clarifies and eliminates unnecessary overlap between revised offenses.

Second, the revised statute applies only to land or buildings owned by a government, government agency, or government-owned corporation. The current crowding, obstructing, or incommoding statute is unclear as to whether the streets, sidewalks, etc.,[26] or entrances to buildings[27] covered by the statute must be on publicly owned property. However, while noting that it would be possible to construe the statute as covering only public locations where an unlawful entry charge could not be brought and recognizing the absence of any legislative history,[28] the DCCA has upheld a conviction for blocking an area "inside a private inclosure on a private driveway leading to the door of a private building."[29] In contrast, the RCC blocking a public way statute excludes conduct on or in all privately owned land and buildings.[30] Unwanted entries onto private property

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[21] Where a law enforcement officer infringes on a person's freedom of movement without requisite cause or authority, in violation of any federal or District law, the person has not committed a blocking offense.
[22] RCC § 22E-207.
[23] Consider, for example, a construction team or a group of organized protesters that (incorrectly) believes it has a valid permit to block a particular street. Such a group is subject to criminal liability for blocking. Such conduct also may subject to arrest pursuant to 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer) or 24 DCMR § 2100 (Crowd and Traffic Control).
[24] D.C. Code § 22-1321(c) ("It is unlawful for a person to engage in loud, threatening, or abusive language, or disruptive conduct with the intent and effect of impeding or disrupting the lawful use of a public conveyance by one or more other persons.").
[25] RCC § 22E-4202.
[26] D.C. Code § 22-1307(a)(1)(A).
[27] D.C. Code § 22-1307(a)(1)(B).
[28] *Morgan v. District of Columbia*, 476 A.2d 1128, 1130 (D.C. 1984).
[29] *Id*.
[30] Note, however, that RCC § 22E-4203 is applicable when the actor is on a public sidewalk immediately abutting a private entrance on private land (or in a private building), effectively blocking the entrance to the

remain separately criminalized as trespass.[31] The revised statute's phrase "owned by a government, government agency, or government-owned corporation" makes clear that land or buildings owned by the Washington Metropolitan Area Transit Authority, Amtrak, and similar locations are within the scope of the revised statute. This change clarifies and reduces unnecessary overlap between revised offenses.

Third, the revised statute repeals and replaces the archaic and unused offense of Driving or riding on footways in public grounds[32] and several other older District offenses.[33] Since this statute was codified in 1892, modes of transportation have drastically change and the District now regulates licensure, traffic, and safety through other mechanisms. Statistics indicate that the statute has not been charged in recent years and the penalty—$1-5—indicates that it has not been a practical deterrent in decades. In contrast, the revised statute provides a clear, consistent way to address misuse of public ways. This change clarifies the revised statute.

Beyond these three changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies that knowledge is the mental state that applies to the elements in paragraphs (a)(1)-(a)(3). No mental state is specified in the current D.C. Code § 22-1307 statute with respect to any elements. Case law indicates some kind of intent is necessary, though the precise kind of intent is unclear.[34] In one case, the District of Columbia Court of Appeals ("DCCA") has recognized that a reasonable mistake defense may apply to crowding, obstructing, or incommoding.[35] The Obstructing bridges connecting D.C. and Virginia statute[36] specifies a culpable mental state of "knowingly and willfully" but does not require a prior law enforcement order to cease obstructing a bridge. To resolve this ambiguity, the revised statute clearly specifies a culpable mental state of "knowingly." Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in

private entrance (or building). The list of locations that may be blocked in paragraph (a)(1) is not limited to government property, however the actor must themselves be on government land or in a government building under paragraph (a)(2).

[31] RCC § 22E-2601.

[32] D.C. Code § 22-1318 ("If any person shall drive or lead any horse, mule, or other animal, or any cart, wagon, or other carriage whatever on any of the paved or graveled footways in and on any of the public grounds belonging to the United States within the District of Columbia, or shall ride thereon, except at the intersection of streets, alleys, and avenues, each and every such offender shall forfeit and pay for each offense a sum not less than $1 nor more than $5.").

[33] D.C. Code §§ 22-1318; 22-3319; 22-3321; and 22-3322.

[34] The DCCA has stated that the offense is one of "general intent" which it noted is frequently defined to require "the absence of an exculpatory state of mind." *Morgan v. District of Columbia*, 476 A.2d 1128, 1132 (D.C. 1984). Under the RCC all physical acts must be voluntary per RCC § 22E-203, but neither the *Morgan* court nor any other DCCA rulings specifically address in detail the culpable mental state required for particular elements in the current crowding, obstructing, or incommoding statute.

[35] *Morgan v. District of Columbia*, 476 A.2d 1128, 1133 (D.C. 1984).

[36] D.C. Code § 22-1323.

American jurisprudence.[37] Given that the current and revised statutes require a warning from a law enforcement officer to the defendant, the defendant will typically have actual knowledge that he or she is blocking a public way. This change improves the clarity, consistency, and completeness of the revised statute.

Second, through its use of the definition of "block," the revised blocking a public way offense specifies that the standard for determining prohibited conduct is whether it makes safe passage on the street, sidewalk, etc., difficult or impossible. The current statute is silent as to the meaning of the verbs "crowd, obstruct, or incommode"[38] used to indicate the prohibited behavior. No case law has defined these words either, although the fact patterns in cases are generally consistent with the revised definition of "blocks."[39] To resolve this ambiguity, the revised statute codifies a standard definition of what constitutes blocking. The requirement that the accused's conduct render safe passage difficult or impossible does not provide liability for mere loitering, where a person can still navigate around the accused without undue risk. This change improves the clarity of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute, in combination with unlawful demonstration, RCC § 22E-4204, divides and replaces the current District offense of crowding, obstructing, or incommoding.[40] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This change logically reorganizes the statutes, given that each provision describes markedly different conduct.

Second, the revised statute prohibits blocking a street, sidewalk, bridge, path, entrance, exit, or passageway. Current D.C. § 22-1307(a) makes it unlawful to block (A) The use of any street, avenue, alley, road, highway, or sidewalk; (B) The entrance of any public or private building or enclosure; (C) The use of or passage through any public building or public conveyance; (D) The passage through or within any park or reservation. These terms are not defined by statute or in case law. The Obstructing bridges connecting D.C. and Virginia statute[41] refers only to "any bridge connecting the District of Columbia

[37] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted.)"). See also *Carrell v. United States*, 165 A.3d 314, 323 n. 22 (D.C. 2017) (analogizing the difference between "general intent" and "specific intent" as recognized in Supreme Court case law to the difference between "knowledge" and "purpose," respectively.

[38] D.C. Code § 22-1307.

[39] For example, the DCCA affirmed a conviction where protestors blocked the front of the Rayburn congressional office building and "the trial judge found that, 'while not 100 percent blocked, [the building entrance] was significantly impeded or incommoded' because 'people had to pick their way around individuals lying on the ground in sheets,' some 'less than two or three feet…from the entryway.'" *Tetaz v. District of Columbia*, 976 A.2d 907, 911 (D.C. 2009). Such facts would likely constitute blocking under revised statute because the entryway was rendered impassable without unreasonable hazard.

[40] D.C. Code § 22-1307.

[41] D.C. Code § 22-1323.

and the Commonwealth of Virginia." The revised statute simplifies the list of covered locations to a street, sidewalk, bridge, path, entrance, exit, or passageway. The common meanings of these undefined terms are intended, and they should be construed broadly.

Third, the revised offense blocking a public way offense merges in the existing District offense for obstructing bridges connecting D.C. and Virginia statute.[42] A separate statute regarding bridges to Virginia is unnecessary. The revised statute specifically lists bridges as one of the covered locations, and the revised statute is intended to cover bridges to the same extent as the prior statute.[43]

[42] D.C. Code § 22-1323 ("Effective with respect to conduct occurring on or after August 5, 1997, whoever in the District of Columbia knowingly and willfully obstructs any bridge connecting the District of Columbia and the Commonwealth of Virginia: (1) Shall be fined not less than $1,000 and not more than $5,000, and in addition may be imprisoned not more than 30 days; or (2) If applicable, shall be subject to prosecution by the District of Columbia under the provisions of District law and regulation amended by the Safe Streets Anti-Prostitution Amendment Act of 1996.").

[43] Notably, unlike the revised Blocking a Public Way offense, current D.C. Code § 22-1323 does not require a lawful law enforcement order. Additionally, current law authorizes a fine of $5,000, making it a jury-demandable offense. D.C. Code § 16-705(b)(1)(A).

RCC § 22E-4204. Unlawful Demonstration.

Explanatory Note. *This section establishes the unlawful demonstration offense for the Revised Criminal Code (RCC). The offense proscribes knowingly engaging in conduct that constitutes a demonstration, in locations where demonstration is prohibited by law, after receiving a law enforcement order to stop such conduct. The revised Unlawful Demonstration offense and revised Blocking a Public Way offense[1] together replace the current District offense of Crowding, obstructing, or incommoding.[2] The revised unlawful demonstration offense also replaces D.C. Code § 10-503.17 (Parades, assemblages, and displays forbidden).*

Paragraph (a)(1) describes the conduct required for the offense: engaging in a demonstration. The term "demonstrating" is defined in RCC § 22E-701 and means an act of marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling by one or more persons, with or without signs, with the desire to persuade one or more individuals, or the public, or to protest some action, attitude, or belief. Paragraph (a)(1) also specifies that the person must act "knowingly," a term that is defined in RCC § 22E-206 and here requires that the defendant at least be aware to a practical certainty that his or her conduct constitutes a demonstration.

Paragraph (a)(2) requires that the defendant engage in a demonstration in a place where it is otherwise unlawful. Thus, if a civil or criminal statute specifically prohibits a demonstration inside the United States Capitol[3] or the Supreme Court,[4] a person may commit the revised unlawful demonstration offense by engaging in a demonstration in that location. However, there is no liability for unlawful demonstration unless some other law prohibits demonstration in that location.[5] Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(2), here requiring the defendant at least to be aware to a practical certainty that the location is one where demonstration is otherwise unlawful.

Paragraph (a)(3) requires the government to prove that the accused received a law enforcement order to stop demonstrating and that the accused disregarded that directive. Per the rules of interpretation in RCC § 22E-207, the "knowingly" mental state in paragraph (a)(1) also applies to paragraph (a)(3). "Knowingly" is a defined term[6] and here means the person must be practically certain that he or she received an order from someone he or she is practically certain is a law enforcement officer.[7] "Law enforcement officer" is

[1] RCC § 22E-4203.
[2] D.C. Code § 22-1307.
[3] D.C. Code § 10-503.16.
[4] 40 U.S.C. § 6135.
[5] For example, absent any law prohibiting demonstration on a particular sidewalk, an advocacy group does not commit unlawful demonstration by standing on that sidewalk and soliciting petition signatures or donations. Similarly a group of laborers who are picketing on a sidewalk does not commit unlawful demonstration absent a law prohibiting demonstration in that location. Notably, a person may be liable under RCC § 22E-4203, blocking a public way, for related conduct.
[6] RCC § 22E-206.
[7] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit blocking a public way.

a defined term.[8] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to stop demonstrating.[9] Where a person is uncertain as to whether they can safely comply with the order, a justification defense may apply. The accused must also be practically certain that his or her action constitutes a continuance or resumption of the demonstrating conduct that was the object of the law enforcement officer order.

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised unlawful demonstration statute does not clearly change current District law, however, two aspects of the revised statute may constitute substantive changes to current District law.*

First, the revised statute clarifies that a culpable mental state of "knowingly" applies to all elements of the offense, except strict liability is required as to the fact that demonstration in the location is otherwise unlawful under District of Columbia or federal law. The current statute is silent as to culpable mental state elements. There is no case law on the unlawful demonstration portion of the crowding, obstructing, or incommoding offense.[10] To resolve this ambiguity, the revised statute specifies a knowledge culpable mental state requirement to most elements, except it applies strict liability to the unlawfulness of demonstrating in the particular location. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[11] Given that the current and revised statute require a warning from a law enforcement officer to the defendant, a defendant will typically have actual knowledge that he or she is demonstrating in an area where demonstration is not permitted. However, given that failure to obey a lawful law

[8] RCC § 22E-701.

[9] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).

[10] D.C. Code § 22-1307(b). Note that this portion of the statute is new, having been introduced as legislation in as part of the omnibus Criminal Code Amendments Act of 2012 at the suggestion of the United States Attorney. Report on Bill 19-645, the "Criminal Code Amendments Act of 2012," Council of the District of Columbia Committee on the Judiciary (December 1, 2012).

[11] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted.)").

enforcement order likely already involves prohibited conduct,[12] strict liability is imposed as to the additional fact of the location being barred from demonstration under another law. This change improves the clarity and completeness of the revised statute.

Second, the revised statute repeals D.C. Code § 10-503.17. Identical to language in a federal statute that has been held unconstitutional on First and Fifth Amendment grounds.[13] This change ensures the constitutionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised statute, in combination with blocking a public way, RCC § 22E-4203, divides and replaces the current District offense of crowding, obstructing, or incommoding.[14] The revised blocking a public way offense effectively replaces subsection (a) of the current law and the revised unlawful demonstration offense replaces subsection (b). This logically reorganizes the offense, given that each provision describes markedly different conduct.

[12] *See* 18 DCMR § 2000.2 and RCC § 22E-4203.
[13] *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583 (D.D.C. 1972) (concerning 40 U.S.C. § 193g).
[14] D.C. Code § 22-1307.

RCC § 22E-4205. Breach of Home Privacy.

Explanatory Note. *This section establishes the invasion of home privacy offense and penalty for the Revised Criminal Code (RCC). The offense prohibits peering into a dwelling without permission. The offense replaces a subsection of the current disorderly conduct offense, D.C. Code § 22-1321(f).*[1]

Paragraph (a)(1) specifies that a person must act knowingly and surreptitiously. "Knowingly" is a defined term[2] and, applied here, means that the person must be practically certain that they are observing inside a dwelling. The term "dwelling" is defined in RCC § 22E-701 to include any structure that is designed for lodging or residing overnight, including, in multi-unit buildings, communal areas secured from the general public.[3] The dwelling may be occupied or unoccupied at the time of the offense. The phrase "by any means" clarifies that, unlike a trespass,[4] the offense does not require a physical intrusion into the dwelling. Unlike a burglary,[5] the offense does not require other criminal intent such as an intent to commit theft or voyeurism.

Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the occupant's circumstances would reasonably expect that such an observation would not occur. A person does not commit an offense where it is objectively reasonable to peer into the dwelling of another.[6]

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised breach of home privacy statute does not clearly change current District law, however, one aspect of the revised statute may constitute a substantive change to current District law.*

The revised statute defines the term "dwelling" differently than in the current statute to address multi-unit buildings. Current D.C. Code § 22-1321(f) refers to the definition of "dwelling" in D.C. Code § 6-101.07(4). This provision, in turn, states: "The term 'dwelling' means any building or structure used or designed to be used in whole or in part as a living or a sleeping place by 1 or more human beings." In contrast, the definition of "dwelling" in RCC § 22E-701 more precisely states: "'Dwelling' means a structure that is either designed for lodging or residing overnight, including, in multi-unit buildings,

[1] Other subsections of the current disorderly conduct statute have been addressed elsewhere in the revised code.
[2] "Knowingly" is defined in RCC § 22E-206.
[3] This includes motor vehicles, watercraft, and tents that are designed or used as a residence.
[4] RCC § 22E-2601.
[5] RCC § 22E-2701.
[6] For example, it may be reasonable for a prospective buyer to peer into a window that is uncovered of a building that is for sale.

communal areas secured from the general public." This change improves the consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised offense clarifies that the observation may occur "by any means." Current D.C. Code § 22-1321(f) makes it unlawful to "stealthily look into a window or other opening of a dwelling." It is unclear from the phrase "look into" whether the statute includes a person hacking into a camera inside a home.[7] District case law has not addressed this issue. The revised offense explicitly criminalizes observations "by any means." This change eliminates a possible gap in liability.

Second, the revised statute substitutes the word "surreptitiously" for "stealthily," for continuity with the revised burglary offense.[8] This change is not intended to substantively change the offense elements.

[7] *See, e.g.*, Allyson Chiu, *She installed a Ring camera in her children's room for 'peace of mind.' A hacker accessed it and harassed her 8-year-old daughter.*, Washington Post (December 12, 2019).
[8] RCC § 22E-2701.

RCC § 22E-4206. Indecent Exposure.

Explanatory Note. *This section establishes the indecent exposure offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits public nudity and sex acts that are lewd. The offense replaces the current lewd, indecent, or obscene acts offense in the first sentence of D.C. Code § 22-1312.*[1]

Subsection (a) specifies the elements of first degree indecent exposure. Paragraph (a)(1) requires that the accused knowingly engage in a sexual act, masturbation, or a sexual or sexualized display of the genitals, pubic area,[2] or anus, when there is less than a full opaque covering. "Knowingly" is a defined term[3] and applied here means that the person must be practically certain that they are engaging in the prohibited conduct.[4] The term "sexual act" is defined in RCC § 22E-701 and does not include a mere simulation.[5]

Subparagraph (a)(2)(A) specifies that the person's conduct must be visible to the complainant. The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[6] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are visible to the complainant.

Subparagraph (a)(2)(B) requires that the person act without the complainant's effective consent. The terms "consent" and "effective consent" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they do not have the complainant's effective consent to engage in the prohibited sexual activity in that place and at that time.[7]

Subparagraph (a)(2)(C) specifies that the accused must also act with the purpose of alarming or sexually abusing, humiliating, harassing, or degrading the complainant. As applied here, "purpose," a term defined in RCC § 22E-206, requires a conscious desire to

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[1] The second sentence of the current statute (pertaining to sexual proposal to a minor) is addressed in RCC § 22E-1305 (Enticing a Minor Into Sexual Conduct).

[2] Reference to "pubic area" is intended to include liability for frontal nudity where the groin is visible but not the external genitalia.

[3] "Knowingly" is defined in RCC § 22E-206.

[4] Consider, for example, a person who is wearing a skirt that they believe is opaque but is actually sheer in natural sunlight. Such a person does not commit an indecent exposure offense. "The exposure must be intentional and not accidental…" *Peyton v. Dist. of Columbia*, 100 A.2d 36, 37 (D.C. 1953). "Ordinary acts involving exposure as a result of carelessness or thoughtlessness, particularly when such acts take place within the privacy of one's home, do not in themselves establish the offense of indecent exposure." *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 826-27 (D.C. 2007) (citing *Selph v. District of Columbia,* 188 A.2d 344, 345 (D.C.1963)).

[5] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Pages 7-8 (rejecting a proposal by USAO, OAG, and MPD to include simulations).

[6] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[7] A person does not commit first degree indecent exposure if they subjectively believe—reasonably or unreasonably—that the recipient consents to viewing the conduct. The indecent exposure statute was not intended to apply to an act committed in private in the presence of a single and consenting person. *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 827 (D.C. 2007) (citing *Rittenour v. District of Columbia,* 163 A.2d 558, 559 (D.C.1960); *District of Columbia v. Garcia,* 335 A.2d 217, 224 (D.C. 1975)).

alarm or sexually abuse, humiliate, harass, or degrade the complainant. The phrase "with the purpose" indicates that it need not be proven that the complainant was actually alarmed, sexually abused, sexually humiliated, sexually harassed, or sexually degraded, so long as the actor consciously desired such a result.[8] The actor's behavior must be directed at the complainant to whom the actor's behavior is visible and who has not given effective consent, not a third party.

Subsection (b) specifies the elements of second degree indecent exposure. Paragraph (b)(1) is nearly identical to paragraph (a)(1), except that paragraph (b)(1)(C) does not require that a display of a person's genitals, pubic area, or anus be "sexual or sexualized." For example, a person may commit second degree indecent exposure by merely walking naked in a location open to the general public at the time of the offense. Although the other elements of second degree indecent exposure differ from first degree, these offenses are intended to merge when they arise from a single act or course of conduct.[9]

Paragraph (b)(2) requires that a person is either located in or visible from a location that is open to the general public; communal area of multi-unit housing; a public conveyance; or a rail transit station. The terms "open to the general public" and "public conveyance," and "rail transit station" are defined in RCC § 22E-701. A location is open to the general public only if no payment, membership, affiliation, appointment, or special permission is required to enter.[10] The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[11] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are either in one of those locations or visible from one of those locations.

Paragraph (b)(3) specifies that the person must also be reckless as to three circumstances being present. The term "reckless" is defined in RCC § 22E-206 and here means the person must be aware of a substantial risk that they are visible to the complainant. The risk must be of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's conscious disregard of that risk is a gross deviation from the ordinary standard of conduct.

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[8] The phrase "with the purpose," like the phrase "with intent," makes the language that follows inchoate. *See* RCC § 22E-205(b).

[9] *See* RCC § 22E-214. Absent a contrary legislative intent, the DCCA currently applies the *Blockburger* "elements test" to determine if two offenses that arise from a single act or course of conduct should merge. *Byrd v. United States*, 598 A.2d 386 (D.C. 1991). Under this test, if it possible to commit one offense without necessarily committing the other, the offenses do not merge.

[10] For example, a person who undresses inside a private theater or poses nude for a private art class does not commit indecent exposure. *See also, Bolz v. D.C.*, 149 A.3d 1130, 1143 (D.C. 2016) ("Even as to expressive nudity, the provision's imposition on First Amendment rights is limited. It applies only "in public," a phrase that the legislative history defines as "in open view; before the people at large," D.C. Council, Report on Bill 18–425 at 7 (Nov. 19, 2010). Thus, the challenged provision does not encompass a number of the settings cited by Mr. Givens, for example, an in-studio display of nudity for a painting class or an indoor theatrical performance that requires the purchase of a ticket.").

[11] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

Subparagraph (b)(3)(A) specifies that the person's conduct must be visible to the complainant. The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[12] Per the rules of interpretation in RCC § 22E-207, the person must be at least reckless as to the fact that their conduct is visible to the complainant.[13]

Subparagraph (b)(3)(B) requires that the person act without the complainant's effective consent. The terms "consent" and "effective consent" are defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must be reckless as to the fact that they do not have the complainant's effective consent to engage in the prohibited conduct.

Subparagraph (b)(3)(C) requires that the person actually alarm[14] or sexually abuse, humiliate, harass, or degrade the complainant. Per the rules of interpretation in RCC § 22E-207, the person must be at least reckless as to the fact that their conduct is alarming, sexually abusive, humiliating, harassing, or degrading to the complainant.

Subsection (c) establishes two exclusions from liability for the indecent exposure offense. Paragraph (c)(1) excludes liability for a person who is engaging in conduct that is visible only to people who are inside the actor's home. This provision provides a clear safe harbor for nudity within one's dwelling that is not visible to anyone outside the dwelling. Per the rules of construction in RCC § 22E-207, the "in fact" specified in paragraph (c)(1) applies to the requirements in subparagraphs (c)(1)(A) and (c)(1)(B). "In fact" is a defined term in RCC § 22E-207 that means there is no culpable mental state for a given element, here the requirements in subparagraphs (c)(1)(A) and (c)(1)(B).

Paragraph (c)(2) excludes liability for employees of licensed adult entertainment businesses (e.g., a strip club) who are acting within the reasonable scope of their professional duties.[15] This provision provides a clear safe harbor for nudity within a business licensed for such conduct and within the normal scope of that business. The term "sexually-oriented business establishment" is defined in paragraph (f)(2) to have the meaning specified in 11 DCMR § 199.1. Per the rules of construction in RCC § 22E-207, the "in fact" specified in paragraph (c)(2) applies to the requirements in subparagraphs (c)(2)(A) and (c)(2)(B). "In fact" is a defined term in RCC § 22E-207 that means there is no culpable mental state for a given element, here the requirements in subparagraphs (c)(2)(A) and (c)(2)(B).

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting second degree indecent exposure.

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[12] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[13] *See Peyton v. Dist. of Columbia*, 100 A.2d 36, 37 (D.C. 1953).

[14] The word "alarm" is not defined and should be construed broadly per its ordinary meaning. Consider, for example, a crossing guard who is not personally offended but is nevertheless alarmed out of concern for children who might see the exposure.

[15] The exclusion does not apply to a rogue employee who is acting *ultra vires*.

Subsection (e) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (f) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised indecent exposure statute clearly changes current District law in two main ways.*

First, the revised statute establishes two distinct penalties for indecent exposure. Current D.C. Code § 22-1312 provides only one sentencing gradation: 90 days in jail. In contrast, the revised statute punishes purposeful conduct directed at a complainant more severely than reckless conduct in a location open to the general public. For example, a person who confronts a complainant in an office building and masturbates in front of them, with a desire to alarm or sexually harass or sexually degrade the complainant, commits first degree indecent exposure. A couple having sex in a car in a public park, reckless as to the fact that passersby see them and are alarmed, commits second degree indecent exposure. This change improves the proportionality of the revised offense.

Second, the revised statute expands liability to conduct that occurs in a location that is not public. Current D.C. Code § 22-1312 requires that an indecent exposure offense occur "in public." The term "public" is not defined in the statute. District case law—relying on legislative history—has explained that "in public" means "in open view; before the people at large."[16] In contrast, the revised statute provides liability for conduct that is calculated to offend an individual complainant in any location (first degree) and conduct that more broadly offends order in specified locations "open to the general public" (second degree). Sexual conduct described in the statute that is without effective consent and targets a complainant may not be otherwise criminal,[17] but may be extremely alarming or sexually degrading whether or not the conduct occurs in a non-public setting. Unlike the current statute's undefined reference to a location that is "in public," for second degree liability under the revised statute a person must also be in a location that is "open to the general public" at the time of the offense, a communal area of multi-unit housing, a "public conveyance," or a "rail transit station," as these terms are defined in RCC § 22E-701. The revised statute also provides clear exceptions to liability for a person who disrobes inside their own home or inside an adult entertainment business, without exposing themselves to

[16] *Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1143-44 (D.C. 2016) ("Even as to expressive nudity, the provision's imposition on First Amendment rights is limited. It applies only "in public," a phrase that the legislative history defines as "in open view; before the people at large," D.C. Council, Report on Bill 18–425 at 7 (Nov. 19, 2010). Thus, the challenged provision does not encompass a number of the settings cited by Mr. Givens, for example, an in-studio display of nudity for a painting class or an indoor theatrical performance that requires the purchase of a ticket. Instead, the revised statute confines this provision's reach to settings wherein expressive nudity can be constitutionally regulated because minors might be present or nonconsenting adults are not easily shielded from displays of nudity. 31 Cf. *Parnigoni v. District of Columbia*, 933 A.2d 823 (D.C. 2007) (upholding, under an earlier form of § 22–1312 that lacked an express "in public" element, a conviction for conduct that occurred in a private home).").

[17] For example, masturbating in front of another person is not otherwise criminal under the current D.C. Code or RCC unless there is a minor complainant, or the conduct has additional characteristics that make it constitute a criminal threat, disorderly conduct, or attempted sexual crime.

others outside.[18] This change improves the clarity and consistency of the revised offense and eliminates an unnecessary gap in law.

Beyond these two changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions for the culpable mental states required for indecent exposure liability. Current D.C. Code § 22-1312 does not specify a culpable mental state for any element of the offense. The sole appellate decision interpreting the current version of the statute does not address the issue.[19] In contrast, the revised statute uses the RCC's general provisions that define "purposefully," "knowingly," and "recklessly"[20] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[21] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[22] These changes clarify and improve the consistency of District statutes.

Second, the revised statute defines the type of nudity that is prohibited in public, consistent with other privacy offenses. Current D.C. Code § 22-1312 makes it unlawful for a person to publicly "make an obscene or indecent exposure of his or her genitalia or anus." The terms "obscene," "indecent," and "genitalia" are not defined in the statute. District case law has not addressed the meaning of "obscene" or "indecent" in the context of the indecent exposure statute.[23] However, the DCCA has held that the term "genitalia" in a prior version of D.C. Code § 22-1312 includes the "front vaginal area."[24] It is not clear whether frontal nudity that does not show female genitalia is covered by the current statute.

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[18] RCC §§ 22E-4206(c)(3) and (4).

[19] *Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1143 (D.C. 2016).

[20] RCC § 22E-206.

[21] RCC § 22E-207(a).

[22] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[23] The DCCA's sole ruling on the current indecent exposure statute indicates that the statute covers non-obscene nudity. *Bolz v. D.C.,* 149 A.3d 1130, 1144 (D.C. 2016) ("Moreover, the challenged provision does not prohibit all nudity in public. It prohibits the exposure only of one's genitals or anus, thereby directing the prohibition at certain kinds of nudity that tend to be sexually evocative even if not "obscene." See *Miller v. California*, 413 U.S. 15, 24, 27, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (defining obscene materials as "works which depict or describe [hard core] sexual conduct,…appeal to the prurient interest," and lack "serious literary, artistic, political, or scientific value")."). *But see Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (narrowly construing "obscene" and "indecent" to ensure the constitutionality of the District's obscenity statute).

[24] *Rolen-Love v. Dist. of Columbia*, 980 A.2d 1063, 1066 (D.C. 2009) (The external organs "include the mons veneris…[and] the labia majora…").

Resolving these ambiguities, the revised statute includes liability for display of the pubic area and the statute's gradations provide liability for both sexual and non-sexual displays of the genitals, pubic area, and anus. Reference to "pubic area" is intended to include liability for frontal nudity where the groin is visible but not the external genitalia. This change improves the clarity, consistency, and proportionality of the revised offense.

Third, the revised statute applies the standardized definition of "sexual act" in RCC § 22E-701. Current D.C. Code § 22-1312 makes it unlawful to publicly "engage in a sexual act as defined in § 22-3001(8)." The definition of "sexual act" in D.C. Code § 22-3001(8) requires in subsection (C) an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire." It is unclear whether penetration of the sort described in the current statute can be done with an intent that is not sexual in nature. There is no DCCA case law on point. Resolving this ambiguity, the revised statute applies the standardized RCC definition of "sexual act" which, in relevant part,[25] requires the intent to abuse, humiliate, etc. be sexual in nature. However, practically, it would be an exceedingly rare fact pattern where penetration-type conduct would occur that is with intent to abuse, humiliate, harass, degrade, or arouse or gratify that is not also done with intent to sexual abuse, humiliate, harass, degrade, or arouse or gratify.[26] This revision improves the clarity and consistency of the revised statute.

Fourth, the revised statute specifies that the Office of the Attorney General shall prosecute second degree indecent exposure. The prosecutorial authority of the OAG stems from D.C. Code § 23-101(b), which states in relevant part: "*Prosecutions* for violations of section 6 of the Act of July 29, 1892 (D.C. Official Code, sec. 22-1307), relating to disorderly conduct, and *for violations of section 9 of that Act (D.C. Official Code, sec. 22-1312), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel* [Attorney General for the District of Columbia] or his assistants." (Emphasis added.) However, section 9 of the Act of July 29, 1892 does not include conduct by a person in a private location to a person who is in a private location (as is included in first degree indecent exposure).[27] Controlling DCCA

[25] Other differences between D.C. Code § 22-3001(8) and the revised definition of "sexual act" in RCC § 22E-701—e.g., the specific inclusion of bestiality and elimination of the "of another" requirement in subsection (A) of the current statute—do not appear to change the operation of the revised indecent exposure offense as compared to D.C. Code § 22-1312.

[26] While there can be virtually no penetration or oral contact that satisfies the definition of "sexual act" that is not sexual in nature, defining the term in this way aligns the revised definition of "sexual act" with the revised definition of "sexual contact" where requiring a sexual intent does have practical impact on distinguishing liability for an assault (e.g., hitting someone with a bicycle or car on their buttocks) and a sexual assault (e.g., hitting someone on their buttocks while commenting on their sexual attractiveness).

[27] *See United States v. Strothers*, 228 F.2d 34, 35 (D.C. Cir. 1955) ("On July 29, 1892, Congress passed 'An act for the preservation of the public peace and the protection of property within the District of Columbia', 27 Stat. 322. The first seventeen sections of this Act enumerated and made unlawful a number of certain actions, mostly minor in nature, some more serious, each section containing a separate provision for a penalty ranging from a maximum fine of five dollars in some instances to a maximum fine of two hundred and fifty dollars in some others. Section 18 of this Act provided that all prosecutions for the offenses were to be conducted in the name of and for the benefit of the District of Columbia. From the date of the passage of this Act until August 15, 1935, the Corporation Counsel for the District of Columbia, and his predecessors, prosecuted cases arising thereunder…"); An act for the preservation of the public peace and

case law based on the Home Rule Act precludes Council assignment of prosecutorial authority to OAG unless the offenses falls into one of the categories in D.C. Code § 23-101(a) or is otherwise specifically provided by Congress.[28] To resolve ambiguity about prosecutorial authority, the revised statute does not purport to assign any prosecutorial authority to OAG for first degree indecent exposure because doing so may be inconsistent with District case law based on the Home Rule Act. However, based on the longstanding OAG prosecutorial jurisdiction over D.C. Code § 22-1312, the revised statute maintains OAG jurisdiction for locations open to the general public. This change improves the enforceability and consistency of the revised statutes.

the protection of property within the District of Columbia, 52nd Cong. § 9 (July 29, 1892) ("That it shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person or their persons in any street, avenue, or alley, road, or highway, open space, public square, or inclosure in the District of Columbia, or to make any such obscene or indecent exposure of person in any dwelling or other building or other place where from the same may be seen in any street, avenue, alley, road, or-highway, open space, public square, or inclosure, under a penalty not exceeding two hundred and fifty dollars for each and every such offense.").

[28] *See, generally: In re Crawley*, 978 A.2d 608 (D.C. 2009); *In re Hall*, 31 A.3d 453, 456 (D.C. 2011); and *In re Settles*, 218 A.3d 235 (D.C. 2019).

RCC § 22E-4301. Rioting.

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes knowingly participating in a group of eight or more people who are each personally engaging in a criminal harm involving injury, property loss, or property damage. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Paragraph (a)(1) requires that the accused act "knowingly," a defined term,[1] which here means the person must be practically certain that he or she is personally attempting or committing a criminal harm involving bodily injury, taking of property, or damage to property.[2] A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative is not liable for rioting.[3] "Bodily injury" is defined in RCC § 22E-701 and means physical pain, illness, or any impairment of physical condition. "Property" is defined in RCC § 22E-701 and means "anything of value." Conduct that constitutes only a criminal threat[4] and conduct not involving bodily injury, taking of property, or damage to property are not predicates for rioting liability.

Paragraph (a)(2) requires proof that seven[5] or more persons are also engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be the precise type of conduct the actor is engaged in, but must also be criminal harm[6] involving bodily injury, taking of property, or damage to property.[7] The revised statute does not require that the eight people act in concert with one another[8] or organize together in advance.[9] However, the others' conduct must be in a location where the actor

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[1] RCC § 22E-206.

[2] RCC offenses that involve bodily injury, loss of property, or damage to property include: Assault (RCC § 22E-1202), Robbery (RCC § 22E-1201), Murder (RCC § 22E-1101), Theft (RCC § 22E-2101), Arson (RCC § 22E-2501), Criminal Damage to Property (RCC § 22E-2503), and Criminal Graffiti (RCC § 22E-2504).

[3] The RCC does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

[4] For example, the RCC criminal threats statute is not included in the scope of the revised rioting statute.

[5] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[6] The word "criminal" modifies the words that follow.

[7] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[8] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[9] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the

can reasonably see or hear their activities.[10] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that seven or more persons are engaged in riotous conduct nearby. A person who is merely present in or near a riot is not criminally liable under the revised rioting statute,[11] nor is a person only engaged in First Amendment activities or seeking to prevent criminal activities liable.[12]

Subsection (b) specifies that there is no attempt liability for the rioting offense as a whole. However, attempts to commit criminal bodily injury, taking of property, or damage to property are part of the element specified in paragraph (a)(1).

Subsection (c) provides the penalty for this offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised rioting statute clearly changes current District law in four main ways.*

First, the revised rioting statute has only one gradation that addresses attempted and completed criminal harms involving bodily injury, taking of property, or damage to property. The current rioting statute addresses a "public disturbance" that involves "tumultuous and violent conduct" and is divided into two sentencing gradations.[13] The lower grade consists of such conduct that "creates grave danger of damage or injury to property or persons" or incites persons to such risk-creating behavior.[14] Limited case law indicates that this lower grade does not include "minor breaches of the peace," but instead reaches "frightening group behavior" and "will usually be accompanied by the use of actual force or violence against property or persons."[15] The higher grade consists of inciting such

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assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[10] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[11] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish willful conduct or involvement.").

[12] For example, the following persons are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; or a local resident using public ways to leave and return home through a group engaged in riotous activity.

[13] D.C. Code § 22-1322(a).

[14] D.C. Code §§ 22-1322(b) and (c).

[15] *United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has a clear

conduct that actually causes "serious bodily harm or there is property damage in excess of $5,000."[16] The current statute's higher gradation has a maximum penalty twenty-times that of the lower gradation.[17] In contrast, the revised statute consists of one penalty gradation based on the attempt or commission of actual criminal harms involving bodily injury, taking of property, or damage to property. Revising the statute to require the attempt or commission of actual harms by the actor more clearly distinguishes rioting liability from minor breaches of the peace by a group, and, unlike the current statute, does not base the degree of punishment on the extent of others' misconduct.[18] Additional and alternative criminal punishments may also be available under other RCC offenses including, in the case of police-monitored crowds, the RCC failure to disperse offense.[19] This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute requires eight people to form riot. The District's current rioting statute states that a riot is a "public disturbance involving an assemblage of 5 or more persons..."[20] Legislative history indicates that the threshold of five people was a subjective judgment based, in significant part, on administrative considerations that it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[21] In contrast, the revised statute raises the number of people that must be involved in riotous conduct to eight. This number excludes many common types of group misconduct from being categorized as a riot,[22] focusing the offense on large-scale events that may give rise to a mob mentality and overwhelm the ability of a few law enforcement officers to control the scene. This change improves the proportionality of the revised offense and reduces an unnecessary overlap between the composite offense of rioting and common occurrences of predicate offenses.

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and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").

[16] D.C. Code § 22-1322(d).

[17] The maximum imprisonment penalty for violations of subsection (b) and (c) is 180 days, compared to a 10-year maximum for a violation of subsection (d).

[18] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.

[19] RCC § 22E-4302.

[20] D.C. Code § 22-1322(a).

[21] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses."); *see also United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[22] Common examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

Third, the revised statute eliminates incitement as a distinct basis for rioting liability.[23] Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[24] The terms "incite" and "urge" are not defined in the statute or in case law.[25] Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[26] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[27] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for liability as an accomplice[28] or is part of a criminal solicitation[29] or criminal conspiracy.[30] The revised statute relies on the general provisions regarding accomplice, solicitation, and conspiracy liability to more precisely establish the limits of what instances of "incitement" or "urging" are criminal, and to provide a more proportionate penalty for acting as an accomplice or co-conspirator. The revised statute's more specific requirements committing or attempting commit a specified harm (and reliance on widely-recognized requirements for accomplice,

[23] Speech that incites violence is punished as disorderly conduct. RCC § 22E-4201(a)(2)(B). Abusive speech that is likely to provoke violence is punished as disorderly conduct. RCC § 22E-4201(a)(2)(C).
[24] D.C. Code § 22-1322(c).
[25] *But see United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968) ("In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it.") (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966) (J. Douglas concurring)).
[26] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.
[27] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.
[28] *See* RCC § 22E-210.
[29] *See* RCC § 22E-302. A person has liability for criminal solicitation for purposely commanding, requesting, or trying to persuade another person to engage in or aid the planning or commission of a criminal bodily injury that satisfies the elements of an offense in RCC Subtitle II (Offenses against persons) or significant damage to property or taking of property that satisfies the elements of a felony offense in RCC Subtitle III (Property offenses). Solicitation liability attaches as soon as the actor gives a command, makes a request, or tries to persuade another. It does not require an agreement between the actor and person solicited (unlike conspiracy liability) and does not require the actor be dangerously close to committing the conduct (unlike attempt liability). The penalty for solicitation is half the penalty of the predicate offense.
[30] *See* RCC § 22E-303.

solicitation, and conspiracy liability to address efforts to start rioting) also limit potential conflicts with First Amendment protections.[31] This change improves the clarity, consistency, and proportionality of the revised statutes, and may help ensure the constitutionality of the revised rioting offense.

Fourth, the revised offense bars any general attempt liability. Under current law, rioting or inciting to riot is subject to the general attempt statute.[32] In contrast, under the revised offense, the elements of rioting include attempts and additional liability under the general attempt statute is unnecessary. This change improves the clarity and proportionality of the revised statute.

Beyond these four changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised statute does not require that rioting occur in a public location. The current rioting statute defines rioting as a "public disturbance," but does not explain whether the term "public" refers to the character of the location of the riot or to the persons whose tranquility is disturbed. There is no case law on point.[33] Resolving this ambiguity, the revised statute provides that where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,[34] run a similar risk of escalating into mob-like action. This change clarifies the revised statutes and eliminates an unnecessary gap in liability.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

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[31] The District's rioting statute language is very similar to the federal Anti-rioting statute in 18 U.S.C. § 2101 which provides liability for conduct to "incite a riot" or "to organize, promote, encourage, participate in, or carry on a riot." After decades of no appellate case law on the statute, two recent cases addressing the federal statute have found these provisions of 18 U.S.C. § 2101 facially unconstitutional in whole or part. *See United States v. Rundo*, No. 18-cr-759 (C.D. Cal. June 3, 2019), *appeal docketed*, No. 19-50189 (9th Cir. June 12, 2019) (finding the incitement exception to the First Amendment inapplicable because the statute does not require the advocacy to be directed at producing imminent lawless action, contrary to *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); *United States v. Miselis*, 972 F.3d 518, 540 (4th Cir. 2020) (finding language of "promote," "encourage," and "urging" unconstitutionally overbroad).

[32] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.").

[33] *But see, e.g., Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct, with an element that location of the offense be open to the general public, where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[34] *See, e.g.,* United States House of Representatives, *The Most Infamous Floor Brawl in the History of the U.S. House of Representatives: February 06, 1858*, History, Art, and Archives (available at https://history.house.gov/Historical-Highlights/1851-1900/The-most-infamous-floor-brawl-in-the-history-of-the-U-S--House-of-Representatives/).

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[35] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this reference to "injury to property" includes "either actual physical damage to property or the taking of another's property without the consent of the owner."[36] The revised rioting statute specifically refers to conduct that not only involves unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to other persons being in a location where the actor can reasonably perceive them at the time of the target conduct, and requires a culpable mental state of recklessness as to their activities. The current law defines a riot as an "assemblage of 5 or more persons,"[37] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the defendant such that the person could "could reasonably have been expected to see or to hear" their action.[38] The revised statute codifies and clarifies this requirement as to others nearby activities by using the standard culpable mental state definition of "reckless." The actor need not be practically certain as to the scope and nature of others' activities, but must be aware of a substantial risk as to the others' numbers and conduct. No special connection or common purpose is required of the other persons engaged in unlawful conduct. This change clarifies and improves the consistency of the revised statute.

Third, the revised statute requires a culpable mental state of knowledge for an actor engaging in the riotous conduct. The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[39] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants also.[40] The RCC clarifies this culpable mental state requirement as to riotous activities by using the standard definition of knowledge[41] as the culpable mental state for paragraph (a)(1).[42] Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established

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[35] DC Code § 22-1322.
[36] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).
[37] D.C. Code § 22-1322(a).
[38] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").
[39] D.C. Code § 22-1322.
[40] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").
[41] RCC § 22E-206.
[42] Other participants in the riot must meet the culpable mental state for their own underlying offenses.

practice in American jurisprudence.[43] This change clarifies and improves the consistency of the revised statute.

[43] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (a defendant generally must "know the facts that make his conduct fit the definition of the offense," even if he does not know that those facts give rise to a crime. (Internal citation omitted)).

RCC § 22E-4302. Failure to Disperse.

Explanatory Note. *This section establishes the new failure to disperse offense for the Revised Criminal Code (RCC). The offense does not exist under current District law but is closely related to conduct already punished in D.C. Code § 22-1322 (Rioting or inciting to riot) and 18 DCMR § 2000.2 (Failure to obey a lawful police order).*[1]

Paragraph (a)(1) requires that the accused act "knowingly," a term defined in RCC § 22E-206, that here means a person must be practically certain that he or she received a dispersal order from someone he or she is practically certain is a law enforcement officer.[2] "Law enforcement officer" is a defined term.[3] The order may be personalized to the individual or directed to an entire group, and may be articulated in various ways so long as the meaning is clear. There is no requirement that the police order indicate the reasons for the dispersal order. The person must be afforded fair notice and a reasonable opportunity to comply with the law enforcement order to disperse from the scene.[4] Where a person is uncertain as to whether they can safely comply with the dispersal order, a justification defense may apply.[5]

Paragraph (a)(2) requires proof that eight[6] or more persons are engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be identical, but each person's conduct must be causing criminal harm[7] involving bodily injury, taking of property, or damage to property.[8] The revised statute does not require that the eight people act in concert with one another[9] or organize together in advance.[10]

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[1] The failure to disperse offense does not replace or subsume the existing regulation in 18 DCMR § 2000.2.
[2] A person who does not know the speaker is a law enforcement officer or who does not know the order is directed to them does not commit failure to disperse.
[3] RCC § 22E-701.
[4] *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty.) *see also Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (requiring an opportunity to comply with a dispersal order); *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 126 n.5 (D.C. Cir. 1977).
[5] *See* RCC § 22E-401, Lesser Harm.
[6] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.
[7] The word "criminal" modifies the words that follow. The governing criminal statute must include as an element, the infliction of a bodily injury, taking of property, or damage to property. Courts should take a categorical, not a conduct-specific approach.
[8] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.
[9] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).
[10] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular

However, the others' conduct must be in a location where the actor can reasonably see or hear their activities.[11] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that eight or more persons are engaged in riotous conduct nearby.

Paragraph (a)(3) requires that the presence of the person substantially impairs the ability of a law enforcement officer to stop the riotous conduct. The impairment must be substantial, not trivial, and is a highly fact-specific assessment.[12] The term "in fact" here means that no culpable mental state is required as to the need for the order to disperse, but the objective fact still must be proven that the actor's presence substantially impairs the ability of a law enforcement officer to stop the conduct. False assertions that an actor must disperse because they are substantially impairing the law enforcement response would not satisfy this element of the failure to disperse offense.

Subsection (b) provides the penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions in the RCC.

Relation to Current District Law. *Failure to disperse is a new offense and, in that sense, all aspects of the crime are substantive changes to District law. However, as compared to the District's current rioting[13] and failure to obey a lawful police order[14] laws, four aspects of the revised offense may constitute substantive changes to current District law.*

First, the RCC failure to disperse statute specifies that a culpable mental state of knowing is required for failing to disperse. The current D.C. Code does not include a failure to disperse offense but it does punish rioting[15] which requires "willful" conduct. A

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persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[11] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[12] For example, the need for a law enforcement officer to walk around a peaceable demonstrator in order to reach the place where the group disorderly conduct is occurring would not, alone, amount to substantial impairment. On the other hand, peaceful demonstrators linking arms in a manner that blocks police access to a site where rioters are engaged in setting fire to a building may amount to substantial impairment. Relevant considerations may include: the delay in response time to the arson due to the demonstrators' continued presence, the potential severity of the arson, and the vulnerability of the demonstrators to unintended harm if there is resistance by those committing arson to the course of a law enforcement response.

[13] D.C. Code § 22-1322.

[14] 18 DCMR § 2000.2.

[15] D.C. Code § 22-1322.

District municipal regulation criminalizes failure to obey a lawful police order,[16] and case law holds that a knowing refusal to obey a lawful order is sufficient for liability.[17] The RCC clearly specifies that knowledge, defined in RCC § 22E-206, is the applicable mental state. The focus of the offense is the person's response to a law enforcement order. Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[18] This change improves the clarity and the consistency of the revised offense, and, to the extent it may require a new culpable mental state as to some of the principal elements of the offense, improves its proportionality.[19]

Second, the revised statute specifies that no culpable mental state needs to be proven as to the substantial impairment to law enforcement resulting from the person's failure to disperse. The current District regulation in 18 DCMR § 2000.2 is silent as to the culpable mental state, if any, required for this element of the offense. Case law interpreting 18 DCMR § 2000.2 suggests that a person need not believe or agree that an order is lawful before being required to obey it.[20] The RCC clearly specifies that no culpable mental state is required as to this element. The focus of the revised offense is the person's response to a law enforcement order and, in some situations, a person in a crowd may not know that their continued presence in the crowd substantially impairs law enforcement's ability to respond. Applying strict liability to statutory elements that do not distinguish innocent from criminal behavior is an accepted practice in American jurisprudence.[21] This change improves the clarity and consistency of the revised offense.

Third, the revised statute specifies that a reckless culpable mental state must be proven as to the existence of riotous activity nearby. This culpable mental state of recklessness as to the criminal conduct being attempted or committed in the area perceptible to the actor distinguishes the culpability of an actor for the crime of failure to disperse as compared to the civil penalties for failure to obey a law enforcement officer's order per 18 DCMR § 2000.2 (Failure to obey a lawful police order). This change improves the consistency and proportionality of the revised offenses.

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[16] 18 DCMR § 2000.2.

[17] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998) ("According to his own testimony, Karriem *knowingly* refused to comply with lawful police orders. That refusal provided an objective basis for the police officers' probable cause determination, and thus as a matter of law their arrest of Mr. Karriem was valid.") (emphasis added).

[18] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[19] Were a person strictly liable for conduct that causes liability under 18 DCMR § 2000.2, even mistakes or accidents by a defendant could be the basis of criminal liability for failing to obey a lawful police order. For example, a person who starts to disperse but twists their ankle and cannot move further without severe pain would be liable.

[20] *Karriem v. District of Columbia*, 717 A.2d 317, 322 (D.C. 1998).

[21] *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015)("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)*).*

Fourth, the revised offense requires eight or more actors be engaged in riotous activity for an actor to be liable for failure to disperse liability. Current District law defines a riot as five or more people engaged in "tumultuous and violent conduct,"[22] in part, because it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[23] However, there are many instances in which a group of five disorderly persons may not rise to the level of a riot.[24] This change reduces unnecessary overlap between the composite offense of rioting and the underlying substantive offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised offense requires proof that the person's continued presence substantially impairs the ability of a law enforcement officer to stop the riotous conduct of others nearby. In such circumstances, a law enforcement order to disperse is a "lawful" order under current District law. Under current law, a refusal to follow a necessary[25] and lawful[26] move-on order may subject a person to arrest in a variety of circumstances.[27] Crowd control measures in current law are designed to ensure law enforcement has adequate authority to immediately intervene when necessary to restore public order.[28] The revised offense merely clarifies the particular circumstances in which a law enforcement dispersal order is valid.

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[22] D.C. Code § 22-1322.

[23] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses.").

[24] Examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

[25] *See Bolz v. District of Columbia*, 149 A.3d 1130, 1137 (D.C. 2016).

[26] *See Streit v. District of Columbia*, 26 A.3d 315, 319 (D.C. 2011).

[27] *See, e.g.*, 18 DCMR § 2000.2 (Failure to Obey a Lawful Order of a Police Officer); 24 DCMR § 2100 (Crowd and Traffic Control); D.C. Code § 22-1307 (Crowding, obstructing, or incommoding); D.C. Code § 22-1314.02 (Prohibited acts); D.C. Code § 22-1321 (Obstructing bridges connecting D.C. and Virginia); D.C. Code § 22-2752 (Engaging in an unlawful protest targeting a residence); D.C. Code § 22-3302 (Unlawful entry on property); D.C. Code § 22-3321 (obstructing public highway).

[28] "The goal of restoring public order comes from the concern that citizens who are being bothered or annoyed might choose violent self-help when someone is being loud on the street or otherwise causing a disturbance." Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 3.

RCC § 22E-4401. Prostitution.

Explanatory Note. *The RCC prostitution offense prohibits engaging in, agreeing to, or soliciting for a commercial sex act in exchange for the actor or a third party receiving anything of value. Along with the RCC patronizing prostitution offense,[1] the RCC prostitution offense replaces two distinct offenses in the current D.C. Code: prostitution[2] and soliciting for prostitution[3] and the definitions statute that applies to these offenses.[4] The revised prostitution statute also replaces in relevant part three distinct provisions for the current D.C. Code prostitution and soliciting for prostitution offenses: the deferred disposition provision,[5] provisions for establishing a nuisance and abating a nuisance,[6] and provisions for vehicle impoundment[7] and the Anti-Prostitution Vehicle Impoundment Proceeds Fund.[8]*

Subsection (a) specifies the prohibited conduct for the revised prostitution statute. Paragraph (a)(1) specifies one type of prohibited conduct—pursuant to a prior agreement, explicit or implicit, engaging in or submitting to a sexual act or sex contact in exchange for the actor or a third party receiving anything of value. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor or a third party actually receives anything of value or if anything of value was promised to the actor or a third party.[9] Paragraph (a)(1) is intended to apply only to a prostitute—an individual that receives or agrees to receive payment for sexual activity—and not a patron. The RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor, pursuant to a prior agreement, explicit or implicit, engages in or submits to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(2) specifies the second type of prohibited conduct—agreeing, explicitly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor or a third party receives anything of value or if anything of value was promised to the actor or a third party. Paragraph (a)(2) is intended to apply only to a prostitute—an

[1] RCC § 22E-4402.
[2] D.C. Code § 22-2701.
[3] D.C. Code § 22-2701.
[4] D.C. Code § 22-2701.01.
[5] D.C. Code § 22-2703.
[6] D.C. Code §§ 22-2713 - 22-2720.
[7] D.C. Code § 22-2724.
[8] D.C. Code § 22-2725.
[9] If anything of value is promised as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to engage in or submit to sexual activity in exchange for the actor or a third party receiving anything of value.

individual that receives or agrees to receive payment for sexual activity—and not a patron. The RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor agrees, explicitly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(3) prohibits the final type of prohibited conduct—commanding, requesting, or trying to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor or a third party receives anything of value or if anything of value was promised to the actor or a third party. Paragraph (a)(3) is intended to apply only to a prostitute—an individual that receives or agrees to receive payment for sexual activity—and not a patron. The RCC patronizing prostitution offense (RCC § 22E-4402) criminalizes patronizing prostitution. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor or a third party receiving anything of value. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (b) codifies immunity from the offense for a person under 18 years of age. Paragraph (b)(1) states that an actor does not commit an offense under this section when, "in fact" the actor is under 18 years of age. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the age of the actor. Paragraph (b)(2) requires that the Metropolitan Police Department and any other District agency designated by the Mayor refer a person under the age of 18 years that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605.

Subsection (c) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised prostitution statute clearly changes District law in eight main ways.*

First, the revised prostitution statute is limited to an individual that engages in sexual activity in exchange for receiving payment. The current D.C. Code prostitution

offense[10] and current D.C. Code soliciting for prostitution offense[11] include, without distinction, a patron that pays for sexual activity, as well as an adult[12] who receives payment for sexual activity. In contrast, the RCC prostitution statute is limited to an individual that engages in, agrees to engage in, or solicits for sexual activity, in exchange for the actor or a third party receiving payment. As is discussed in the explanatory note, the phrase "in exchange for" in paragraphs (a)(1), (a)(2), and (a)(3) of the revised statute is intended to exclude a patron from the offense. The RCC patronizing prostitution statute (RCC § 22E-4402) separately criminalizes patronizing prostitution—paying for, agreeing to pay for, or soliciting for sexual activity in exchange for giving payment. As part of this revision, the revised prostitution statute no longer uses the current D.C. Code definitions of "prostitution" (D.C. Code § 22-2701.01(3)) or "solicit for prostitution" (D.C. Code § 22-2701.01(7)), and there is no longer a separate soliciting for prostitution form of the offense.[13] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the revised prostitution statute deletes the special recidivist penalty for engaging in or soliciting for prostitution set forth in current D.C. Code § 22-2701(b).[14] For the first offense, the current D.C. Code prostitution or solicitation statute has a

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[10] The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution" and defines "prostitution" as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definition of "prostitution" is inserted into the current prostitution or solicitation statute, the statute prohibits both engaging in sexual activity "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."

[11] The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution." D.C. Code § 22-2701(a). "Solicit for prostitution" is defined, in relevant part, as "to invite, entice, offer, persuade, or agree to engage in prostitution, or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution" and "prostitution" is defined as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definitions of "solicit for prostitution" and "prostitution" are inserted into the current prostitution or solicitation statute, the statute prohibits offering, agreeing, or soliciting to engage in sexual activity both "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."

[12] Although the current D.C. Code prostitution offense includes both a prostitute and a patron, the "safe harbor" provision in subsection (d)(1) of the current statute is limited to the individual that engages in sexual activity for payment, and excludes patrons. D.C. Code § 22-2701(d)(1) ("A child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section.").

[13] D.C. Code § 22-2701 prohibits both "engag[ing] in prostitution" and "solicit[ing] for prostitution."

[14] D.C. Code § 22-2701 ("(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be: (A) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both, for the first offense; and (B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense. (2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both. (c) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for prostitution or soliciting for prostitution if he or she has been convicted on at least 2 occasions of violations of: (1) This section; (2) A statute in one or more other jurisdictions prohibiting prostitution or soliciting for prostitution; or (3) Conduct that would constitute a violation of this section if committed in the District of Columbia.").

maximum term of imprisonment of 90 days.[15] The special recidivist penalty provides that for the second offense, the maximum term of imprisonment is 180 days,[16] and for a third or subsequent offense, the conviction is a felony with a maximum term of imprisonment of two years.[17] This special enhancement is highly unusual in current District law. In contrast, for the revised prostitution statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist prostitution, consistent with other misdemeanor offenses. There is no clear basis for singling out recidivist prostitution or solicitation offenses as compared to other offenses of similar seriousness. This change improves the consistency and proportionality of the revised statutes.

Third, the revised prostitution statute limits soliciting for prostitution to conduct that "commands, requests, or tries to persuade" another person. The current D.C. Code definition of "solicit for prostitution" is "to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution."[18] There is no DCCA case law interpreting this special definition of "solicit for prostitution."[19] However, an older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[20] for the purpose of prostitution. The DCCA stated that the older statute used the term "address," as opposed to "solicit" or "solicitation,"[21] which "removes the suggestion that an initial, active effort to engage someone in a conversation or transaction involving prostitution is a prerequisite to guilt,"[22] and that "an enticement also does not require an active, initiatory effort but can occur in a responsive manner."[23] Under this case law, it is also irrelevant which party broaches the subject of payment: "[o]nce there is an enticement or an address for the purpose of enticement, it becomes unimportant who broaches the commercial nature of

[15] D.C. Code § 22-2701(b)(1)(A).
[16] D.C. Code § 22-2701(b)(1)(B).
[17] D.C. Code § 22-2701(b)(2).
[18] D.C. Code § 22-2701.01(7).
[19] The current D.C. Code definition of "solicit for prostitution" was enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16–482).
[20] D.C. Code § 22-2701 (1973).
[21] *Dinkins v. United States*, 374 A.2d 292, 294 (D.C. 1977).
[22] *Dinkins v. United States*, 374 A.2d 292, 295 (D.C. 1977). The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").
[23] *Dinkins*, 374 A.2d at 295. The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").

the transaction."[24] In contrast, the revised prostitution statute limits soliciting for prostitution to conduct that "commands, requests, or tries to persuade" another person to engage in sexual activity in exchange for the actor or a third party receiving anything of value. With this change, the revised prostitution statute uses language identical to the general RCC solicitation statute (RCC § 22E-302), and the RCC prostitution statute differs from the general RCC solicitation statute primarily in the required culpable mental state—prostitution requires "knowingly" rather than "purposely." To the extent that DCCA case law interpreting the older statute is still good law under the current D.C. Code, the revised statute preserves case law establishing that it is irrelevant which party initiates the encounter or brings up the subject of payment. However, unlike current case law, liability under paragraph (a)(3) of the revised statute does require active efforts to solicit another person—"commands, requests, or tries to persuade another person." This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. The current D.C. Code definitions of "prostitution" and "solicit for prostitution" use the terms "sexual act" and "sexual contact" as those terms are currently defined in D.C. Code § 22-3001[25] for the current D.C. Code sexual abuse statutes. In contrast, the revised prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of "sexual act" and "sexual contact" differ in multiple ways as compared to current law. As a result, the scope of the revised prostitution statute will differ as compared to the current D.C. Code prostitution or solicitation statute. For example, the current D.C. Code definitions of "sexual act" and "sexual contact" extend to conduct done with "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually "abuse, humiliate, harass, degrade, arouse, or gratify" any person. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, a vehicle used in furtherance of the RCC prostitution offense is no longer subject to vehicle impoundment. Current D.C. Code § 22-2724[26] provides that when there

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[24] *Dinkins*, 374 A.2d at 295. The DCCA further stated that "[i]t is sufficient that an understanding emerges that a commercial venture was contemplated when the sexual availability was made apparent." *Dinkins*, 374 A.2d at 296.

[25] D.C. Code §§ 22-2701.01(5), (6) (stating the terms "sexual act" and "sexual contact" in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph" and "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[26] In addition to D.C. Code § 22-2724, D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which "shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense." D.C. Code § 22-2725(b).

is probable cause that a vehicle "is being used in furtherance of a prostitution-related offense," including prostitution or solicitation,[27] and there is an arrest,[28] the vehicle "shall" be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.[29] There is no requirement that the owner be involved in the offense or know of the vehicle's use in the offense. The owner is "entitled to a due process hearing regarding the seizure of the vehicle,"[30] but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed "at any time" by paying several different penalties, fees, and costs,[31] which are either not

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D.C. Code § 22-2725 states that all "funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723" will be deposited in the fund. D.C. Code § 22-2725(a). The reference to "§ 22-2723" appears to be an error, however, and the text should instead refer to "§ 22-2724." D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law "An act for the suppression of prostitution in the District of Columbia." The text of Section 7 in the Omnibus Act, establishing § 22-2725, states "All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*." The reference to section 5 appears to be an error. Section 5 of the 1935 "An act for the suppression of prostitution in the District of Columbia" is specific to forfeiture, not impoundment. The text in the Omnibus Act should instead refer to "section 6," which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

[27] D.C. Code § 22-2724(b). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[28] D.C. Code § 22-2724(b).

[29] D.C. Code § 22-2724(b)(1), (b)(2).

[30] D.C. Code § 22-2701(f) ("An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.").

[31] D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.").

refundable,[32] or are refundable only in narrow circumstances.[33] Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner's right to a due process hearing.[34] There is no DCCA case law interpreting the current D.C. Code prostitution impoundment provision. In contrast, a vehicle used in furtherance of the RCC prostitution offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what otherwise is a minor misdemeanor offense or comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. A vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under certain circumstances, however, as opposed to impoundment, because that statute targets "pimps" and owners of prostitution businesses, as opposed to an individual engaged in consensual commercial sex work. This change improves the consistency and proportionality of the revised statutes.

Sixth, the revised prostitution statute is no longer subject to civil asset forfeiture. Current D.C. Code § 22-2723 makes subject to forfeiture all conveyances that are used, or

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[32] Subsection (d) requires paying "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing" and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6)."); § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[33] D.C. Code § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[34] Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner "shall be entitled to a due process hearing regarding the seizure of the vehicle," D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must "convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing." D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing." D.C. Code § 22-2724(d) (emphasis added).

intended to be used, "to transport, or in any manner to facilitate a violation of a prostitution-related offense,"[35] and all "money, coins, and currency" which are used, or intended to be used "in violation of a prostitution-related offense."[36] Prostitution forfeitures currently are subject to D.C. Law 20-278,[37] which provides significant due process protections for the owner of property,[38] but still can result in a lengthy or permanent loss of an individual's vehicle or money. There is no DCCA case law interpreting the current D.C. Code § 22-2723. However, under an earlier version of the solicitation for prostitution statute, the DCCA held in *One Toyota Pick-Up Truck v. District of Columbia* that forfeiture of the truck the defendant used to solicit for prostitution, valued at $15,500, would violate the Excessive Fines Clause of the U.S. Constitution.[39] The DCCA determined that, under controlling Supreme Court case law, the forfeiture would be "grossly disproportionate to the gravity of the defendant's offense."[40] It was the defendant's first conviction for solicitation and the DCCA stated that solicitation for prostitution "particularly for a first conviction, has historically been treated as a minor crime in the District, and was certainly so treated at the time of the defendant's conduct."[41] At the time, a first offense for solicitation for prostitution had a maximum criminal fine of $300 and no incarceration and the defendant actually received a $150 fine.[42] The court concluded that "forfeiting a vehicle valued at $15,500 inflicts a penalty . . . on the order of fifty times the fine authorized . . . and one hundred times the fine actually imposed."[43] Finally, the DCCA

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[35] D.C. Code § 22-2723(a)(1). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[36] D.C. Code § 22-2723(a)(2). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[37] D.C. Code § 22-2723(b).

[38] *See* D.C. Code §§ 41-301 through 41-315.

[39] *One 1995 Toyota Pick-Up Truck v. District of Columbia,* 718 A.2d 558, 559, 560 (D.C. 1998).

[40] The DCCA applied the test established in *United States v. Bajakajian*, 524 U.S. 321 (1998), which states that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 564-65 (quoting *United States v. Bajakajian*, 524 U.S. 321 (1998)). Prior to engaging in the proportionality analysis, the DCCA first had to establish whether the forfeiture provision in D.C. Code § 22-2723 was a "fine" within the meaning of the Excessive Fines Clause because "the limitation on excessive fines is meant to curb 'the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 560 (internal quotations and citations omitted) (emphasis in the original). The DCCA concluded that forfeiture of the truck pursuant to D.C. Code § 22-2723 was "at least in part," punishment for solicitation and that D.C. Code § 22-2723 "has distinct punitive aspects," an "innocent owner" defense and a direct tie to a violation of law. *Id.* at 562, 563. Although D.C. Code § 22-2723 has been amended since the version at issue in *One 1995 Toyota Pick-Up Truck*, it retains an "innocent owner defense" and directly ties the forfeiture to a violation of the prostitution laws, making it likely that the DCCA would reach the same conclusion—that D.C. Code § 22-2723 is subject to the Excessive Fines Clause.

[41] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565.

[42] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565-66.

[43] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The court stated that these ratios are "comparable to the seventy-to-one figured considered grossly disproportionate" in the controlling Supreme Court case

stated that while the defendant "fit[] within the class of persons for whom the statute was principally designed, he can not [sic] be made to bear grossly disproportionate responsibility for the problem of prostitution in the District or for the attendant consequences . . . he is, at bottom, one individual who on one occasion attempted to retain a prostitute."[44]

In contrast, a conveyance or money used or intended to be used in furtherance of the RCC prostitution offense is no longer subject to forfeiture. Forfeiture of a vehicle or money is a disproportionate penalty under the RCC prostitution statute and may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the statute.[45] A vehicle or money used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under RCC § 22E-4404 because that statute targets "pimps" and owners of prostitution businesses, as opposed to an individual engaged in consensual commercial sex work. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 ("current D.C. Code prostitution nuisance provisions") and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 ("Title 42 nuisance provisions."). The current D.C. Code prostitution nuisance provisions apply to "any building, erection, or place used for the purpose of lewdness, assignation, or prostitution,"[46] or a nuisance that is established "in a criminal proceeding."[47] The scope of "in a criminal proceeding" is unclear under current

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United States v. Bajakajian, 524 U.S. 321 (1998) and are "also consistent with excessiveness determinations in of other federal courts." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566 (internal citations omitted).

[44] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The DCCA further noted that "the forfeiture of the pick-up truck cannot fairly be said to compensate the District for any loss associated with Esparza's crime, one justification commonly advanced for the *in rem* action. . . . And although no findings have been made on the impact on Esparza and his family of the forfeiture of the truck, the government does not dispute Esparza's assertions that the vehicle played a significant role in the maintenance of his livelihood. *Id.* (internal citations omitted).

[45] The forfeiture statute has been amended since the version at issue in the 1998 *One 1995 Toyota Pick-Up Truck* case, but the amendments do not address the basis for the DCCA's ruling in that case that forfeiture of a vehicle valued at $15,500 was grossly disproportionate when the defendant received at $150 fine for a first conviction of solicitation for prostitution. The penalties for soliciting for prostitution have increased since the 1998 *One 1995 Toyota Pick-Up Truck* case, but it is unclear whether they would be significant enough for forfeiture of a vehicle to survive a constitutional challenge. The DCCA has not interpreted the current forfeiture statute under the increased prostitution or solicitation penalties.

[46] D.C. Code § 22-2713(a) ("Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.").

[47] D.C. Code § 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the

District law.[48] Violating a court order under the current D.C. Code prostitution nuisance provisions is punishable by no less than three months and no more than six months

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building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[48] D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if "the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding." A broad reading of "in a criminal proceeding" is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether "in a criminal proceeding" extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . ."). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a "disorderly house" under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house." Under DCCA case law, a "bawdy house" used for prostitution is a type of "disorderly house," but a "disorderly house" can extend beyond a "bawdy house" to encompass "activities on the premises that either disturb the public or constitute a nuisance per se." *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a "disorderly house" that is used for "lewdness, assignation, or prostitution" as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of "lewdness, assignation, or prostitution," and D.C. Code § 22-2717 refers to the existence of "*the* nuisance." *Id.* at 971-72 (emphasis in original). The court concluded that "the" refers back to the requirements of "lewdness, assignation, or prostitution" in D.C. Code § 22-2713 and that D.C. Code § 22-2717 "concerns only those nuisances defined in" D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a "bawdy house" under D.C. Code § 22-2722 would "clearly entail the type of nuisance described in [D.C. Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it." *Id.* The court stated that "[b]ecause the Government failed to show that [the property] was 'used for the purpose of lewdness, assignation, or prostitution," the [defendants'] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717]." *Id.* The court acknowledged that the DCCA in *Raleigh v. United States* had stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for "lewdness, assignation, or prostitution," and, furthermore, that the DCCA "did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717]." *Id*. The court stated that "we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-

imprisonment.[49] The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.[50] The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,[51] and again in 2010 to include firearm-related nuisances.[52] It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law[53] or legislative

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2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713]." *Id.*

[49] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[50] "Drug–Related Nuisance Abatement Act of 1998," 1998 District of Columbia Laws 12-194 (Act 12–470).

[51] "Nuisance Abatement Reform Amendment Act of 2006," 2006 District of Columbia Laws 16-81 (Act 16–267).

[52] "Community Impact Statement Amendment Act of 2010," 2010 District of Columbia Laws 18-259 (Act 18-446).

[53] Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington*, D.C., 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 "authorizes a special summary action in equity to abate and enjoin" a nuisance, and that D.C. Code § 42-3102 "authorizes an action to abate, enjoin, and prevent" a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

It should be noted that the "special summary action in equity to abate and enjoin" a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 ("In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented."). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 ("Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course."). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 ("(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated

history on this issue. In contrast, the revised prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions[54] do not apply to real property that is used for "lewdness" or "assignation" like the current D.C. Code prostitution nuisance provisions do.[55] To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.[56] Second, the Title 42 nuisance provisions apply to any "real property"[57] "used" or "intended to be used" for prostitution,[58] whereas current D.C. Code § 22-2713 is limited to any "building, erection, or place used for the purpose of prostitution."[59] Third, the Title 42 nuisance provisions do not extend to a prostitution-

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with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.").

[54] The Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C).

[55] The current D.C. Code prostitution nuisance provisions apply to any "building, erection, or place used for the purposes of lewdness, assignation, or prostitution." D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of "debauchery" or "other immoral" purposes, which may overlap with "lewdness" or "assignation." However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of "prostitution."

[56] "Lewdness" and "assignation" appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that "lewdness" "has been defined by the Supreme Court as 'that form of immorality which has relation to sexual impurity.'" *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of "assignation," but Black's Law Dictionary defines it as "[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex." Assignation, Black's Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[57] The Title 42 nuisance provisions define "property" as "tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land."

[58] The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

[59] D.C. Code § 22-2713.

related nuisance that is established in a "criminal proceeding" as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months' imprisonment as do the current D.C. Code prostitution nuisance provisions.[60] Fifth, while both sets of nuisance provisions provide for a preliminary injunction,[61] a permanent injunction and order of abatement,[62] and a procedure for vacating an order of abatement,[63] the procedural

[60] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."). A violation of a court order "issued under" the Title 42 nuisance provisions is "punishable as a contempt of court." D.C. Code § 42-3112(a).

[61] D.C. Code §§ 22-2714 (". . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . ."); 42-3104(a) ("Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .").

[62] D.C. Code §§ 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."); 42-3110(a) ("If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.").

[63] D.C. Code §§ 22-2719 ("If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law."); 42-3112(c) ("Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior

requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,[64] as do the types of equitable relief.[65] This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the general RCC deferred disposition provision in RCC § 22E-602 makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703. Current D.C. Code § 22-2703 states that the "court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct."[66] The statute specifies examples of conditions that the court may impose on the defendant, such as "an order to stay away from the area within which the offense or offenses occurred."[67] D.C. Code § 22-2703 was enacted in 1914. Despite substantive revisions to the current D.C. Code prostitution or solicitation statute (D.C. Code § 22-2701) in 2007, 2009, and 2015, D.C. Code § 22-2703 has not been substantively amended since 1996.[68] In contrast, the

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to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.").

[64] For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 ("The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111."). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

[65] For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all "fixtures, furniture, musical instruments, or movable property used in conducting the nuisance." D.C. Code § 22-2717 ("an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . . ."). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) ("Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.").

[66] D.C. Code § 22-2703.

[67] D.C. Code § 22-2703.

[68] The second sentence of D.C. Code § 22-2703, specifying examples of conditions that the court may impose on the defendant, was added in 1996. Safe Streets Anti–Prostitution Amendment Act of 1996, 1996 District of Columbia Laws 11-130 (Act 11–237).

RCC general deferred disposition provision in RCC § 22E-602 makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703.

First, the revised deferred disposition provision no longer codifies examples of conditions that the court may impose on the defendant. This language is unnecessary because the revised provision requires "reasonable conditions" and does not restrict the conditions the court may impose. Second, the revised provision deletes this language from D.C. Code § 22-2703: "The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant."[69] The current D.C. Code deferred disposition provision for possession of a controlled substance does not have such a provision,[70] and the statutory grant of authority to probation officers appears unnecessary. Similarly, it is unclear whether the Department of Human Services of the District of Columbia needs such a statutory grant of authority, and the Women's Bureau of the Police Department no longer exists. Third, the revised provision requires the consent of the defendant and limits the probation period to a maximum of one year, instead of "for such period as the court may direct"[71] in current D.C. Code § 22-2703. Fourth, the revised provision establishes that discharge or dismissal of the charge is not a conviction "for purposes of disqualifications or disabilities imposed by law," including the imposition of recidivist penalties for prior misdemeanor convictions under RCC § 22E-606 or other similar provisions, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code[72] and the RCC.[73] Fifth, after discharge of the proceedings, the revised provision provides for sealing the publicly available records of the arrest and related court proceedings under D.C. Code § 16–803. These changes improve the clarity, consistency, and proportionality of the revised statutes.

Beyond these eight changes to current District law, six other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised prostitution statute clarifies that payment can be received by or promised to "the actor or a third party." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[74] or "solicit[ing] for prostitution"[75] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for . . . receiving anything of value."[76] It is

[69] D.C. Code § 22-2703.
[70] D.C. Code § 48-904.01(e).
[71] D.C. Code § 22-2703 ("The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed."). Under the revised deferred disposition provision, the court must have the consent of the defendant to defer imposition or execution of sentence, and the period of probation is limited to one year.
[72] D.C. Code § 48-904.01(e).
[73] RCC § 48-904.01a(g).
[74] D.C. Code § 22-2701(a).
[75] D.C. Code § 22-2701(a).
[76] D.C. Code § 22-2701.01(3).

unclear whether the recipient of payment must be the person engaging in or soliciting for sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution statute requires "in exchange for the actor or a third party receiving anything of value." This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in or soliciting for the sexual activity for payment or a third party, as long as the payment is "in exchange" for the sexual activity. This change improves the clarity and consistency of the revised statute and removes a possible gap in liability.

Second, a promise for payment of anything of value is sufficient for liability in the revised prostitution statute. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[77] or "solicit[ing] for prostitution" and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for . . . receiving anything of value."[78] It is unclear whether "receiving anything of value" requires that a person actually receive anything of value, or if a promise to receive anything of value in the future is sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution statute retains the language "receiving anything of value," but requires an agreement to engage in sexual activity in paragraphs (a)(1) and (a)(2), and, per the explanatory note to the commentary above, it is sufficient if anything of value is promised as part of this agreement. In paragraph (a)(1), the actor must engage in sexual activity in exchange for the actor or a third party "receiving anything of value" pursuant to a prior agreement. In paragraph (a)(2), the actor must agree to engage in sexual activity in exchange for the actor or a third party "receiving anything of value." In the revised statute the phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if any person receives anything of value or if anything of value was promised to any person.[79] This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Third, the revised prostitution statute requires that an individual engage in or submit to sexual activity in exchange for anything of value "pursuant to a prior agreement, explicit or implicit." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[80] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for . . . receiving anything of value."[81] It seems clear that the offense includes an individual and a patron reaching an agreement for payment "in exchange" for sexual activity, and then engaging in sexual activity. It is unclear, however, if the offense includes individuals engaging in sexual activity, and after the fact coming to an agreement about payment. Resolving this ambiguity, the revised prostitution statute includes receiving anything of value in exchange for past sexual activity only if it is "pursuant to a prior agreement, explicit or

[77] D.C. Code § 22-2701(a).
[78] D.C. Code § 22-2701.01(3).
[79] As is noted in the explanatory note, there is overlap between paragraph (a)(1) and paragraph (a)(2). In paragraph (a)(1), if anything of value is promised to the actor or a third party as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to engage in or submit to sexual activity in exchange for the actor or a third party receiving anything of value.
[80] D.C. Code § 22-2701(a).
[81] D.C. Code § 22-2701.01(3).

implicit." Without requiring a prior agreement, receiving anything of value in exchange for past sexual activity could criminalize consensual romantic conduct with subsequent gifts. This change improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engages in, agrees to engage in, or solicits for sexual activity, in exchange for the actor or a third party receiving anything of value. The current D.C. Code prostitution or solicitation statute does not specify any culpable mental states, and there is no DCCA case law on this issue.[82] Resolving this ambiguity, the revised prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engaging in, or agreeing or offering to engage in, a sexual act or sexual contact in exchange for anything of value to be received by the actor or a third party. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[83] This change improves the clarity and consistency of the revised statutes.

Fifth, the revised prostitution statute does not require that the sexual activity be "with another person." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[84] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[85] The current D.C. Code[86] and RCC[87] definitions of "sexual act" and "sexual contact" include masturbation. However, the current statute's "with another person" requirement may narrow the offense to exclude a prostitute engaging in or soliciting to

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[82] Due to the statutory definition of "sexual contact" (D.C. Code § 22-3001(9)), prostitution based on a "sexual contact" requires that the prostitute have an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." In the context of the District's current D.C. Code sexual abuse statutes, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement. *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[83] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[84] D.C. Code § 22-2701(a).

[85] D.C. Code § 22-2701.01(3).

[86] D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of "sexual act" in D.C. Code § 22-3001(8) and the definition of "sexual contact" in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph."); 22-3001(9) (defining "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[87] RCC § 22E-701.

engage in masturbation because masturbation is not "with another person." Alternatively, the current prostitution or solicitation offense could be interpreted to include a prostitute engaging in or soliciting to engage in masturbation "with another person," if the latter phrase is construed to mean "for another person to watch." To resolve this ambiguity, the revised statute does not require that the sexual activity be "with another person." Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statute.

Sixth, the revised prostitution statute expands the scope of the "safe harbor" provision in the current D.C. Code prostitution or solicitation statute to include solicitation. The "safe harbor" provision in the current prostitution or solicitation statute states that a person under the age of 18 years that "engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section."[88] However, subsection (a) of the current statute prohibits conduct beyond engaging in or offering to engage in sexual activity. It also prohibits "solicit[ing] for prostitution,"[89] defined as "to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution."[90] It is unclear if the current safe harbor provision is limited to engaging in or offering to engage in sexual activity, or if it extends to all solicitation of prostitution, as prohibited in subsection (a). There is no DCCA case law interpreting the current "safe harbor" provision. Resolving this ambiguity, the safe harbor provision in the revised prostitution statute applies to all prohibited conduct in the revised statute—engages in, agrees to engage in, or solicits for sexual activity, in exchange for any person receiving payment. This change improves the clarity and may improve the proportionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised prostitution statute makes "agrees" to engage in or submit to sexual activity a discrete basis of liability in paragraph (a)(2), separate from soliciting for prostitution in paragraph (a)(3). The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution"[91] and the current D.C. Code definition of "solicit for prostitution" is, in relevant part, "to invite, entice, offer, persuade, or agree to engage in prostitution."[92] Paragraph (a)(3) of the revised statute encompasses liability for "invite," "entice," "offer," or "persuade" to engage in prostitution using language consistent with the general RCC solicitation statute (RCC § 22E-302). Paragraph (a)(2) separately and clearly addresses an agreement to engage in prostitution. This change clarifies the revised statute.

[88] D.C. Code § 22-2701(d)(1).
[89] D.C. Code § 22-2701(a).
[90] D.C. Code § 22-2701.01(7).
[91] D.C. Code § 22-2701(a).
[92] D.C. Code § 22-2701.01(7).

Second, the revised prostitution statute specifies that an agreement can be either explicit or implicit. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[93] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[94] The language "in return for" implies the requirement of an agreement, either explicit or implicit, but there is no DCCA case law interpreting this requirement. An older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[95] for the purpose of prostitution and DCCA case law interpreting this older statute appears to have extended to both an explicit or implicit agreement.[96] More recent case law has also looked beyond spoken words to the surrounding circumstances to assess whether there is an agreement to prostitution.[97] This change improves the clarity of the revised statutes.

Third, the revised prostitution statute uses "in exchange" for anything of value instead of "in return" for anything of value. The current D.C. Code definition of "prostitution" is a "sexual act or contact with another person in return for giving or receiving anything of value."[98] "In exchange" emphasizes the transactional nature of the sexual act or sexual contact, regardless of when the sexual activity occurs, and is not intended to substantively change current District law.

Fourth, the revised safe harbor provision language is changed in several minor ways to be more consistent and clear than the safe harbor provision in current D.C. Code § 22-2701(d). First, the revised prostitution statute replaces "shall be immune from prosecution" with "does not commit an offense under this section." The revised language is consistent with other RCC offenses that contain an exclusion from liability and is not intended to change the scope of the provision. Second, the revised safe harbor provision no longer uses the term "child," defined in the current safe harbor provision as a "person who has not attained the age of 18 years."[99] The revised safe harbor provision instead refers to a person that is "under 18 years of age," which is consistent with other RCC offenses. Third, the revised safe harbor provision replaces the reference to current D.C. Code § 22-1834, the sex trafficking of children offense, with RCC § 22E-1805, the equivalent RCC sex trafficking a minor offense. This change improves the clarity and consistency of the revised statutes.

Fifth, the revised prostitution statute includes an actor who "engages in or submits to" sexual activity (paragraph (a)(1)), agrees to "engage in or submit to" sexual activity, (paragraph (a)(2)), and solicits any person to "engage in or submit to" sexual activity

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[93] D.C. Code § 22-2701(a).
[94] D.C. Code § 22-2701.01(3).
[95] D.C. Code § 22-2701 (1973).
[96] *See, e.g.*, *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("In the final analysis, it is a question of fact whether the acts and words of the defendant in general, viewed in the light of surrounding circumstances, constitute the enticing or addressing prohibited by the statute. Were specific language or conduct determinative, as urged by appellant, every prostitute could know how to avoid arrest.") (internal citations omitted).
[97] In 2013, the DCCA affirmed a conviction for soliciting for prostitution under D.C. Code § 22-2701 when the current definition of "solicitation" was in effect and stated that "we do not require the government to prove any particular language" and "we look to appellant's conduct or words in light of surrounding circumstances." *Moten v. United States*, 81 A.3d 1274, 1280, 1281 (D.C. 2013) (internal citations omitted).
[98] D.C. Code § 22-2701.01(3).
[99] D.C. Code § 22-2701(d)(3).

(paragraph (a)(3)). The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[100] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[101] The revised language is consistent with the revised sex offenses in RCC Chapter 13 and is not intended to substantively change current District law.

Sixth, the revised prostitution statute is no longer subject to the definition of "anything of value" in D.C. Code § 22-1802 that applies to the current D.C. Code prostitution or solicitation statute. Current D.C. Code § 22-1802 states that "anything of value" "shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value."[102] This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within "anything of value" in the revised offense is not intended to change current District law.

Seventh, the revised prostitution offense includes states that the Metropolitan Police Department (MPD) and "and any other District agency designated by the Mayor" shall refer any person under the age of 18 years suspected of violating subsection (a) of the revised statute to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of a minor under RCC § 22E-1605. The current D.C. Code prostitution or solicitation statute states that MPD "shall" shall refer any person under the age of 18 years suspected of engaging in prostitution or soliciting for prostitution "to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[103] Including "any other District agency designated by the Mayor" ensures the referral provision remains relevant and applicable should there be future changes in service delivery while ensuring that MPD remains bound to provide referrals. This change improves the clarity of the revised statutes.

[100] D.C. Code § 22-2701(a).
[101] D.C. Code § 22-2701.01(3).
[102] D.C. Code § 22-1802.
[103] D.C. Code § 22-2701(d)(2).

RCC § 22E-4402. Patronizing Prostitution.

Explanatory Note. *The RCC patronizing prostitution offense prohibits engaging in a sexual act or sexual contact in exchange for giving another person anything of value and soliciting for this purpose, as well as agreeing to give anything of value to another person in exchange for a sexual act or sexual contact. The offense does not require that a person be convicted of the RCC prostitution offense (RCC § 22E-4401). The offense is graded based on the age of the person patronized and whether the person patronized is impaired. Along with the RCC prostitution offense,[1] the revised patronizing prostitution offense replaces two distinct offenses in the current D.C. Code: prostitution[2] and soliciting for prostitution[3] and the definitions statute that applies to these offenses.[4] The revised patronizing prostitution statute also replaces in relevant part three distinct provisions for the current D.C. Code prostitution and soliciting for prostitution offenses: the deferred disposition provision,[5] provisions for establishing a nuisance and abating a nuisance,[6] and provisions for vehicle impoundment[7] and the Anti-Prostitution Vehicle Impoundment Proceeds Fund.[8]*

Subsection (a) specifies the prohibited conduct for the revised patronizing prostitution statute. Subsection (a) and paragraph (a)(1) specify one type of prohibited conduct—pursuant to a prior agreement, explicit or implicit, the actor engages in or submits to a sexual act or sex contact in exchange for the actor giving another person anything of value. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to another person.[9] Paragraph (a)(1) is intended to apply only to a patron—an individual that pays or promises to pay for sexual activity—and not a prostitute. The RCC prostitution offense (RCC § 22E-4401) criminalizes receiving or agreeing to receive payment for sexual activity. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(1). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor, pursuant to a prior agreement, explicit or implicit, engages in or submits to a sexual act or sexual contact in exchange for the actor giving another person anything of value. The recipient or promised recipient of payment may be the person engaging in sexual activity

[1] RCC § 22E-4401.
[2] D.C. Code § 22-2701.
[3] D.C. Code § 22-2701.
[4] D.C. Code § 22-2701.01.
[5] D.C. Code § 22-2703.
[6] D.C. Code §§ 22-2713 - 22-2720.
[7] D.C. Code § 22-2724.
[8] D.C. Code § 22-2725.
[9] If anything of value is promised to another person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to give anything of value in exchange for any person engaging in or submitting to sexual activity.

for payment or a third party. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (a) and paragraph (a)(2) specify the second type of prohibited conduct—agreeing, explicitly or implicitly, to give anything of value to another person in exchange for any person engaging in or submitting to a sexual act or sexual contact. The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to another person. Paragraph (a)(2) is intended to apply only to a patron—an individual that pays or promises to pay for sexual activity—and not a prostitute. The RCC prostitution offense (RCC § 22E-4401) criminalizes receiving or agreeing to receive payment for sexual activity. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(2). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor agrees, explicitly or implicitly, to give anything of value to another person in exchange for any person engaging in or submitting to a sexual act or sexual contact. The recipient or promised recipient of payment may be the person agreeing to sexual activity for payment or a third party. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (a) and paragraph (a)(3) prohibit the final type of prohibited conduct—commanding, requesting, or trying to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor giving another person anything of value. "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). The phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to another person. Paragraph (a)(3) is intended to apply only to a patron—an individual that pays or promises to pay for sexual activity—and not a prostitute. The RCC prostitution offense (RCC § 22E-4401) criminalizes receiving or agreeing to receive payment for sexual activity. Subsection (a) specifies a culpable mental state of "knowingly" and per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state applies to all the elements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for the actor giving another person anything of value. The recipient or promised recipient of payment may be the person soliciting for sexual activity for payment or a third party. "Sexual act" and "sexual contact" are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (b) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (b)(2) codifies several penalty enhancements for the revised patronizing prostitution statute. If any of the specified enhancements apply, the penalty classification for the revised offense is increased by one class.

The penalty enhancement in subparagraph (b)(2)(A) applies if the actor is reckless as to the fact that the person patronized is under 18 years of age, or if, in fact, the person

patronized is under 12 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person patronized is under 18 years of age. In the alternative, the penalty enhancement applies if the person patronized "in fact" is under 12 years of age. "In fact" is defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here the age of the person patronized.

Two penalty enhancements are codified under subparagraph (b)(2)(B). Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(i), the actor must be reckless as to the fact that the person patronized is "incapable of appraising the nature of the sexual act or sexual contact" or of understanding the right to give or withhold consent to the sexual act or sexual contact. In addition, the person's inability must be either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (b)(2)(B) applies to the requirements in sub-subparagraph (b)(2)(B)(i). "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person patronized is incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold consent to the sexual act or sexual contact, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.

Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(ii), the actor must be reckless as to the fact that the person patronized is incapable of communicating[10] willingness or unwillingness to engage in the sexual act or sexual contact. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Sub-subparagraph (b)(2)(B)(ii) includes paralyzed individuals who are able to appraise the nature of the sexual activity or of understanding the right to give or withhold consent under sub-subparagraph (b)(2)(B)(i), but are unable to communicate. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (b)(2)(B) applies to the requirements in sub-subparagraph (b)(2)(B)(i). "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the person patronized is incapable of communicating willingness or unwillingness to engage in the sexual act or sexual contact.

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

[10] If the complainant is unable to communicate verbally or orally, but is able to make gestures, facial expressions, or engage in other conduct, the person may be capable of communicating and this element may not be satisfied.

Relation to Current District Law. *The revised patronizing prostitution statute clearly changes District law in ten main ways.*

First, the revised patronizing prostitution statute is limited to an individual that engages in sexual activity in exchange for paying another person. The current D.C. Code prostitution offense[11] and current D.C. Code soliciting for prostitution offense[12] include within their scope an individual that pays for sexual activity, as well as the individual that receives payment for sexual activity. In contrast, the RCC patronizing prostitution statute is limited to the individual that engages in or solicits for sexual activity in exchange for giving any person anything of value, or agrees to give any person anything of value in exchange for sexual activity. The RCC prostitution statute (RCC § 22E-4401) separately criminalizes engaging in, agreeing to, or soliciting for sexual activity in exchange for receiving payment. As part of this revision, the revised patronizing prostitution statute no longer uses the current D.C. Code definitions of "prostitution" (D.C. Code § 22-2701.01(3)) or "solicit for prostitution" (D.C. Code § 22-2701.01(7)), and there is no longer a separate soliciting for prostitution form of the offense.[13] This change improve the clarity, consistency, and proportionality of the revised statutes.

Second, the revised patronizing prostitution statute deletes the special recidivist penalty for engaging in or soliciting for prostitution set forth in current D.C. Code § 22-2701(b).[14] For the first offense, the current D.C. Code prostitution or solicitation statute

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[11] The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution" and defines "prostitution" as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definition of "prostitution" is inserted into the current prostitution or solicitation statute, the statute prohibits both engaging in sexual activity "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."
Although the current D.C. Code prostitution or solicitation offense includes both a prostitute and a patron, the "safe harbor" provision in the current statute is limited to the individual that engages in sexual activity for payment, and excludes patrons. D.C. Code § 22-2701(d)(1) ("A child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section.").

[12] The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution." D.C. Code § 22-2701(a). "Solicit for prostitution" is defined, in relevant part, as "to invite, entice, offer, persuade, or agree to engage in prostitution, or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution" and "prostitution" is defined as a "sexual act or contact with another person in return for *giving* or receiving anything of value." D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definitions of "solicit for prostitution" and "prostitution" are inserted into the current prostitution or solicitation statute, the statute prohibits offering, agreeing, or soliciting to engage in sexual activity both "with another person in return for giving anything of value" and "with another person in return for receiving anything of value."

[13] D.C. Code § 22-2701 prohibits both "engag[ing] in prostitution" and "solicit[ing] for prostitution."

[14] D.C. Code § 22-2701 ("(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be: (A) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both, for the first offense; and (B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense. (2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both. (c) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for prostitution or soliciting for prostitution if he or she has been convicted on at least 2 occasions of violations of: (1) This section; (2)

has a maximum term of imprisonment of 90 days.[15] The special recidivist penalty provides that for the second offense, the maximum term of imprisonment is 180 days,[16] and for a third or subsequent offense, the conviction is a felony with a maximum term of imprisonment of two years.[17] This special enhancement is highly unusual in current District law. In contrast, for the revised patronizing prostitution statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist patronizing prostitution, consistent with other misdemeanor offenses. There is no clear basis for singling out recidivist prostitution or solicitation offenses as compared to other offenses of similar seriousness. This change improves the consistency and proportionality of the revised statutes.

Third, the revised patronizing prostitution statute limits soliciting to conduct that "commands, requests, or tries to persuade" any person. The current D.C. Code definition of "solicit for prostitution" is "to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution."[18] There is no DCCA case law interpreting this special definition of "solicit for prostitution."[19] However, an older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[20] for the purpose of prostitution. The DCCA stated that the older statute used the term "address," as opposed to "solicit" or "solicitation,"[21] which "removes the suggestion that an initial, active effort to engage someone in a conversation or transaction involving prostitution is a prerequisite to guilt,"[22] and that "an enticement also does not require an active, initiatory effort but can occur in a responsive manner."[23] Under this case law, it is also irrelevant which party broaches the subject of payment: "[o]nce there is an enticement or an address for the purpose of enticement, it becomes

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A statute in one or more other jurisdictions prohibiting prostitution or soliciting for prostitution; or (3) Conduct that would constitute a violation of this section if committed in the District of Columbia.").

[15] D.C. Code § 22-2701(b)(1)(A).

[16] D.C. Code § 22-2701(b)(1)(B).

[17] D.C. Code § 22-2701(b)(2).

[18] D.C. Code § 22-2701.01(7). As is discussed elsewhere in this commentary, the current D.C. Code definition of "prostitution" includes both a patron and the individual engaging in prostitution for payment.

[19] The current D.C. Code definition of "solicit for prostitution" was enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16–482).

[20] D.C. Code § 22-2701 (1973).

[21] *Dinkins v. United States*, 374 A.2d 292, 294 (D.C. 1977).

[22] *Dinkins v. United States*, 374 A.2d 292, 295 (D.C. 1977). The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").

[23] *Dinkins*, 374 A.2d at 295. The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer's questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("We hold that appellant's attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.").

unimportant who broaches the commercial nature of the transaction."[24] In contrast, the revised patronizing prostitution statute limits soliciting to conduct that "commands, requests, or tries to persuade" another person to engage in sexual activity in exchange for giving any person anything of value. With this change, the revised patronizing prostitution statute uses language identical to the general RCC solicitation statute (RCC § 22E-302), and the RCC patronizing prostitution statute differs from the general RCC solicitation statute primarily in the required culpable mental state—patronizing prostitution requires "knowingly" rather than "purposely." To the extent that DCCA case law interpreting the older statute is still good law, the revised statute preserves case law establishing that it is irrelevant which party initiates the encounter or brings up the subject of payment. However, unlike current case law, liability under paragraph (a)(3) of the revised statute does require active efforts to solicit another person—"commands, requests, or tries to persuade any person." This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised patronizing prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. The current D.C. Code definitions of "prostitution" and "solicit for prostitution" use the terms "sexual act" and "sexual contact" as those terms are currently defined in D.C. Code § 22-3001[25] for the current D.C. Code sexual abuse statutes. In contrast, the revised patronizing prostitution statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of "sexual act" and "sexual contact" differ in multiple ways as compared to current law. As a result, the scope of the revised patronizing prostitution statute will differ as compared to the current D.C. Code prostitution or solicitation statute. For example, the current D.C. Code definitions of "sexual act" and "sexual contact" extend to conduct done with "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually "abuse, humiliate, harass, degrade, arouse, or gratify" any person. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, a vehicle used in furtherance of the RCC patronizing prostitution offense is no longer subject to vehicle impoundment. Current D.C. Code § 22-2724[26] provides that

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[24] *Dinkins*, 374 A.2d at 295. The DCCA further stated that "[i]t is sufficient that an understanding emerges that a commercial venture was contemplated when the sexual availability was made apparent." *Dinkins*, 374 A.2d at 296.

[25] D.C. Code §§ 22-2701.01(5), (6) (stating the terms "sexual act" and "sexual contact" in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph" and "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[26] In addition to D.C. Code § 22-2724, D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which "shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense." D.C. Code § 22-2725(b).

when there is probable cause that a vehicle "is being used in furtherance of a prostitution-related offense," including prostitution or solicitation,[27] and there is an arrest,[28] the vehicle "shall" be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.[29] There is no requirement that the owner be involved in the offense or know of the vehicle's use in the offense. The owner is "entitled to a due process hearing regarding the seizure of the vehicle,"[30] but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed "at any time" by paying several different penalties, fees, and costs,[31] which are either not

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D.C. Code § 22-2725 states that all "funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723" will be deposited in the fund. D.C. Code § 22-2725(a). The reference to "§ 22-2723" appears to be an error, however, and the text should instead refer to "§ 22-2724." D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law "An act for the suppression of prostitution in the District of Columbia." The text of Section 7 in the Omnibus Act, establishing § 22-2725, states "All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*." The reference to section 5 appears to be an error. Section 5 of the 1935 "An act for the suppression of prostitution in the District of Columbia" is specific to forfeiture, not impoundment. The text in the Omnibus Act should instead refer to "section 6," which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

[27] D.C. Code § 22-2724(b). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[28] D.C. Code § 22-2724(b).

[29] D.C. Code § 22-2724(b)(1), (b)(2).

[30] D.C. Code § 22-2701(f) ("An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.").

[31] D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.").

refundable,[32] or are refundable only in narrow circumstances.[33] Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner's right to a due process hearing.[34] There is no DCCA case law interpreting the current D.C. Code prostitution impoundment provision. In contrast, a vehicle used in furtherance of the RCC patronizing prostitution offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what otherwise is a minor misdemeanor offense or comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. A vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under certain circumstances, however, as opposed to impoundment, because that statute targets "pimps" and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Sixth, the revised patronizing prostitution statute is no longer subject to civil asset forfeiture. Current D.C. Code § 22-2723 makes subject to forfeiture all conveyances that

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[32] Subsection (d) requires paying "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing" and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6)."); § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[33] D.C. Code § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[34] Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner "shall be entitled to a due process hearing regarding the seizure of the vehicle," D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must "convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing." D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing." D.C. Code § 22-2724(d) (emphasis added).

are used, or intended to be used, "to transport, or in any manner to facilitate a violation of a prostitution-related offense,"[35] and all "money, coins, and currency" which are used, or intended to be used "in violation of a prostitution-related offense."[36] Prostitution forfeitures are subject to D.C. Law 20-278,[37] which provides significant due process protections for the owner of property,[38] but still can result in a lengthy or permanent loss of an individual's vehicle or money. There is no DCCA case law interpreting the current D.C. Code § 22-2723. However, under an earlier version of the statute, the DCCA held in *One Toyota Pick-Up Truck v. District of Columbia* that forfeiture of the truck the defendant used to solicit for prostitution, valued at $15,500, would violate the Excessive Fines Clause of the U.S. Constitution.[39] The DCCA determined that, under controlling Supreme Court case law, the forfeiture would be "grossly disproportionate to the gravity of the defendant's offense."[40] It was the defendant's first conviction for solicitation and the DCCA stated that solicitation for prostitution "particularly for a first conviction, has historically been treated as a minor crime in the District, and was certainly so treated at the time of the defendant's conduct."[41] At the time, a first offense for solicitation for prostitution had a maximum criminal fine of $300 and no incarceration and the defendant actually received a $150 fine.[42] The court concluded that "forfeiting a vehicle valued at $15,500 inflicts a penalty . . . on the order of fifty times the fine authorized . . . and one hundred times the fine actually imposed."[43] Finally, the DCCA stated that while the

[35] D.C. Code § 22-2723(a)(1). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[36] D.C. Code § 22-2723(a)(2). The current D.C. Code definition of "prostitution-related offenses" includes both engaging in "prostitution" and "solicit[ing] for prostitution" in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[37] D.C. Code § 22-2723(b).

[38] *See* D.C. Code §§ 41-301 through 41-315.

[39] *One 1995 Toyota Pick-Up Truck v. District of Columbia,* 718 A.2d 558, 559, 560 (D.C. 1998).

[40] The DCCA applied the test established in *United States v. Bajakajian*, 524 U.S. 321 (1998), which states that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 564-65 (quoting *United States v. Bajakajian*, 524 U.S. 321 (1998)). Prior to engaging in the proportionality analysis, the DCCA first had to establish whether the forfeiture provision in D.C. Code § 22-2723 was a "fine" within the meaning of the Excessive Fines Clause because "the limitation on excessive fines is meant to curb 'the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 560 (internal quotations and citations omitted) (emphasis in the original). The DCCA concluded that forfeiture of the truck pursuant to D.C. Code § 22-2723 was "at least in part," punishment for solicitation and that D.C. Code § 22-2723 "has distinct punitive aspects," an "innocent owner" defense and a direct tie to a violation of law. *Id.* at 562, 563. Although D.C. Code § 22-2723 has been amended since the version at issue in *One 1995 Toyota Pick-Up Truck*, it retains an "innocent owner defense" and directly ties the forfeiture to a violation of the prostitution laws, making it likely that the DCCA would reach the same conclusion—that D.C. Code § 22-2723 is subject to the Excessive Fines Clause.

[41] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565.

[42] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 565-66.

[43] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The court stated that these ratios are "comparable to the seventy-to-one figured considered grossly disproportionate" in the controlling Supreme Court case

defendant "fit[] within the class of persons for whom the statute was principally designed, he can not [sic] be made to bear grossly disproportionate responsibility for the problem of prostitution in the District or for the attendant consequences . . . he is, at bottom, one individual who on one occasion attempted to retain a prostitute."[44]

In contrast, a conveyance or money used or intended to be used in furtherance of the RCC patronizing prostitution offense is no longer subject to forfeiture. Forfeiture of a vehicle or money is a disproportionate penalty under the RCC patronizing prostitution statute and may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the statute.[45] A vehicle or money used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under RCC § 22E-4404 because that statute targets "pimps" and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised patronizing prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 ("current D.C. Code prostitution nuisance provisions") and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 ("Title 42 nuisance provisions."). The current D.C. Code prostitution nuisance provisions apply to "any building, erection, or place used for the purpose of lewdness, assignation, or prostitution,"[46] or a nuisance that is established "in a criminal proceeding."[47] The scope of "in a criminal proceeding" is unclear under

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United States v. Bajakajian, 524 U.S. 321 (1998) and are "also consistent with excessiveness determinations in of other federal courts." *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566 (internal citations omitted).

[44] *One 1995 Toyota Pick-Up Truck*, 718 A.2d at 566. The DCCA further noted that "the forfeiture of the pick-up truck cannot fairly be said to compensate the District for any loss associated with Esparza's crime, one justification commonly advanced for the *in rem* action. . . .And although no findings have been made on the impact on Esparza and his family of the forfeiture of the truck, the government does not dispute Esparza's assertions that the vehicle played a significant role in the maintenance of his livelihood. *Id.* (internal citations omitted).

[45] The forfeiture statute has been amended since the version at issue in the 1998 *One 1995 Toyota Pick-Up Truck* case, but the amendments do not address the basis for the DCCA's ruling in that case that forfeiture of a vehicle valued at $15,500 was grossly disproportionate when the defendant received at $150 fine for a first conviction of solicitation for prostitution. The penalties for soliciting for prostitution have increased since the 1998 *One 1995 Toyota Pick-Up Truck* case, but it is unclear whether they would be significant enough for forfeiture of a vehicle to survive a constitutional challenge. The DCCA has not interpreted the current forfeiture statute under the increased prostitution or solicitation penalties.

[46] D.C. Code § 22-2713(a) ("Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.").

[47] D.C. Code § 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless

current District law.[48] Violating a court order under the current D.C. Code prostitution nuisance provisions is punishable by no less than three months and no more than six months

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sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[48] D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if "the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding." A broad reading of "in a criminal proceeding" is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether "in a criminal proceeding" extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . ."). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a "disorderly house" under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house." Under DCCA case law, a "bawdy house" used for prostitution is a type of "disorderly house," but a "disorderly house" can extend beyond a "bawdy house" to encompass "activities on the premises that either disturb the public or constitute a nuisance per se." *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a "disorderly house" that is used for "lewdness, assignation, or prostitution" as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of "lewdness, assignation, or prostitution," and D.C. Code § 22-2717 refers to the existence of "*the* nuisance." *Id.* at 971-72 (emphasis in original). The court concluded that "the" refers back to the requirements of "lewdness, assignation, or prostitution" in D.C. Code § 22-2713 and that D.C. Code § 22-2717 "concerns only those nuisances defined in" D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a "bawdy house" under D.C. Code § 22-2722 would "clearly entail the type of nuisance described in [D.C. Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it." *Id.* The court stated that "[b]ecause the Government failed to show that [the property] was 'used for the purpose of lewdness, assignation, or prostitution," the [defendants'] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717]." *Id.* The court acknowledged that the DCCA in *Raleigh v. United States* had stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for "lewdness, assignation, or prostitution," and, furthermore, that the DCCA "did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717]." *Id*. The court stated that "we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-

imprisonment.[49] The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.[50] The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,[51] and again in 2010 to include firearm-related nuisances.[52] It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law[53] or legislative

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2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713]." *Id.*

[49] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[50] "Drug–Related Nuisance Abatement Act of 1998," 1998 District of Columbia Laws 12-194 (Act 12–470).

[51] "Nuisance Abatement Reform Amendment Act of 2006," 2006 District of Columbia Laws 16-81 (Act 16–267).

[52] "Community Impact Statement Amendment Act of 2010," 2010 District of Columbia Laws 18-259 (Act 18-446).

[53] Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington*, D.C., 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 "authorizes a special summary action in equity to abate and enjoin" a nuisance, and that D.C. Code § 42-3102 "authorizes an action to abate, enjoin, and prevent" a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

It should be noted that the "special summary action in equity to abate and enjoin" a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 ("In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented."). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 ("Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course."). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 ("(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated

history on this issue. In contrast, the revised patronizing prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions[54] do not apply to real property that is used for "lewdness" or "assignation" like the current D.C. Code prostitution nuisance provisions do.[55] To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.[56] Second, the Title 42 nuisance provisions apply to any "real property"[57] "used" or "intended to be used" for prostitution,[58] whereas current D.C. Code § 22-2713 is limited to any "building, erection, or place used for the purpose of prostitution."[59] Third, the Title 42 nuisance provisions do not extend to a prostitution-

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with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.").

[54] The Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C).

[55] The current D.C. Code prostitution nuisance provisions apply to any "building, erection, or place used for the purposes of lewdness, assignation, or prostitution." D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of "debauchery" or "other immoral" purposes, which may overlap with "lewdness" or "assignation." However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of "prostitution."

[56] "Lewdness" and "assignation" appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that "lewdness" "has been defined by the Supreme Court as 'that form of immorality which has relation to sexual impurity.'" *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of "assignation," but Black's Law Dictionary defines it as "[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex." Assignation, Black's Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[57] The Title 42 nuisance provisions define "property" as "tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land."

[58] The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

[59] D.C. Code § 22-2713.

related nuisance that is established in a "criminal proceeding" as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months' imprisonment as do the current D.C. Code prostitution nuisance provisions.[60] Fifth, while both sets of nuisance provisions provide for a preliminary injunction,[61] a permanent injunction and order of abatement,[62] and a procedure for vacating an order of abatement,[63] the procedural

[60] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."). A violation of a court order "issued under" the Title 42 nuisance provisions is "punishable as a contempt of court." D.C. Code § 42-3112(a).

[61] D.C. Code §§ 22-2714 (". . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . ."); 42-3104(a) ("Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .").

[62] D.C. Code §§ 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."); 42-3110(a) ("If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.").

[63] D.C. Code §§ 22-2719 ("If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law."); 42-3112(c) ("Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior

requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,[64] as do the types of equitable relief.[65] This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the general RCC deferred disposition provision in RCC § 22E-602 makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703. Current D.C. Code § 22-2703 states that the "court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct."[66] The statute specifies examples of conditions that the court may impose on the defendant, such as "an order to stay away from the area within which the offense or offenses occurred."[67] D.C. Code § 22-2703 was enacted in 1914. Despite substantive revisions to the current D.C. Code prostitution or solicitation statute (D.C. Code § 22-2701) in 2007, 2009, and 2015, D.C. Code § 22-2703 has not been substantively amended since 1996.[68] In contrast, the

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to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.").

[64] For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 ("The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111."). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

[65] For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all "fixtures, furniture, musical instruments, or movable property used in conducting the nuisance." D.C. Code § 22-2717 ("an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . . ."). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) ("Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.").

[66] D.C. Code § 22-2703.

[67] D.C. Code § 22-2703.

[68] The second sentence of D.C. Code § 22-2703, specifying examples of conditions that the court may impose on the defendant, was added in 1996. Safe Streets Anti–Prostitution Amendment Act of 1996, 1996 District of Columbia Laws 11-130 (Act 11–237).

RCC general deferred disposition provision in RCC § 22E-602 makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703.

First, the revised deferred disposition provision no longer codifies examples of conditions that the court may impose on the defendant. This language is unnecessary because the revised provision requires "reasonable conditions" and does not restrict the conditions the court may impose. Second, the revised provision deletes this language from D.C. Code § 22-2703: "The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant."[69] The current D.C. Code deferred disposition provision for possession of a controlled substance does not have such a provision,[70] and the statutory grant of authority to probation officers appears unnecessary. Similarly, it is unclear whether the Department of Human Services of the District of Columbia needs such a statutory grant of authority, and the Women's Bureau of the Police Department no longer exists. Third, the revised provision requires the consent of the defendant and limits the probation period to a maximum of one year, instead of "for such period as the court may direct"[71] in current D.C. Code § 22-2703. Fourth, the revised provision establishes that discharge or dismissal of the charge is not a conviction "for purposes of disqualifications or disabilities imposed by law," including the imposition of recidivist penalties for prior misdemeanor convictions under RCC § 22E-606 or other similar provisions, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code[72] and the RCC.[73] Fifth, after discharge of the proceedings, the revised provision provides for sealing the publicly available records of the arrest and related court proceedings under D.C. Code § 16–803. These changes improve the clarity, consistency, and proportionality of the revised statutes.

Ninth, the patronizing prostitution statute authorizes enhanced penalties if the accused is reckless as to the fact that the person patronized is under 18 years of age, or if in fact, the person patronized is under 12 years of age. The current D.C. prostitution or solicitation statute does not enhance penalties based on the age of the complainant.[74] However, the current D.C. Code pandering statute[75] and the current D.C. Code procuring

[69] D.C. Code § 22-2703.
[70] D.C. Code § 48-904.01(e).
[71] D.C. Code § 22-2703 ("The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed."). Under the revised deferred disposition provision, the court must have the consent of the defendant to defer imposition or execution of sentence, and the period of probation is limited to one year.
[72] D.C. Code § 48-904.01(e).
[73] RCC § 48-904.01a(g).
[74] D.C. Code § 22-2701(b).
[75] D.C. Code § 22-2705(c)(1), (c)(2) (pandering statute authorizing a maximum penalty of five years imprisonment, unless the person trafficked is under the age of 18 years, in which case the maximum penalty is 20 years).

for prostitution statute[76] have enhanced penalties when the trafficked person is under the age of 18 years. The penalty enhancements do not specify any culpable mental states for the age of the complainant and there is no DCCA case law on this issue. In contrast, the RCC patronizing prostitution statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the complainant is under 18 years of age or, if, in fact the person patronized is under the age of 12 years. Recklessness as to under the age of 18 years and strict liability for under the age of 12 years is consistent with other age-based penalty enhancements in the RCC sex offenses and the RCC Chapter 16 human trafficking offenses. However, the patronizing prostitution penalty enhancement is intended to be used in the rare instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.[77] This change improves the consistency and proportionality of the revised statute.

Tenth, the patronizing prostitution statute authorizes enhanced penalties if the actor is reckless as to the fact that the person patronized is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a sexual act or sexual contact. The current D.C. prostitution or solicitation statute does not enhance penalties based on whether the person patronized is incapacitated or impaired.[78] In contrast, the RCC patronizing prostitution statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the person patronized is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a sexual act or sexual contact. These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as a penalty enhancement in the RCC Chapter 16 human trafficking offenses. However, the patronizing prostitution penalty enhancement is intended to be used when a more serious RCC sex offense, such as sexual assault (RCC § 22E-1301), or RCC Chapter 16 human trafficking offense does not apply. This change improves the consistency and proportionality of the revised statute.

Beyond these ten changes to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised patronizing prostitution statute clarifies that payment can be given to or promised to "another person." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[79] or "solicit[ing] for prostitution"[80] and defines "prostitution," in relevant part, as "a sexual act or sexual

[76] D.C. Code § 22-2707(b)(1), (c)(2) (procuring statute prohibiting receiving anything of value for or on account of arranging for prostitution and authorizing a maximum penalty of five years imprisonment, unless the person procured is under the age of 18 years, in which case the maximum penalty is 20 years).
[77] Because the patronizing prostitution statute includes more inchoate conduct (e.g., efforts to persuade) with a "knowingly" culpable mental state, there may be rare instances where patronizing prostitution is chargeable but attempted sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for attempt liability.
[78] D.C. Code § 22-2701(b).
[79] D.C. Code § 22-2701(a).
[80] D.C. Code § 22-2701(a).

contact with another person in exchange for giving . . . anything of value."[81] It is unclear whether the payment must be given to the person engaging in or soliciting for sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised patronizing prostitution statute specifies "another person." This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in, agreeing to, or soliciting for the sexual activity for payment or a third party, as long as the payment is "in exchange" for the sexual activity. This change improves the clarity and consistency of the revised statute and removes a possible gap in liability.

Second, a promise to give anything of value is sufficient for liability in the revised patronizing prostitution statute. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[82] or "solicit[ing] for prostitution"[83] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in exchange for giving . . . anything of value."[84] It is unclear whether "giving anything of value" requires that a person actually give anything of value, or if a promise to give anything of value in the future is sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised patronizing prostitution statute retains the requirement of giving anything of value, but requires an agreement to engage in sexual activity in paragraphs (a)(1) and (a)(2), and, per the explanatory note to the commentary above, it is sufficient if anything of value is promised as part of this agreement. In paragraph (a)(1), the actor must engage in sexual activity in exchange for "giving" another person anything of value pursuant to a prior agreement. In paragraph (a)(2), the actor must agree to give another person anything of value "in exchange" for sexual activity. In the revised statute the phrase "in exchange for" specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value to any person or if anything of value was promised to any person.[85] This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Third, the revised patronizing prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engages in or solicits for sexual activity, in exchange for giving another person anything of value, or agrees to give anything of value in exchange for sexual activity. The current D.C. Code prostitution or solicitation statute does not specify any culpable mental states, and there is no DCCA case law on this issue.[86]

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[81] D.C. Code § 22-2701.01(3).
[82] D.C. Code § 22-2701(a).
[83] D.C. Code § 22-2701(a).
[84] D.C. Code § 22-2701.01(3).
[85] As is noted in the explanatory note, there is overlap between paragraph (a)(1) and paragraph (a)(2). In paragraph (a)(1), if anything of value is promised to another person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, explicitly or implicitly, to give anything of value to another person in exchange for any person engaging in or submitting to sexual activity.
[86] Due to the statutory definition of "sexual contact" (D.C. Code § 22-3001(9)), prostitution based on a "sexual contact" requires that the prostitute have an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." In the context of the District's current D.C. Code sexual abuse statutes, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement. *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the

Resolving this ambiguity, the revised patronizing prostitution statute requires a "knowingly" culpable mental state for the prohibited conduct—engages in or solicits for sexual activity, in exchange for giving another person anything of value, or agrees to give anything of value in exchange for sexual activity. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[87] This change improves the clarity and consistency of the revised statute.

Fourth, the revised patronizing prostitution statute does not require that the sexual activity be "with another person." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[88] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[89] The current D.C. Code[90] and RCC[91] definitions of "sexual act" and "sexual contact" include masturbation. However, the current statute's "with another person" requirement may narrow the offense to exclude a patron engaging in or soliciting to engage in masturbation because masturbation is not "with another person." Alternatively, the current prostitution or solicitation offense could be interpreted to include a patron engaging in or soliciting to engage in masturbation "with another person," if the latter phrase is construed to mean "for another person to watch." To resolve this ambiguity, the revised statute does not require that the sexual activity be "with another person." Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised patronizing prostitution statute makes "agrees" to give anything of value in exchange for sexual activity a discrete basis of liability in paragraph (a)(2),

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appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[87] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[88] D.C. Code § 22-2701(a).

[89] D.C. Code § 22-2701.01(3).

[90] D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of "sexual act" in D.C. Code § 22-3001(8) and the definition of "sexual contact" in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph."); 22-3001(9) (defining "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[91] RCC § 22E-701.

separate from soliciting for prostitution in paragraph (a)(3). The current D.C. Code prostitution or solicitation statute prohibits "solicit[ing] for prostitution"[92] and the current D.C. Code definition of "solicit for prostitution" is, in relevant part, "to invite, entice, offer, persuade, or agree to engage in prostitution."[93] Paragraph (a)(3) of the revised statute encompasses liability for "invite," "entice," "offer," or "persuade" to engage in prostitution using language consistent with the general RCC solicitation statute (RCC § 22E-302). Paragraph (a)(2) separately and clearly addresses an agreement to engage in prostitution. This change clarifies the revised statute.

Second, the revised patronizing prostitution statute specifies that an agreement can be either explicit or implicit. The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[94] and defines "prostitution" as a "sexual act or contact with another person in return for giving or receiving anything of value."[95] The language "in return for" implies the requirement of an agreement, either explicit or implicit, but there is no DCCA case law interpreting this requirement. An older version of the statute made it unlawful to "invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading"[96] for the purpose of prostitution and DCCA case law interpreting this older statute appears to have extended to both an explicit or implicit agreement.[97] More recent case law has also looked beyond spoken words to the surrounding circumstances to assess whether there is an agreement to prostitution.[98] This change improves the clarity of the revised statutes.

Third, the revised patronizing prostitution statute uses "in exchange" for anything of value instead of "in return" for anything of value. The current D.C. Code definition of "prostitution" is a "sexual act or contact with another person in return for giving or receiving anything of value."[99] "In exchange" emphasizes the transactional nature of the sexual act or sexual contact, regardless of when the sexual activity occurs, and is not intended to substantively change current District law.

Fourth, the revised patronizing prostitution statute includes an actor who "engages in or submits to" sexual activity (paragraph (a)(1)), agrees to give anything of value in exchange for a person "engaging in or submitting to" sexual activity, (paragraph (a)(2)), and solicits any person to "engage in or submit to" sexual activity (paragraph (a)(3)). The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution or . . . solicit[ing] for prostitution"[100] and defines "prostitution" as a "sexual

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[92] D.C. Code § 22-2701(a).
[93] D.C. Code § 22-2701.01(7).
[94] D.C. Code § 22-2701(a).
[95] D.C. Code § 22-2701.01(3).
[96] D.C. Code § 22-2701 (1973).
[97] *See, e.g.*, *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) ("In the final analysis, it is a question of fact whether the acts and words of the defendant in general, viewed in the light of surrounding circumstances, constitute the enticing or addressing prohibited by the statute. Were specific language or conduct determinative, as urged by appellant, every prostitute could know how to avoid arrest.") (internal citations omitted).
[98] In 2013, the DCCA affirmed a conviction for soliciting for prostitution under D.C. Code § 22-2701 when the current definition of "solicitation" was in effect and stated that "we do not require the government to prove any particular language" and "we look to appellant's conduct or words in light of surrounding circumstances." *Moten v. United States*, 81 A.3d 1274, 1280, 1281 (D.C. 2013) (internal citations omitted).
[99] D.C. Code § 22-2701.01(3).
[100] D.C. Code § 22-2701(a).

act or contact with another person in return for giving or receiving anything of value."[101] The revised language is consistent with the revised sex offenses in RCC Chapter 13 and is not intended to substantively change current District law.

Fifth, the revised patronizing prostitution statute clarifies that an individual that engages in or submits to sexual activity in exchange for giving anything of value must do so "pursuant to a prior agreement, explicit or implicit." The current D.C. Code prostitution or solicitation statute prohibits "engag[ing] in prostitution"[102] and defines "prostitution," in relevant part, as "a sexual act or sexual contact with another person in return for giving . . . anything of value."[103] The language "in return for" implies that there was a prior agreement, but there is no DCCA case law interpreting this language. The revised patronizing prostitution statute includes giving anything of value in exchange for past sexual activity only if it is "pursuant to a prior agreement, explicit or implicit." Without requiring a prior agreement, giving anything of value in exchange for sexual activity could criminalize consensual romantic conduct with subsequent gifts. This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the revised patronizing prostitution statute is no longer subject to the definition of "anything of value" in D.C. Code § 22-1802 that applies to the current D.C. Code prostitution or solicitation statute. Current D.C. Code § 22-1802 states that "anything of value" "shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value."[104] This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within "anything of value" in the revised offense is not intended to change current District law.

[101] D.C. Code § 22-2701.01(3).
[102] D.C. Code § 22-2701(a).
[103] D.C. Code § 22-2701.01(3).
[104] D.C. Code § 22-1802.

RCC § 22E-4403. Trafficking in Commercial Sex.

Explanatory Note. *The RCC trafficking in commercial sex statute prohibits causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a commercial sex act or providing a location for this purpose, as well as obtaining anything of value from a commercial sex act. The offense provides enhanced penalties based on the age of the person trafficked and whether the person trafficked is impaired. The RCC trafficking in commercial sex statute replaces the operating a house of prostitution statute,[1] portions of the keeping a disorderly or bawdy house statute,[2] portions of the pandering statute,[3] the procuring for prostitution statute,[4] the procuring for a house of prostitution statute,[5] the procuring for a third person statute,[6] and the definitions statute that applies to these offenses.[7] The revised trafficking in commercial sex statute also replaces in relevant part two distinct provisions for the current D.C. Code prostitution and solicitating for prostitution offenses: provisions for establishing a nuisance and abating a nuisance,[8] and provisions for vehicle impoundment[9] and the Anti-Prostitution Vehicle Impoundment Proceeds Fund.[10]*

Subsection (a) specifies the prohibited conduct for the RCC trafficking in commercial sex statute. Paragraph (a)(1) specifies one basis of liability for the offense. Per paragraph (a)(1), the actor must act with "intent to receive anything of value as a result." "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that the actor would receive anything of value as a result. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually received anything of value as a result, just that the actor believed to a practical certainty that the actor would receive anything of value as a result.

Under subparagraph (a)(1)(A) and subparagraph (a)(1)(B), the actor must either cause, procure, provide, recruit, or entice a person to engage in or submit to a "commercial sex act" with or for another person, or provide or maintain a location for a person to engage in or submit to a "commercial sex act" with or for another person. "Commercial sex act" is defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." The requirement "with or for another person" may be satisfied if the

[1] D.C. Code § 22-2712.
[2] D.C. Code § 22-2722.
[3] D.C. Code § 22-2705(a)(1), (a)(2). As is discusssed in the commentary to this offense, other RCC offenses, such as kidnapping (RCC § 22E-1401) and criminal restaint (RCC § 22E-1402), replace current D.C. Code §§ 22-2705(a)(3) and 22-2705(b), which prohibit abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage.
[4] D.C. Code § 22-2707.
[5] D.C. Code § 22-2710.
[6] D.C. Code § 22-2711.
[7] D.C. Code § 22-2701.01.
[8] D.C. Code §§ 22-2713 - 22-2720.
[9] D.C. Code § 22-2724.
[10] D.C. Code § 22-2725.

actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct.[11] An actor who causes, procures, etc., a person to engage in or submit to a consensual commercial sex act with the actor, or provides or maintains a location for a person to engage in or submit to a consensual commercial sex act with the actor, may be subject to liability under the RCC patronizing prostitution statute (RCC § 22E-4402).[12]

Paragraph (a)(1) also specifies a culpable mental state of "purposely." Per the rule of construction in RCC § 22E-207, the "purposely" culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(A) and subparagraph (a)(1)(B). "Purposely" is a defined term in RCC § 22E-206 that here means the actor must "consciously desire" that the actor causes, procures, etc., a person to engage in or submit to a commercial sex act with or for another person, or provides or maintains a location for a person to engage in or submit to a commercial sex act with or for another person.

Paragraph (a)(2) specifies a second basis of liability for the offense. For this basis of liability, the actor must receive anything of value as a result of causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a "commercial sex act" with or for another person (subparagraph (a)(2)(A)), or providing or maintaining a location for a person to engage in or submit to a "commercial sex act" with or for another person (subparagraph (a)(2)(B)). "Commercial sex act" is defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." Paragraph (a)(2) specifies a culpable mental state of "knowingly." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(2) applies to the elements in paragraph (a)(2), subparagraph (a)(2)(A), and subparagraph (a)(2)(B). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor receives anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person, or providing or maintaining a location for a person to engage in or submit to a commercial sex act with or for another person. An actor who receives anything of value as a result of causing, procuring, etc., a person to engage in or submit to a consensual commercial sex act with the actor, or providing or maintaining a location for a person to engage in or submit to a consensual commercial sex act with the actor, may be subject to liability under the RCC prostitution statute (RCC § 22E-4401).[13]

Paragraph (a)(3) specifies the final possible basis of liability for the offense. The actor must receive anything of value from the proceedings or earnings of a "commercial sex act" that a person has engaged in or submitted to, without consideration or when the

[11] Masturbation is not explicitly included in the RCC definition of "commercial sex act." However, the term "commercial sex act" is defined to include any "sexual act" or "sexual contact" performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the RCC definitions of "sexual act" or "sexual contact," if it performed in exchange for anything of value, it constitutes a "commercial sex act."

[12] If the commercial sex act is not consensual, or if the person whom the actor solicits or patronizes is under the age of 18 years, there may be liability under the RCC sex assault offenses in Chapter 13.

[13] If the commercial sex act is not consensual, or if the person whom the actor solicits or with whom the actor engages in sexual activity is under the age of 18 years, there may be liability under the RCC sex assault offenses in Chapter 13.

consideration is providing or maintaining a location for a "commercial sex act." "Commercial sex act" is defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(2) applies to the elements in paragraph (a)(3). "Knowingly" is a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that the actor receives anything of value from the proceeds or earnings of a "commercial sex act" that a person has engaged in or submitted to, without consideration or when the consideration is providing or maintaining a location for a "commercial sex act." Unlike the other bases of liability, paragraph (a)(3) does not require that the "commercial sex act" be "with or for another person." An actor that engages in a "commercial sex act" with a person, and receives anything of value from any earnings or proceeds of that commercial sex act, has liability under paragraph (a)(3) if the other requirements of the provision are met. Similarly, if the only consideration is providing or maintaining a location for a "commercial sex act" with the actor, the actor has liability under paragraph (a)(3) if the other requirements of the provision are met.

Subsection (b) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (b)(2) codifies several penalty enhancements for the revised trafficking in commercial sex statute. If any of the specified enhancements apply, the penalty classification for the revised offense is increased by one class.

The penalty enhancement in subparagraph (b)(2)(A) applies if the actor is reckless as to the fact that the person trafficked is under 18 years of age, or if, in fact, the person trafficked is under 12 years of age. "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person trafficked is under 18 years of age. In the alternative, the penalty enhancement applies if the person trafficked "in fact" is under 12 years of age. "In fact" is defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here the age of the person trafficked.

Two penalty enhancements are codified under subparagraph (b)(2)(B). Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(i), the actor must be reckless as to the fact that the person trafficked is "incapable of appraising the nature of the commercial sex act" or of understanding the right to give or withhold consent to the commercial sex act. In addition, the person's inability must be either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (b)(2)(B) applies to the requirements in sub-subparagraph (b)(2)(B)(i). "Reckless" is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person trafficked is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due

to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness.

Under subparagraph (b)(2)(B) and sub-subparagraph (b)(2)(B)(ii), the actor must be reckless as to the fact that the person trafficked is incapable of communicating[14] willingness or unwillingness to engage in the commercial sex act. This language is identical to one of the requirements in second degree and fourth degree of the RCC sexual assault statute (RCC § 22E-1301) and is intended to have the same meaning. Sub-subparagraph (b)(2)(B)(ii) includes paralyzed individuals who are able to appraise the nature of the commercial sex act or of understanding the right to give or withhold consent under sub-subparagraph (b)(2)(B)(i), but are unable to communicate. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in subparagraph (b)(2)(B) applies to the requirements in sub-subparagraph (b)(2)(B)(i). "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the person trafficked is incapable of communicating willingness or unwillingness to engage in the commercial sex act.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised trafficking in commercial sex statute clearly changes District law in twelve main ways.*

First, the RCC trafficking in commercial sex statute no longer prohibits abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage. Several of the current D.C. Code prostitution statutes prohibit abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage, with maximum penalties that range from five years to 20 years.[15] In addition to these statutes, current D.C.

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[14] If the complainant is unable to communicate verbally or orally, but is able to make gestures, facial expressions, or engage in other conduct, the person may be capable of communicating and this element may not be satisfied.

[15] D.C. Code § 22-2704 prohibits abducting, secreting, or harboring a person under the age of 18 years for purposes of prostitution and has a maximum penalty of 20 years. D.C. Code § 22-2704 ("(a) It is unlawful for any person, for purposes of prostitution, to: (1) Persuade, entice, or forcibly abduct a child under 18 years of age from his or her home or usual abode, or from the custody and control of the child's parents or guardian; or (2) Secrete or harbor any child so persuaded, enticed, or abducted from his or her home or usual abode, or from the custody and control of the child's parents or guardian. (b) A person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both.").

D.C. Code § 22-2705(a)(3) prohibits taking or detaining an individual to force them to marry another person, with a maximum penalty of 5 years, unless the individual is under the age of 18 years, in which case the maximum penalty is 20 years. D.C. Code §§ 22-2705(a)(3), (c)(1), (c)(2) ("(a) It is unlawful for any person, within the District of Columbia to: (3) Take or detain an individual against the individual's will, with intent to compel such individual by force, threats, menace, or duress to marry the abductor or to marry any other person. . . . (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) or (b) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) or (b) of this section when the individual so placed, caused, compelled, induced, enticed, procured, taken, detained, or used or attempted to be so placed, caused, compelled, induced, enticed, procured, taken, detained, or used is under the age of 18 years shall be guilty of a felony and, upon

Code § 22-2708 prohibits "plac[ing] or leav[ing]" a spouse or domestic partner "in a house of prostitution, or to lead a life of prostitution" by "force, fraud, intimidation, or threats."[16] These statutes overlap with the current D.C. Code kidnapping statute (RCC § 22-2001), which has a higher maximum penalty (30 years),[17] as well as other current D.C. Code statutes, such as human trafficking. In contrast, the RCC kidnapping (RCC § 22E-1401) and RCC criminal restraint (RCC § 22E-1402) statutes criminalize abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage, as well as placing or leaving a spouse or domestic partner "in a house of prostitution, or to lead a life

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conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.

D.C. Code § 22-2705(b) prohibits a parent, guardian, or other legal custodian from consenting to an individual being taken or detained for purposes of prostitution or sexual activity, with a maximum penalty of 5 years, unless the individual is under the age of 18 years, in which case the maximum penalty is 20 years. D.C. Code §§ 22-2705(b), (c)(1), (c)(2) ("(b) It is unlawful for any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual's being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact. . . . (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) or (b) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) or (b) of this section when the individual so placed, caused, compelled, induced, enticed, procured, taken, detained, or used or attempted to be so placed, caused, compelled, induced, enticed, procured, taken, detained, or used is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.").

D.C. Code § 22-2706 prohibits, by threats or duress, detaining an individual or compelling an individual to reside with any person for the purposes of prostitution or sexual activity and has a maximum penalty of 15 years, unless the complainant is under the age of 18, in which case the maximum penalty is 20 years. D.C. Code § 22-2706 ("(a) It is unlawful for any person, within the District of Columbia, by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact. (b)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 15 years or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) of the section when the individual so detained or compelled is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.").

D.C. Code § 22-2709 prohibits attempting to detain an individual in a disorderly house or house of prostitution because of debt accrued while living in that house and has a five year maximum penalty. D.C. Code § 22-2709 ("Any person or persons who attempt to detain any individual in a disorderly house or house of prostitution because of any debt or debts such individual has contracted, or is said to have contracted, while living in said house of prostitution or disorderly house shall be guilty of a felony, and on conviction thereof be imprisoned for a term not less than one year nor more than 5 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01."). This statute will also overlap with attempted kidnapping and attempted criminal restraint under the RCC general attempt provision (RCC § 22E-301).

[16] D.C. Code § 22-2708 ("Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than one year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[17] D.C. Code § 22-2001.

of prostitution" by "force, fraud, intimidation, or threats." There may also be liability under the RCC human trafficking statutes in RCC Chapter 16 or other RCC offenses against persons, such as sexual assault. There is no reason why forcing a person into prostitution should be penalized differently or less severely than other forms of sexual assault, kidnapping, criminal coercion, and human trafficking. This change reduces unnecessary overlap between offenses and improves the clarity, consistency, and proportionality of the revised statute.

Second, the RCC trafficking in commercial sex statute is limited to consensual commercial sex acts that are not caused by the prohibited means in the RCC human trafficking statutes, such as physical force or a coercive threat. Two of the current D.C. Code prostitution statutes require the use of force, threats, etc.,[18] but most of the current D.C. Code prostitution statutes do not specify whether force, threats, etc., are required. As a result, most of the current D.C. Code prostitution statutes appear to extend liability equally to both coerced and consensual commercial sexual conduct, particularly the statutes that require "causing"[19] or "compelling"[20] an individual to engage in prostitution. There is no DCCA case law discussing the scope of "causing" or "compelling" in these statutes. However, under earlier versions of the D.C. Code pandering[21] and procuring for prostitution[22] statutes, the DCCA upheld the trial court admitting evidence of the appellant's assault on a prostitute because the "evidence was relevant to the issue of appellant's intent to coerce complainant to engage in prostitution."[23] To the extent that the current D.C. Code prostitution statutes extend to forced or coerced commercial sexual conduct, they overlap with the current D.C. Code human trafficking statutes, which generally have significantly higher maximum penalties for the same conduct.[24] In contrast,

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[18] D.C. Code § 22-2706 ("(a) It is unlawful for any person, within the District of Columbia, by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact."); 22-2708 ("Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than one year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

[19] D.C. Code §§ 22-2705(a)(2)(C) (pandering statute prohibiting, in part, "[c]ause . . . any individual" to "engage in prostitution."); 22-2707(a) (procuring statute prohibiting, in part, receiving anything of value "for or on account of . . . causing any individual to engage in prostitution or a sexual act or contact.").

[20] D.C. Code §§ 22-2705(a)(2)(C) (pandering statute prohibiting, in part, "[c]ause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual" to "engage in prostitution.").

[21] D.C. Code § 22-2705.

[22] D.C. Code § 22-2707.

[23] *Godfrey v. United States*, 454 A.2d, 293, 295, 295 & n. 1 (D.C. 1982).

[24] The relevant D.C. Code human trafficking statutes have a maximum term of imprisonment of 20 years. *See* D.C. Code §§ 22-1833; 22-1834; 22-1837(a)(1), (c) (statutes prohibiting trafficking in labor or commercial sex acts and sex trafficking of children with maximum terms of imprisonment of 20 years, and statute prohibiting benefitting financially from human trafficking with the same maximum penalty as the underlying trafficking offense, which, in the case of trafficking in commercial sex acts and sex trafficking of children, is 20 years).
In contrast, the current D.C. Code prostitution statutes that prohibit causing individuals to engage in prostitution and procuring individuals for prostitution, have a maximum penalty of five years unless the

the RCC trafficking in commercial sex statute is limited to consensual commercial sex acts, with lower maximum penalties, and the RCC human trafficking statutes in Chapter 16 require forced or coerced commercial sex acts, and have higher maximum penalties. The seriousness of forced or coerced commercial sex acts is far greater than consensual acts. This change improves the clarity and the proportionality of the revised assault statute.

Third, the RCC trafficking in commercial sex statute requires a "purposely" culpable mental state for the prohibited conduct in subparagraph (a)(1)(A) and that the conduct be "with intent to receive anything of value as a result." The current D.C. Code pandering statute prohibits, in part, conduct to "[c]ause, compel, induce, entice, or procure" any individual "to engage in prostitution."[25] There is no requirement that the defendant receive anything of value as a result. The statute does not specify any culpable mental states and there is no District case law on this issue. However, in the context of denying a claim for merger of a pandering conviction and a procuring conviction, the DCCA has stated that "[t]o convict appellant of pandering, the government had to prove that he induced or coerced complainant to engage in prostitution, not merely that he facilitated or arranged for an act that she, herself, elected to do."[26] In contrast, the RCC trafficking in commercial sex statute requires a "purposely" culpable mental state for the pandering conduct under paragraph subparagraph (a)(1)(A)—cause, procure, provide, recruit, or entice a person to engage in or submit to a commercial sex act—and that the defendant act "with intent to receive anything of value as a result." In the RCC statute, the "purposely" culpable mental state excludes many well-intentioned individuals who might otherwise be captured by a lower culpable mental state.[27] In addition, the RCC trafficking in commercial

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complainant is under the age of 18 years, in which case the maximum penalty is 20 years. *See* D.C. Code §§ 22-2705(a)(2)(C), (c)(1), (c)(2) (pandering statute prohibiting causing, compelling, inducing, enticing, or procuring any individual to engage in prostitution with a maximum term of imprisonment of 5 years unless the complainant is under the age of 18 years, in which case the maximum term of imprisonment is 20 years); 22-2707 (procuring statute prohibiting receiving anything of value for arranging for or causing an individual to engage in prostitution with a maximum term of imprisonment of five years, unless the complainant is under the age of 18 years, in which case the maximum term of imprisonment is 20 years); 22-2710 (procuring statute prohibiting paying or receiving anything of value for procuring for or placing an individual in a house of prostitution with a maximum term of imprisonment of five years); 22-2711 (procuring statute prohibiting receiving anything of value for procuring and placing an individual in the custody of a third person for purposes of prostitution with a maximum term of imprisonment of five years); 22-2712 (statute prohibiting operating a house of prostitution with a maximum term of imprisonment of five years); 22-2722 (statute prohibiting keeping a bawdy house or disorderly house with a maximum term of imprisonment of five years).

[25] D.C. Code § 22-2705(a)(2)(C).

[26] *Godfrey v. United States*, 454 A.2d 295 n.1 (D.C. 1982). Although *Godfrey* was decided in 1982, D.C. Code § 22-2705 has not been substantively amended since.

[27] The RCC generally uses a lower culpable mental state of knowledge for prohibited conduct, which here would require that the defendant be "practically certain" that he or she causes, procures, etc., an individual to engage in or submit to a commercial sex act. However, a knowledge culpable mental state, particularly without any additional requirement that the defendant receive or intend to receive anything of value as a result, would criminalize well-intentioned individuals such as friends, family, other individuals engaged in commercial sex work, and medical professionals, that facilitate consensual commercial sex work that a person chooses to do. For example, a friend or family member that drives an individual to a location for commercial sex work that the individual wants to do or needs to do for financial reasons is arguably "knowingly" causing that individual to engage in commercial sex work. The friend or family member is

sex offense requires that an individual must have "intent to receive anything of value as a result"—i.e. the individual must be practically certain that he or she will receive anything of value as a result of his or her actions. This requirement limits the RCC offense to traditional "pimping" behavior and would also excluded well-intentioned individuals that facilitate but do not desire to profit from the consensual commercial sex work of another. If an individual actually receives anything of value as a result of causing, procuring, etc., an individual to engage in a commercial sex act, that would satisfy the "with intent" requirement. This change is consistent with DCCA case law and improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the RCC trafficking in commercial sex statute punishes an attempted offense the same as most other criminal attempts. The current D.C. Code pandering statute includes an "attempt" to cause any individual to engage in prostitution,[28] and the current D.C. Code procuring for prostitution statute includes "any act . . . to attempt to procure or otherwise arrange for the purpose of prostitution."[29] There is no District case law construing this "attempt" language. The current D.C. Code pandering and procuring for prostitution statutes penalize an attempted offense the same as a completed offense. In contrast, under the RCC trafficking in commercial sex statute, the general attempt provision in RCC § 22E-301 will establish liability and penalties for attempted trafficking in commercial sex consistent with other RCC offenses. Under RCC § 22E-301, the penalty for an attempted offense is one-half the maximum penalty of the completed offense, consistent with several of the more recently revised D.C. Code offenses.[30] There is no clear rationale for attempts to be treated differently in trafficking in commercial sex as compared to other offenses, or for penalizing attempted trafficking in commercial sex the same as the completed offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability a parent or guardian of an individual consenting to that individual being used in prostitution. The current D.C. Code pandering statute prohibits, in part, "any parent, guardian, or other person having legal custody of the person of an individual [consenting] to the individual's being . . . used by any person, for the purpose of prostitution or a sexual act or sexual contact."[31] The current D.C. Code pandering statute has a maximum penalty of five years unless the complainant is under the age of 18 years, in which case the maximum penalty is 20 years.[32] In contrast, the RCC arranging for sexual

"practically certain," as required by the definition of "knowingly" in RCC § 22E-206, that his or her conduct is causing that individual to engage in commercial sex work.

[28] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting "Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . to engage in prostitution.").

[29] This language appears in the current D.C. Code definition of "arranging for prostitution." D.C. Code § 22-2701.01(1) (defining "arranging for prostitution" as "any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or anything of value was given or received."). The definition is incorporated into the current D.C. Code procuring for prostitution statute, which prohibits receiving anything of value "for or on account of arranging for . . . any individual to engage in prostitution."). D.C. Code § 22-2707.

[30] *See, e.g.,* D.C. Code § 22–3018, Attempts to commit sexual offenses.

[31] D.C. Code § 22-2705(b).

[32] D.C. Code § 22-2705(c)(1), (c)(2).

conduct with a minor or person incapable of consenting statute (RCC § 22E-1306) criminalizes a person with a responsibility under civil law for the health, welfare, or supervision of a complainant that is under the age of 18 years giving effective consent for that complainant to engage in or submit to a sexual act or sexual contact. If the sexual act or sexual contact occurs, there also may be liability under the RCC sexual assault offenses in Chapter 13 or RCC human trafficking statutes in Chapter 16. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised prostitution statutes.

Sixth, to the extent that keeping a "disorderly house" does not otherwise satisfy the RCC trafficking in commercial sex statute (including accomplice liability for trafficking in commercial sex), this conduct is no longer criminalized in the RCC.[33] Current D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house" with a five year maximum penalty.[34] The statute does not codify the elements of the offense; they are established entirely by District case law. DCCA case law refers to the common law definition of a "disorderly house"[35] and establishes that keeping a "disorderly house" requires that "acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them."[36] A "bawdy house" for prostitution is a type of "disorderly house," but a "disorderly house" can extend to other conduct.[37] In contrast, the RCC

[33] *But see* RCC § 48-904.12 prohibits knowingly maintaining or opening any location with the intent that the location will be used to manufacture methamphetamine. While it seems likely that such a location would be considered a "disorderly house" under current District law, there is no DCCA case law on point.

[34] D.C. Code § 22-2722 ("Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both.").

[35] *See, e.g.*, *Harris v. United States*, 315 A.2d 569, 572 (D.C. 1974) ("Since Congress in enacting our disorderly house statute made no attempt to define what conduct it was seeking to proscribe we necessarily must resort to the common-law definition of the crime.").

[36] *Harris v. United States*, 315 A.2d 569, 575 (D.C. 1947). Earlier DCCA case law (*Payne v. United States*, 171 A.2d 509, 511 (D.C. 1961)) required that the acts be "subversive of the public morals," but *Harris* specifically overruled this requirement. *Harris*, 315 A.2d at 573 ("We conclude . . . that subversion of the public morals is not an element of [keeping a disorderly house]. . . . *Payne* was incorrect in requiring proof by the government that the defendant subverted public morals."). *Payne* had upheld a disorderly house conviction when the defendant regularly purchased stolen property at her home and the court in *Harris* noted that this "departed from the mainstream of the common law that for a disorderly house to exist there must be a public disturbance or a nuisance per se." *Harris*, 315 A.2d at 573.

[37] The majority of District case law on disorderly houses is limited to prostitution, but the United States District Court for the District of Columbia noted that a "crack house" would likely be a nuisance per se and would be a disorderly house, even if it did not disturb the public peace. *United States v. Wade*, 992 F. Supp. 6, 15 & n.5 (D.D.C. 1997) (ordered vacated on other grounds by *United States v. Wade*, 152 F.3d 969 (D.C. Cir. 1998) ("A reasonable argument could be made that a crack house fits under this definition [nuisance per se]; the inherent potential for breaches of the peace when a crack house is present is beyond question. However, this court does not at this time conclude that § 22–2722 is applicable whenever police seize a crack house, and therefore limits its reach to situations in which the government has proven that there exists an actual, demonstrative public disturbance."). The United States District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

trafficking in commercial sex statute, and the RCC generally, do not specifically criminalize keeping a "disorderly house." If an individual commits a crime at or in relation to the property, such as a drug-related or prostitution-related crime, that individual will have liability for that offense. If an individual does not commit a crime at or in relation to the property, but merely "knows or should know" of the activity at the property, it is disproportionate to impose criminal liability. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 et. seq. address the harm of such a property, and are discussed elsewhere in this commentary. Where, however, a person purposely maintains a "disorderly house" to facilitate trafficking in commercial sex, there may be liability as a principal or accomplice to RCC trafficking in commercial sex statute to the extent the statutory requirements are met. This change improves the clarity, consistency, and proportionality of the revised statutes.

Seventh, to the extent that keeping a "bawdy house" does not otherwise satisfy the RCC trafficking in commercial sex statute (including accomplice liability for trafficking in commercial sex), this conduct is no longer criminalized in the RCC. Current D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house" with a five year maximum penalty.[38] The statute does not codify the elements of the offense; they are established entirely by District case law. DCCA case law refers to the common law definition of a "disorderly house"[39] and establishes that keeping a "disorderly house" requires that "acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them."[40] The DCCA has stated that "the government does not have to prove ownership or legal control of the premises"[41] and that it is sufficient that the defendant "in fact controlled or managed the premises."[42] A "bawdy house" is a type of "disorderly house," but DCCA case law does not clearly state the elements of a "bawdy

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The District case law on a "disorderly house" is fairly limited in scope, but the United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[38] D.C. Code § 22-2722 ("Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both.").

[39] *See, e.g.*, *Harris v. United States*, 315 A.2d 569, 572 (D.C. 1974) ("Since Congress in enacting our disorderly house statute made no attempt to define what conduct it was seeking to proscribe we necessarily must resort to the common-law definition of the crime.").

[40] *Harris v. United States*, 315 A.2d 569, 575 (D.C. 1947). Earlier DCCA case law (*Payne v. United States*, 171 A.2d 509, 511 (D.C. 1961)) required that the acts be "subversive of the public morals," but *Harris* specifically overruled this requirement. *Harris*, 315 A.2d at 573 ("We conclude . . . that subversion of the public morals is not an element of [keeping a disorderly house]. . . . *Payne* was incorrect in requiring proof by the government that the defendant subverted public morals."). *Payne* had upheld a disorderly house conviction when the defendant regularly purchased stolen property at her home and the court in *Harris* noted that this "departed from the mainstream of the common law that for a disorderly house to exist there must be a public disturbance or a nuisance per se." *Harris*, 315 A.2d at 573.

[41] *Thomas v. United States*, 588 A.2d 272, 275 (D.C. 1991).

[42] *Thomas v. United States*, 588 A.2d 272, 275 (D.C. 1991).

house" specifically. In dicta, the DCCA referred to a "bawdy house" as "a place for the convenience of people of both sexes in resorting to lewdness.[43]

In contrast, keeping or maintaining a "bawdy house," alone, is not sufficient for liability under the RCC trafficking in commercial sex statute. Keeping or maintaining a "bawdy house" must otherwise satisfy the requirements of the RCC offense. Three provisions in particular apply to keeping or maintaining a "bawdy house," although the other provisions of the RCC offense may also apply: 1) purposely providing or maintaining a location for a commercial sex act with or for another person with intent to receive anything of value as a result (subparagraph (a)(1)(B)); 2) knowingly receiving anything of value as a result of providing or maintaining a location for a commercial sex act with or for another person; (subparagraph (a)(2)(B)); or 3) receiving anything of value from a commercial sex act and providing or maintaining a location for a commercial sex act as the only consideration (paragraph (a)(3)). Unlike current law, a person that merely "knows or should know" that prostitution occurs at the property and does nothing to prevent it is not criminally liable. It is disproportionate to impose criminal liability in such a situation. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 address the harm of such a property, and are discussed elsewhere in this commentary. Although the scope of the RCC offense may be narrower than the current D.C. Code "bawdy house" offense, it is also broader in the sense that a single commercial sex act, or no commercial sex act, can be sufficient for liability, as opposed to the requirement of "regularly" sexual activity occurring under current law. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised trafficking in commercial sex statute authorizes enhanced penalties if the accused is reckless as to the fact that the person trafficked is under 18 years of age or if, in fact, the person trafficked is under 12 years of age. The current D.C. Code pandering statute[44] and the current D.C. Code procuring for prostitution statute[45] have enhanced penalties when the trafficked person is under the age of 18 years, but the current D.C. Code procuring for a house of prostitution,[46] procuring for a third person,[47] operating

[43] *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972) ("A bawdy house has been defined as a place for the convenience of people of both sexes in resorting to lewdness. It is a place many people may frequent for immoral purposes or a house where one may go for immoral purposes without invitation.") (citing *Trent v. Commonwealth*, 181 Va. 338 (1943)).

[44] D.C. Code § 22-2705(c)(1), (c)(2) (pandering statute authorizing a maximum penalty of five years imprisonment, unless the person trafficked is under the age of 18 years, in which case the maximum penalty is 20 years).

[45] D.C. Code § 22-2707(b)(1), (c)(2) (procuring statute prohibiting receiving anything of value for or on account of arranging for prostitution and authorizing a maximum penalty of five years imprisonment, unless the person procured is under the age of 18 years, in which case the maximum penalty is 20 years).

[46] D.C. Code § 22-2710 (procuring statute prohibiting paying or receiving anything of value for or an account of procuring an individual for or placing an individual in a house of prostitution, with a maximum penalty of five years).

[47] D.C. Code § 22-2711 (procuring statute prohibiting procuring and placing an individual in the custody of a third person for purposes of prostitution with a maximum penalty of five years).

a house of prostitution,[48] and keeping a "bawdy house"[49] statutes do not. In the pandering and procuring statutes that do have an enhanced penalty, the penalty quadruples, increasing from a five year maximum penalty to a 20 year maximum penalty. The penalty enhancements do not specify any culpable mental states for the age of the complainant and there is no DCCA case law on this issue. It is unclear whether a reasonable mistake of fact as to the complainant's age would be a defense. In contrast, the RCC trafficking in commercial sex statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the person trafficked is under 18 years of age or if, in fact the person trafficked is under the age of 12 years. Recklessness for under the age of 18 years and strict liability for under the age of 12 years are consistent with other age-based penalty enhancements in the RCC sex offenses and the RCC Chapter 16 human trafficking offenses. However, the trafficking in commercial sex penalty enhancement is generally intended to be used when a more serious RCC sex offense, or RCC Chapter 16 human trafficking offense does not apply. This change improves the consistency and proportionality of the revised statute. This change improves the consistency and proportionality of the revised statutes.

Ninth, the revised trafficking in commercial sex statute authorizes enhanced penalties if the actor is reckless as to the fact that the person trafficked is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a commercial sex act. The current D.C. Code pandering,[50] procuring,[51] house of prostitution,[52] and keeping a disorderly or bawdy house[53] statutes do not enhance penalties based on whether the person trafficked is incapacitated or impaired. In contrast, the RCC trafficking in commercial sex statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the person trafficked is incapacitated, impaired, or incapable of communicating willingness or unwillingness to engage in a commercial sex act. These requirements are consistent with the requirements in second degree and fourth degree of the RCC sexual assault statute, as well as the requirements for an incapacitated complainant in the RCC sex trafficking of a minor or adult incapable of consenting statute (RCC § 22E-1605). However, the trafficking in commercial sex penalty enhancement is intended to be used in the rare instance when a more serious RCC sex offense, such as sexual abuse of a minor (RCC § 22E-1302), or RCC Chapter 16 human trafficking offense does not apply.[54] This change improves the consistency and proportionality of the revised statute.

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[48] D.C. Code § 22-2712 (statute prohibiting operating a house of prostitution with a five year maximum penalty).
[49] D.C. Code § 22-2722 (statute prohibiting keeping or maintaining a "bawdy house" with a maximum penalty of five years).
[50] D.C. Code § 22-2705(a).
[51] D.C. Code §§ 22-2707(a); 22-2710; 22-2711.
[52] D.C. Code § 22-2712.
[53] D.C. Code § 22-2722.
[54] Because the trafficking in commercial sex statute includes conduct with a "knowingly" culpable mental state, there may be rare instances where the commercial sex statute is chargeable but accomplice liability

Tenth, through the RCC definition of "commercial sex act," the RCC trafficking in commercial sex statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. The current D.C. Code definition of "prostitution"[55] uses the terms "sexual act" and "sexual contact" as those terms are currently defined in D.C. Code § 22-3001[56] for the current D.C. Code sexual abuse statutes. In contrast, through the RCC definition of "commercial sex act," the RCC trafficking in commercial sex statute uses the revised definitions of "sexual act" and "sexual contact" in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of "sexual act" and "sexual contact" differ in multiple ways as compared to current law. As a result, the scope of the trafficking in commercial sex statute will differ as compared to the current D.C. Code pandering,[57] procuring,[58] and house of prostitution[59] statutes. For example, the current D.C. Code definitions of "sexual act" and "sexual contact" extend to conduct done with "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually "abuse, humiliate, harass, degrade, arouse, or gratify" any person. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eleventh, a vehicle used in furtherance of the RCC trafficking in commercial sex offense is no longer subject to vehicle impoundment. Current D.C. Code §§ 22-2724[60]

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for sexual abuse of a minor or human trafficking offenses are not chargeable due to the heightened mental state requirements for accomplice liability.

[55] D.C. Code § 22-2701.01(3) (defining "prostitution" as "a sexual act or contact with another person in return for giving or receiving anything of value."). Several of the current D.C. Code prostitution statutes that the RCC trafficking in commercial sex statute replaces use the term "prostitution." *See* D.C. Code §§ 22-2705; 22-2707; 22-2710; 22-2711; 22-2712.

[56] D.C. Code §§ 22-2701.01(5), (6) (stating the terms "sexual act" and "sexual contact" in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph" and "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[57] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting causing a person to "engage in prostitution.").

[58] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution . . . .").

[59] D.C. Code § 22-2712 ("Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[60] D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which "shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles

provides that when there is probable cause that a vehicle "is being used in furtherance of a prostitution-related offense"[61] and there is an arrest,[62] the vehicle "shall" be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.[63] There is no requirement that the owner be involved in the offense or know of the vehicle's use in the offense. The owner is "entitled to a due process hearing regarding the seizure of the vehicle,"[64] but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed "at any time" by paying several different penalties, fees, and costs,[65] which are either not refundable,[66] or are

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used in furtherance of prostitution-related activities, in violation of a prostitution-related offense." D.C. Code § 22-2725(b).

D.C. Code § 22-2725 states that all "funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723" will be deposited in the fund. D.C. Code § 22-2725(a). The reference to "§ 22-2723" appears to be an error, however, and the text should instead refer to "§ 22-2724." D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law "An act for the suppression of prostitution in the District of Columbia." The text of Section 7 in the Omnibus Act, establishing § 22-2725, states "All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*." The reference to section 5 appears to be an error. Section 5 of the 1935 "An act for the suppression of prostitution in the District of Columbia" is specific to forfeiture, not impoundment.

The text in the Omnibus Act should instead refer to "section 6," which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

[61] D.C. Code § 22-2724(b). The current D.C. Code definition of "prostitution-related offenses" includes the current D.C. Code prostitution offenses that the RCC trafficking in commercial sex statute replaces. D.C. Code § 22-2701(4) (defining "prostitution-related offenses as "those crimes and offenses defined in this subchapter."). The RCC prostitution statutes no longer use the term "prostitution-related offenses."

[62] D.C. Code § 22-2724(b).

[63] D.C. Code § 22-2724(b)(1), (b)(2).

[64] D.C. Code § 22-2701(f) ("An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.").

[65] D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.").

[66] Subsection (d) requires paying "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing" and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) ("An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of $150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6)."); § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that

refundable only in narrow circumstances.[67] Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner's right to a due process hearing.[68] There is no DCCA case law interpreting the current prostitution impoundment provisions. In contrast, a vehicle used in furtherance of the RCC trafficking in commercial sex offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what is comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. However, a vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute is subject to forfeiture under the RCC prostitution forfeiture provision (RCC § 22E-4404). RCC § 22E-4404, like the current prostitution forfeiture statute,[69] requires that the seizures and forfeitures of property "be pursuant to the standards and procedures set forth in D.C. Law 20-278." D.C. Law 20-278 provides significant due process protections that are lacking in the current prostitution impoundment provisions, such as strict deadlines for filings,[70] and requires the owner's knowledge and consent to the use of the property, or willful blindness.[71] This change improves the consistency and proportionality of the revised statutes.

Twelfth, the revised trafficking in commercial sex statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2723 through 22-2720 ("current D.C. Code prostitution nuisance provisions") and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 ("Title 42 nuisance provisions."). The current D.C. Code prostitution nuisance provisions apply to "any building, erection, or place used

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the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[67] D.C. Code § 22-2724(e) ("An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.").

[68] Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner "shall be entitled to a due process hearing regarding the seizure of the vehicle," D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must "convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing." D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay "all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing." D.C. Code § 22-2724(d) (emphasis added).

[69] D.C. Code § 22-2723.

[70] D.C. Code §§ 41-301 through 41-315.

[71] D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission."). The District has the burden of proof to prove the owner's knowledge or willful blindness by a preponderance of the evidence or, if the property is a motor vehicle or real property, by clear and convincing evidence. D.C. Code § 41-308(d)(1)(A) – (C).

for the purpose of lewdness, assignation, or prostitution,"[72] or a nuisance that is established "in a criminal proceeding."[73] The scope of "in a criminal proceeding" is unclear under current District law,[74] but the DCCA has stated that "when a defendant has been found

[72] D.C. Code § 22-2713(a) ("Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.").

[73] D.C. Code § 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[74] D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if "the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding." A broad reading of "in a criminal proceeding" is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether "in a criminal proceeding" extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . ."). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a "disorderly house" under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits "keeping a bawdy or disorderly house." Under DCCA case law, a "bawdy house" used for prostitution is a type of "disorderly house," but a "disorderly house" can extend beyond a "bawdy house" to encompass "activities on the premises that either disturb the public or constitute a nuisance per se." *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a "disorderly house" that is used for "lewdness, assignation, or prostitution" as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of "lewdness, assignation, or prostitution," and D.C. Code § 22-2717 refers to the existence of "*the* nuisance." *Id.* at 971-72 (emphasis in original). The court concluded that "the" refers back to the requirements of "lewdness, assignation, or prostitution" in D.C. Code § 22-2713 and that D.C. Code § 22-2717 "concerns only those nuisances defined in" D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a "bawdy house" under D.C. Code § 22-2722 would "clearly entail the type of nuisance described in [D.C.

guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate."[75] Violating a court order under the current D.C. Code prostitution nuisance provisions is punishable by no less than three months and no more than six months imprisonment.[76] The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.[77] The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,[78] and again in 2010 to include firearm-related nuisances.[79] It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law[80] or legislative

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Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it." *Id.* The court stated that "[b]ecause the Government failed to show that [the property] was 'used for the purpose of lewdness, assignation, or prostitution," the [defendants'] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717]." *Id.* The court acknowledged that the DCCA in *Raleigh v. United States* had stated that "when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate." *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for "lewdness, assignation, or prostitution," and, furthermore, that the DCCA "did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717]." *Id*. The court stated that "we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713]." *Id.*

[75] *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)).

[76] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.").

[77] "Drug–Related Nuisance Abatement Act of 1998," 1998 District of Columbia Laws 12-194 (Act 12–470).

[78] "Nuisance Abatement Reform Amendment Act of 2006," 2006 District of Columbia Laws 16-81 (Act 16–267).

[79] "Community Impact Statement Amendment Act of 2010," 2010 District of Columbia Laws 18-259 (Act 18-446).

[80] Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington*, D.C., 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 "authorizes a special summary action in equity to abate and enjoin" a nuisance, and that D.C. Code § 42-3102 "authorizes an action to abate, enjoin, and prevent" a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia's interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g.*, *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) ("even though we may find persuasive a federal court's interpretation of District of Columbia or of similar federal law . . .").

It should be noted that the "special summary action in equity to abate and enjoin" a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 ("In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of

history on this issue. In contrast, the revised trafficking in commercial sex prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2723 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions[81] do not apply to real property that is used for "lewdness" or "assignation" like the current D.C. Code prostitution nuisance provisions do.[82] To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.[83] Second, the Title 42 nuisance provisions apply to any "real

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injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented."). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 ("Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course."). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.
D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 ("(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.").

[81] The Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C).

[82] The current D.C. Code prostitution nuisance provisions apply to any "building, erection, or place used for the purposes of lewdness, assignation, or prostitution." D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any "real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community," and any "real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722." D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of "debauchery" or "other immoral" purposes, which may overlap with "lewdness" or "assignation." However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of "prostitution."

[83] "Lewdness" and "assignation" appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that "lewdness" "has been defined by the Supreme Court as 'that form of immorality which has relation to sexual impurity.'" *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of "assignation," but Black's Law Dictionary defines it as "[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit

property"[84] "used" or "intended to be used" for prostitution,[85] whereas current D.C. Code § 22-2713 is limited to any "building, erection, or place used for the purpose of prostitution."[86] Third, the Title 42 nuisance provisions do not extend to a prostitution-related nuisance that is established in a "criminal proceeding" as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months' imprisonment as do the current D.C. Code prostitution nuisance provisions.[87] Fifth, while both sets of nuisance provisions provide for a preliminary injunction,[88] a permanent injunction and

sex." Assignation, Black's Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[84] The Title 42 nuisance provisions define "property" as "tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land."

[85] The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

[86] D.C. Code § 22-2713.

[87] D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than $200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment."); 22-2717 ("If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."). A violation of a court order "issued under" the Title 42 nuisance provisions is "punishable as a contempt of court." D.C. Code § 42-3112(a).

[88] D.C. Code §§ 22-2714 (". . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . ."); 42-3104(a) ("Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .").

order of abatement,[89] and a procedure for vacating an order of abatement,[90] the procedural requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,[91] as do the types of equitable relief.[92] This change improves the clarity, consistency, and proportionality of the revised statutes.

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[89] D.C. Code §§ 22-2717 ("If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716."); 42-3110(a) ("If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.").

[90] D.C. Code §§ 22-2719 ("If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law.); 42-3112(c) ("Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.").

[91] For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 ("The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111."). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

[92] For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all "fixtures, furniture, musical instruments, or movable property used in conducting the nuisance." D.C. Code § 22-2717 ("an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . . ."). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) ("Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make

Beyond these twelve changes to current District law, eight other aspects of the revised statute may constitute substantive changes to current District law.

First, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability "arranging for" prostitution. Current D.C. Code § 22-2707 prohibits receiving anything of value "for or on account of arranging for . . . any individual to engage in prostitution."[93] "Arranging for prostitution" is defined in current D.C. Code § 22-2701.01, in part, as "any act to procure . . . or otherwise arrange for the purpose of prostitution."[94] It is unclear what conduct this definition covers beyond procuring an individual for prostitution. There is no DCCA case law interpreting the current D.C. Code definition of "arranging for prostitution." Resolving this ambiguity, paragraph (a)(2) of the revised trafficking in commercial sex statute prohibits knowingly receiving anything of value as a result of the prohibited conduct—causing, procuring, etc., a person to engage in or submit to a commercial sex act. The prohibited conduct encompasses what is ordinarily considered "arranging" for prostitution. This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC trafficking in commercial sex statute limits liability for procuring to procuring a person for a "commercial sex act." Two of the current D.C. Code procuring statutes prohibit receiving anything of value for procuring an individual for "debauchery" or an "immoral" act or purpose, in addition to prostitution.[95] "Debauchery" and "immoral" are undefined statutorily and there is no DCCA case law interpreting these terms. It is unclear to what extent these terms refer to conduct other than prostitution. Resolving this ambiguity, the procuring provisions in the RCC trafficking in commercial sex statute are limited to a "commercial sex act," as that term is defined in RCC § 22E-701. The United States Supreme Court has made clear that public morality cannot justify a law that regulates

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repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.").

[93] D.C. Code § 22-2707.

[94] D.C. Code § 22-271.01(1). The full definition is "any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or anything of value was given or received." The scope of the "attempt" language is unclear. To the extent the current D.C. Code definition of "arranging for prostitution" includes an attempted offense in current D.C. Code § 22-2707, the RCC trafficking in commercial sex statute is limited to a completed offense. This is discussed elsewhere in this commentary as a substantive change in law.

[95] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall . . . receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution, debauchery, or other immoral act, any individual . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution, debauchery, or other immoral purposes any individual . . . .").

private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct.[96] To the extent that "debauchery" and "immoral" act or purpose refer to private sexual conduct other than prostitution, the current D.C. Code procuring statutes may be unconstitutional. This change improves the clarity, consistency, and proportionality of the revised statutes.

Third, the RCC trafficking in commercial sex statute clarifies that a promise for payment is sufficient for liability. The current D.C. Code definition of "prostitution" is "a sexual act or sexual contact with another person in exchange for giving or receiving anything of value."[97] The current D.C. Code pandering statute prohibits "causing" a person to engage in "prostitution,"[98] the current D.C. Code procuring for prostitution statute prohibits receiving anything of value for "arranging for or causing" a person to engage in "prostitution,"[99] and the current D.C. Code house of prostitution statute prohibits "furnishing" or "servicing" a place "for prostitution."[100] It is unclear whether "giving or receiving anything of value" in the current D.C. Code definition of "prostitution" limits these offenses to sexual activity when anything of value is given or received, or if sexual activity when there is promise to give or receive anything of value in the future is sufficient.[101] There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute uses the RCC term "commercial sex act," defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." The definition makes clear that a promise for payment is sufficient for liability. This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Fourth, the RCC trafficking in commercial sex statute clarifies that payment can be given to, received, or promised to "any person." The current D.C. Code definition of "prostitution" is "a sexual act or sexual contact with another person in exchange for giving or receiving anything of value."[102] The current D.C. Code pandering statute prohibits

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[96] *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

[97] D.C. Code § 22-2701.01(3).

[98] D.C. Code § 22-2705(a)(2)(C) ("(a) It is unlawful for any person, within the District of Columbia to . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (C) To engage in prostitution.").

[99] D.C. Code § 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."). The other current D.C. Code procuring statutes require procuring for "sexual intercourse, prostitution, debauchery, or other immoral [purposes]." D.C. Code §§ 22-2710 (procuring for a house of prostitution); 22-2711 (procuring for a third party). Even if the current D.C. Code definition of "prostitution" excludes a promise to pay for sexual activity, that sexual activity would likely fall under the other prohibited purposes in these statutes.

[100] D.C. Code § 22-2712.

[101] The current D.C. Code house of prostitution statute prohibits providing a place "for prostitution," and appears to be satisfied if prostitution does not occur, but is the purpose of a place. In this situation, it is similarly unclear whether the D.C. Code definition of "prostitution" limits the offense to a place where sexual activity may occur and payment is only promised. D.C. Code § § 22-2712

[102] D.C. Code § 22-2701.01(3).

"causing" a person to engage in "prostitution,"[103] the current D.C. Code procuring for prostitution statute prohibits receiving anything of value for "arranging for or causing" a person to engage in "prostitution,"[104] and the current D.C. Code operating a house of prostitution statute prohibits "furnishing" or "servicing" a place "for prostitution."[105] It is unclear whether the recipient of payment for the sexual activity[106] must be the person engaging in sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient.[107] There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute uses the RCC term "commercial sex act," defined in RCC § 22E-701 as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in the sexual activity for payment or a third party. This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Fifth, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(A)—receiving anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person. The current D.C. Code pandering[108] and procuring[109] statutes do not specify any culpable mental states. However, the current D.C. Code operating a house of prostitution statute specifies a culpable mental state of

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[103] D.C. Code § 22-2705(a)(2)(C) ("(a) It is unlawful for any person, within the District of Columbia to . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (C) To engage in prostitution.").

[104] D.C. Code § 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."). The other current D.C. Code procuring statutes require procuring for "sexual intercourse, prostitution, debauchery, or other immoral [purposes]." D.C. Code §§ 22-2710 (procuring for a house of prostitution); 22-2711 (procuring for a third party). Even if the current D.C. Code definition of "prostitution" excludes sexual activity based upon the recipient of payment, that sexual activity would likely fall under the other prohibited purposes in these statutes.

[105] D.C. Code § 22-2712.

[106] The current D.C. Code procuring statutes require that the defendant receive anything of value for causing prostitution or procuring for purposes of prostitution. D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . ."). However this requirement is independent of whether the sexual activity satisfies the current D.C. Code definition of "prostitution"— a sexual act or sexual contact with another person in exchange for giving or receiving anything of value."

[107] The current D.C. Code house of prostitution statute prohibits providing a place "for prostitution," and appears to be satisfied if prostitution does not occur, but is the purpose of a place. In this situation, it is similarly unclear whether the D.C. Code definition of "prostitution" limits the offense to a place where sexual activity may occur and the recipient of payment is a person other than the individual engaging in the sexual activity.

[108] D.C. Code § 22-2705.

[109] D.C. Code §§ 22-2707; 22-2710; 22-2711.

"knowingly,"[110] which is codified in paragraph (a)(3) of the RCC trafficking in commercial sex statute. There is no DCCA case law interpreting the required mental states, if any, for the current D.C. Code pandering and procuring statutes. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(A)—receiving anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[111] This change improves the clarity and consistency of the revised statutes.

Sixth, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(B)—receiving anything of value as a result of providing or maintaining a location for a person to engage in or submit to a commercial sex act. The current D.C. Code keeping a disorderly house or bawdy house statute[112] ("bawdy house statute) does not specify any culpable mental states. DCCA case law for the current bawdy house statute requires that the defendant "know or should know" of the commission of the prohibited activities and "does nothing to prevent them."[113] There is no further discussion of the meaning of "know or should know" in this case law. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in subparagraph (a)(2)(B)—receiving anything of value as a result of providing or maintaining a location for a person to engage in or submit to a commercial sex act. The "knowingly" culpable mental state as defined in RCC § 22E-206 may be a higher culpable mental state than "should know" that is sufficient under DCCA case law. However, the scope of the RCC offense is narrower—the defendant must knowingly receive anything of value "as a result" of providing the premises. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 provide a remedy when an individual merely "should know" that premises he or she owns or maintains are being used for a commercial sex act, and are discussed elsewhere in this commentary. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[114] This change improves the clarity and consistency of the revised statutes.

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[110] D.C. Code § 22-2712 ("Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[111] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[112] D.C. Code § 22-2722.

[113] *Harris v. United States*, 315 A.2dc 569, 575 (D.C. 1974) (" In summary, to constitute the offense of keeping a bawdy or disorderly house under D.C. Code 1973, s 22-2722, the government must prove that acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them.").

[114] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

Seventh, paragraph (a)(3) of the RCC trafficking in commercial sex statute requires a "knowingly" culpable mental state for the prohibited conduct in paragraph (a)(3) regarding obtaining anything of value from the proceeds or earnings of a commercial sex act a person has engaged in or submitted to, without consideration or when the consideration is providing or maintaining a location for a commercial sex act. The current D.C. Code house of prostitution statute specifies a culpable mental state of "knowingly," making it unlawful to "knowingly . . . accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution."[115] It is unclear, however, if the mental state applies to all of the elements of the offense, or if it is limited to "accept, receive, levy, or appropriate any money or other valuable thing." There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a culpable mental state for all elements in paragraph (a)(3). Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[116] This change improves the clarity and consistency of the revised statutes.

Eighth, the RCC trafficking in commercial sex statute does not require that the sexual activity be "with another person." The current D.C. Code pandering,[117] procuring,[118] and house of prostitution[119] statutes incorporate the current D.C. Code definition of "prostitution"—a "sexual act or contact with another person in return for

[115] D.C. Code § 22-2712.
[116] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).
[117] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting causing a person to "engage in prostitution.").
[118] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution . . . .").
[119] D.C. Code § 22-2712 ("Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

giving or receiving anything of value."[120] The current D.C. Code[121] and RCC[122] definitions of "sexual act" and "sexual contact" include masturbation. However, the current statutes' "with another person" requirement may narrow the offense to exclude a prostitute engaging in or soliciting to engage in masturbation because masturbation is not "with another person." Alternatively, the current pandering, procuring, and house of prostitution statutes could be interpreted to include a prostitute engaging in or soliciting to engage in masturbation "with another person," if the latter phrase is construed to mean "for another person to watch." To resolve this ambiguity, the revised statute does not require that the sexual activity be "with another person." Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability causing a person to reside in a house of prostitution or with another person for the purposes of prostitution. The current D.C. Code pandering statute prohibits placing an individual in a "house of prostitution" with intent that the individual engage in prostitution,[123] causing an individual to "reside or continue to reside in a house of prostitution,"[124] or to "reside with any other person for the purpose of prostitution."[125] Current D.C. Code § 22-2710 prohibits paying or receiving anything of value for placing a person in a "house of prostitution."[126] There is no DCCA case law interpreting these

[120] D.C. Code § 22-2701.01(3).
[121] D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of "sexual act" in D.C. Code § 22-3001(8) and the definition of "sexual contact" in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining "sexual act" as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph."); 22-3001(9) (defining "sexual contact" as "the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").
[122] RCC § 22E-701.
[123] D.C. Code § 22-2705(a)(1) ("(a) It is unlawful for any person, within the District of Columbia to: (1) Place or cause, induce, entice, procure, or compel the placing of any individual . . . in a house of prostitution, with intent that such individual shall engage in prostitution.").
[124] D.C. Code § 22-2705(a)(2)(B) ("(a) It is unlawful for any person, within the District of Columbia to: . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (B) To reside or continue to reside in a house of prostitution.").
[125] D.C. Code § 22-2705(a)(2)(A) ("(a) It is unlawful for any person, within the District of Columbia to: . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual: (A) To reside with any other person for the purpose of prostitution.").
[126] D.C. Code § 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution, debauchery, or other immoral act, any individual, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

provisions. The RCC trafficking in commercial sex statute replaces reference to a "house of prostitution" and residing for purposes of prostitution with the conduct prohibited under paragraphs (a)(1) and (a)(2). This change improves the clarity of the revised statutes without changing current District law.

Second, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability causing the placement of or placing an individual in the "charge or custody" of a third person. The current D.C. Code pandering statute prohibits causing the placing of an individual in "the charge or custody of any other person" with intent that the individual engage in prostitution[127] and current D.C. Code § 22-2711 prohibits receiving anything of value for "for or on account of procuring and placing in the charge and custody of another person" for prostitution.[128] There is no DCCA case law interpreting these provisions. The RCC trafficking in commercial sex statute replaces reference to a "house of prostitution" and residing for purposes of prostitution with the conduct prohibited under paragraphs (a)(1) and (a)(2). This change improves the clarity of the revised statutes without changing current District law.

Third, the RCC trafficking in commercial sex statute no longer prohibits receiving anything of value for procuring an individual to engage in a "sexual act" or "sexual contact"[129] or for purposes of "sexual intercourse."[130] This language is unnecessary given the RCC definition of "commercial sex act" in RCC § 22-701[131] and deleting it does not change current District law. This change improves the clarity of the revised statutes without changing current District law.

Fourth, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability paying to obtain an individual for a house of prostitution. Current D.C. Code § 22-2710 prohibits "pay[ing]" for "the procuring for, or placing in, a house of

[127] D.C. Code § 22-2705(a)(1) ("(a) It is unlawful for any person, within the District of Columbia to: (1) Place or cause, induce, entice, procure, or compel the placing of any individual in the charge or custody of any other person . . . with intent that such individual shall engage in prostitution.").

[128] D.C. Code § 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution, debauchery, or other immoral purposes any individual shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.").

[129] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.").

[130] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall . . . receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . .").

[131] Subparagraph (a)(2)(A) of the RCC trafficking in commercial sex statute prohibits receiving anything of value as a result of causing, procuring, etc., an individual to engage in or submit to a "commercial sex act." RCC § 22E-701 defines "commercial sex act" as a "sexual act or sexual contact for which anything of value is given to, promised to, or received by any person." By receiving anything of value for causing, etc., a person to engage in sexual activity, the defendant satisfies the RCC definition of "commercial sex act."

prostitution for purposes of sexual intercourse [or] prostitution . . . any individual."[132] In the RCC trafficking in commercial sex statute, subparagraph (a)(1)(A) or subparagraph (a)(1)(B) would provide liability for this conduct. This change improves the clarity of the revised statutes without changing current District law.

Fifth, the RCC trafficking in commercial sex statute prohibits receiving anything of value "as a result of" causing, procuring, etc., a person for a commercial sex act with or for another person, or providing or maintaining a location for this purpose. The current D.C. Code procuring for prostitution statute prohibits receiving anything of value "for or on account of" arranging for or causing an individual for prostitution.[133] There is no DCCA case law interpreting this "on account of" language. The phrase "as a result of" clarifies that there must be a nexus between the receipt of anything of value and the prohibited conduct and is not intended to change current District law.

Sixth, the RCC trafficking in commercial sex statute specifically prohibits conduct that "provides" or "recruits" a person to engage in or submit to a commercial sex act. The current D.C. Code pandering statute[134] and procuring for prostitution statutes[135] appear to extend to this conduct through use of a variety of verbs, but do not specifically use the terms "provides" or "recruits." Adding the verbs "provides" and "recruits" aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

Seventh, the RCC trafficking in commercial sex statute does not include as a discrete means of liability conduct that "induces" a person to engage in or submit to a commercial sex act. The current D.C. Code pandering statute prohibits, in relevant part, "induc[ing]" any individual to engage in prostitution.[136] There is no DCCA case law interpreting the meaning of this "inducing" language. The RCC trafficking in commercial sex statute prohibits "causes, procures, provides, recruits, or entices" a person to engage in or submit to a commercial sex act, which includes conduct ordinarily covered by the verb "inducing." Removing the verb "induc[ing]" aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

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[132] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . .").

[133] D.C. Code § 22-2707(a).

[134] D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting, in part, "[c]ause, compel, induce, entice, or procure" an individual to engage in prostitution).

[135] D.C. Code §§ 22-2707 (procuring statute prohibiting receiving anything of value "for or on account of arranging for or causing any individual to engage in prostitution."); 22-2710 (procuring statute prohibiting paying or receiving anything of value "for or on account of the . . . placing in, a house of prostitution . . . any individual" for purposes of prostitution); 22-2711 (procuring statute prohibiting receiving anything of value "for or on account of procuring and placing in the charge or custody of another person" for prostitution).

[136] D.C. Code § 22-2705(a)(2)(C).

Eighth, paragraph (a)(3) of the RCC trafficking in commercial sex statute makes four clarificatory changes to the current D.C. Code house of prostitution statute. First, paragraph (a)(3) of the revised statute prohibits "obtains" anything of value, as opposed to "accept, receive, levy, or appropriate" anything of value in the current D.C. Code house of prostitution statute. "Obtains" is clearer language and is intended to encompass accepting, receiving, levying, and appropriating. Adding the verb "obtains" also aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. Second, paragraph (a)(3) refers to "anything of value" instead of "any money or other valuable thing,"[137] consistent with the other provisions in the revised statute. Third, paragraph (a)(3) refers to "providing or maintaining" a location for a commercial sex act, as opposed to "furnishing" or "servicing."[138] "Providing" and "maintaining" are clearer language and are intended to encompass "furnishing or servicing." Adding the verbs "provides" and "maintains" also aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. Fourth, paragraph (a)(3) clarifies that the proceeds or earnings must be from a commercial sex act that a person has engaged in or submitted to. The current D.C. Code house of prostitution statute refers to "from the proceeds or earnings of any individual engaged in prostitution."[139] Paragraph (a)(3) clarifies that the proceeds or earnings must be from a commercial sex act, as opposed to any earnings or money of a person that engages in prostitution, regardless of the source. These changes improve the clarity and consistency of the revised statutes.

Ninth, the RCC trafficking in commercial sex statute prohibits causing, etc., a person to "engage in or submit to" a commercial sex act (subparagraphs (a)(1)(A) and (a)(2)(A)), or providing or maintaining a location for a person to "engage in or submit to" a commercial sex act (subparagraphs (a)(1)(B) or (a)(2)(B)). Similarly, subparagraph (a)(3) refers to a person who has "engaged in or submitted to" a commercial sexual act. The current D.C. Code pandering statute prohibits causing a person to "engage" in prostitution[140] and the current D.C. Code procuring statutes prohibit either causing a person to "engage" in prostitution[141] or procure "for" prostitution.[142] The use of the phrase "engage in or submit to" aligns the RCC trafficking in commercial sex statute with the verbs RCC sex offense statutes in RCC Chapter 13 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

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[137] D.C. Code § 22-2712.
[138] D.C. Code § 22-2712.
[139] D.C. Code § 22-2712.
[140] D.C. Code § 22-2705(a)(2)(C).
[141] D.C. Code § 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.").
[142] D.C. Code §§ 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution . . . ."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution . . . .").

Tenth, the revised trafficking in commercial sex statute replaces references to "money or other valuable thing" in the current D.C. Code procuring statutes[143] with "anything of value" through the statute's use of the RCC definition of "commercial sex act." This clarifies the revised statute without changing current District law.

Eleventh, the revised trafficking in commercial sex statute is no longer subject to the definition of "anything of value" in D.C. Code § 22-1802 that applies to the current D.C. Code pandering,[144] procuring,[145] and house of prostitution[146] statutes.[147] Current D.C. Code § 22-1802 states that "anything of value" "shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value."[148] This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within "anything of value" in the revised offense is not intended to change current District law.

Twelfth, the RCC trafficking in commercial sex statute deletes the requirement in the current D.C. Code pandering,[149] procuring,[150] house of prostitution,[151] and keeping a disorderly or bawdy house[152] statutes that the offense occur in the "District" or the "District of Columbia." This language is surplusage and deleting it does not change current District law.

[143] D.C. Code §§ 22-2707(a) ("It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing."); 22-2710 ("Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing."); 22-2711 ("Any person who, within the District of Columbia, shall receive any money or other valuable thing.").
[144] D.C. Code § 22-2705.
[145] D.C. Code §§ 22-2707; 22-2710; 22-2711.
[146] D.C. Code § 22-2712.
[147] The current D.C. Code pandering (D.C. Code § 22-2705), procuring (D.C. Code §§ 22-2707; 22-2710; 22-2711), and house of prostitution (D.C. Code § 22-2712) statutes incorporate the current D.C. Code definition of "prostitution," which requires "anything of value." D.C. Code § 22-2701.01(a)(3).
[148] D.C. Code § 22-1802.
[149] D.C. Code § 22-2705(a).
[150] D.C. Code §§ 22-2707(a); 22-2710; 22-2711.
[151] D.C. Code § 22-2712.
[152] D.C. Code § 22-2722.

RCC § 22E-4404. Civil Forfeiture.

Explanatory Note. *This section establishes civil forfeiture rules for conveyances and money that are intended to be used, or are used, in violation of the RCC trafficking in commercial sex statute.*[1] *All seizures and forfeitures under this section shall be pursuant to D.C. Law 20-278. The revised statute replaces the current forfeiture statute applicable to prostitution and related offenses*[2] *and provisions for vehicle impoundment*[3] *and the Anti-Prostitution Vehicle Impoundment Proceeds Fund.*[4]

Subsection (a) establishes the types of property that are subject to civil forfeiture under the revised statute. Paragraph (a)(1) applies to any property that is, in fact, a conveyance, including aircraft, vehicles, or vessels. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is a conveyance. There are two alternative bases for forfeiture of a conveyance in paragraph (a)(1). The first requires that the conveyance is possessed with intent to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." "Intent" is a defined term in RCC § 22E-206 that here means a person was practically certain that a conveyance would be used to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the person's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the conveyance was used to facilitate commission of an RCC human trafficking offense, just that a person believed to a practical certainty that a conveyance would be so used. Applying the RCC definition of "intent" does not change the mental state requirements for forfeiture in D.C. Law 20-278.[5]

The alternative basis for forfeiture of a conveyance in paragraph (a)(1) is a conveyance which is, "in fact," used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the conveyance was used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[6]

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[1] RCC § 22E-4403.
[2] D.C. Code § 22-2723.
[3] D.C. Code § 22-2724.
[4] D.C. Code § 22-2725.
[5] This issue is discussed in detail later in the commentary to this revised statute.
[6] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

Paragraph (a)(2) applies to any property that is, "in fact," money, coins, and currency. "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the property is money, coins, or currency. There are two alternative bases for forfeiture of money, coins, and currency in paragraph (a)(2). The first requires that the money, coins, or currency are possessed with intent to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "Possess" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over." The culpable mental state requirement of "intent" and the strict liability requirements of "in fact" are the same in paragraph (a)(2) as they are in paragraph (a)(1).

The alternative basis for forfeiture of money, coins, or currency in paragraph (a)(2) is if it is, "in fact," used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). "In fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, "in fact" means that there is no culpable mental state required for the fact that the money, coins or currency were used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[7]

Paragraph (b) establishes that the seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised forfeiture statute clearly changes District law in two main ways.*

First, the revised prostitution forfeiture statute is limited to the RCC trafficking in commercial sex statute. The current D.C. Code prostitution forfeiture provision applies to a "prostitution-related offense."[8] "Prostitution-related offenses" is defined to include all prostitution offenses in the current D.C. Code, including the misdemeanor offenses of prostitution and solicitation for prostitution.[9] In contrast, the RCC limits the prostitution forfeiture provision to the RCC trafficking in commercial sex statute and no longer uses the terms "prostitution-related offense" or "prostitution-related offenses." Forfeiture of a vehicle or money used in furtherance of prostitution or solicitation is a disproportionate penalty for otherwise very low-level conduct, and in some instances may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version

[7] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").
[8] D.C. Code § 22-2723.
[9] D.C. Code § 22-2701.01(4) (defining "prostitution-related offenses" as "those crimes and offenses defined in this subchapter.").

of the prostitution forfeiture statute.[10] However, a vehicle or money used to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) remains subject to forfeiture under RCC § 22E-4404 because the statute targets "pimps" and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Second, the revised prostitution forfeiture provision applies to money, coins, and currency which are used, or intended to be used, "to facilitate commission" of the RCC trafficking in commercial sex statute. The current D.C. Code prostitution forfeiture statute applies to conveyances that are used, or intended to be used, "to facilitate a violation" of the current D.C. Code prostitution statutes[11] and to currency that is used, or intended to be used, "in violation" of the current D.C. Code prostitution statutes.[12] "In violation" appears to be narrower than "to facilitate a violation," but there is no DCCA case law on this issue. In contrast, the revised prostitution forfeiture provision applies to currency that is used, or intended to be used, "to facilitate the commission of" of the RCC trafficking in commercial sex statute, which is consistent with the scope of conveyances subject to forfeiture. It is inconsistent to include in forfeiture conveyances that are used, or intended to be used, "to facilitate a violation" of a prostitution offense, but to limit forfeiture of currency to currency that is used, or intended to be used "in violation" of a prostitution offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Beyond these two changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the RCC definition of "intent to" applies to the revised forfeiture provision. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "intended for use" in a prostitution offense.[13] The meaning of "intended to" is unclear and there is no DCCA case law on this issue.[14] Resolving this ambiguity, the revised prostitution forfeiture provision applies the RCC definition of "intent" in RCC § 22E-206. "Intent" is a defined term in RCC § 22E-206 that here means the actor was

[10] This case, *One 1995 Toyota Pick-Up Truck v. District of Columbia,* 718 A.2d 558 (D.C. 1998) is discussed in detail in the commentaries to the RCC prostitution and RCC patronizing prostitution statutes.
[11] D.C. Code Ann. § 22-2723(a)(1) ("(a) The following are subject to forfeiture: (1) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.").
[12] D.C. Code Ann. § 22-2723(a)(2) ("(a) The following are subject to forfeiture: . . . (2) All money, coins, and currency which are used, or intended for use, in violation of a prostitution-related offense.").
[13] D.C. Code § 22-2723(a)(1), (a)(2).
[14] The words "intended to" as used in the current prostitution forfeiture statute may refer to what was commonly known as "specific intent." However, even if this is the case, current District case law is unclear as to whether "specific intent" may be satisfied by mere knowledge, or if conscious desire is required. Compare, *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984) (""[a] specific intent to kill exists when a person acts with the purpose . . . of causing the death of another,") with *Peoples v. United States*, 640 A.2d 1047, 1055-56 (D.C. 1994) (proof that the appellant, who set fire to a building "knew" people inside a would suffer injuries sufficient to infer that the appellant "had the requisite specific intent to support his convictions of malicious disfigurement").

practically certain that the property would be used in a prostitution offense.[15] Applying the RCC definition of "intent" does not change the mental state requirements for forfeiture in D.C. Law 20-278.[16] This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC establishes that strict liability is a distinct basis for the forfeiture of property. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are "are used" in a prostitution offense.[17] It is unclear whether "are used" applies strict liability. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution forfeiture provision, by use of the phrase "in fact," clarifies that strict liability is a distinct basis for the forfeiture of property. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.[18] This change improves the clarity, consistency, and proportionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised forfeiture provision deletes the language "to transport." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense." The term "conveyances" sufficiently communicates an object designed to transport. The verb "to transport" is unnecessary and deleting it improves the clarity of the revised statutes.

Second, the revised forfeiture provision deletes the language "in any manner." The current D.C. Code prostitution forfeiture provision includes "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any

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[15] Relying on the RCC definition of "intent" may produce an additional change in current District law. Under the RCC, the "intent" mental state may be satisfied by knowledge of a circumstance or result. The RCC also provides that knowledge of a circumstance may be imputed if a person is reckless as to whether the circumstance exists, and with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied to this forfeiture provision, if an owner does *not* know that property is to be used to violate the trafficking in forced commercial sex offense, but was reckless as to this fact, and avoided investigating whether this circumstance exists in order to avoid criminal liability, the imputation rule may allow a fact finder to impute knowledge to the owner. It is unclear under current District law whether a similar rule of imputation would apply. Current D.C. Code § 41-306 states that "[n]o property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission." However, this provision applies when an actual *act or omission* is the basis for forfeiture. It is unclear whether an owner's willful blindness as to *intended* uses of property still authorizes civil forfeiture. If this provision does apply even when property has not yet been used, the term "willfully blind" is undefined, and it is unclear how it differs from the deliberate ignorance provision under the RCC.

[16] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

[17] D.C. Code § 22-2723(a)(1), (a)(2).

[18] *See, e.g.*, D.C. Code § 41-302(b) ("No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.").

manner to facilitate a violation of a prostitution-related offense."[19] "To facilitate" is sufficiently broad to encompass all methods of facilitation, particularly since the revised statute, as is discussed above, no longer specifies "to transport." Deleting "in any manner" improves the clarity of the revised statutes.

Third, the revised forfeiture provision deletes the term "property." The current D.C. Code prostitution forfeiture provision states that "All seizures and forfeitures of property under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278."[20] The term "property" is unnecessary because paragraphs (a)(1) and (a)(2) of the revised provision and the current forfeiture provision[21] are limited to types of property—vehicles and money. This change improves the clarity of the revised statutes.

[19] D.C. Code § 22-2723(a)(1).
[20] D.C. Code § 22-2723(b).
[21] D.C. Code § 22-2723(a)(1), (a)(2).

RCC § 22E-4601. Contributing to the Delinquency of a Minor.

Explanatory Note. *The RCC contributing to the delinquency of a minor statute prohibits being an accomplice to or criminally soliciting a person under the age of 18 years of age with respect to a District offense or comparable offense in another jurisdiction. The revised contributing to the delinquency of a minor statute applies only to actors that are at least 18 years of age and at least four years older than the minor complainant. The revised contributing to the delinquency of a minor statute replaces the current contributing to the delinquency of a minor offense*[1] *in the current D.C. Code.*

Subsection (a) specifies the prohibited conduct for the revised contributing to the delinquency of a minor statute. Paragraph (a)(1) and paragraph (a)(2) specify the age requirements for the actor and the complainant. Paragraph (a)(1) requires that, "in fact," the actor is at least 18 years of age and at least four years older than the complainant. The phrase "in fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to all the elements in paragraph (a)(1) and there is no culpable mental state required for the age of the actor or the age gap. Paragraph (a)(2) requires that the actor is "reckless" as to the fact that the complainant is under the age of 18 years. "Reckless" is a defined term in RCC § 22E-206 that here means the actor was aware of a substantial risk that the complainant was under 18 years of age.

Paragraph (a)(3) and subparagraph (a)(3)(A) specify one means of liability for the revised contributing to the delinquency of a minor statute—the actor, "in fact," is an accomplice to the complainant as proscribed in RCC § 22E-210 for any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction. Per the rules of construction in RCC § 22E-207, the "in fact" specified in paragraph (a)(3) applies to the requirements in subparagraph (a)(3)(A). "In fact" is a defined term in RCC § 22E-207 which here means that, beyond the culpable mental state requirements specified in RCC § 22E-210, there are no additional culpable mental state requirements as to subparagraph (a)(3)(A). There is no culpable mental state required for the fact that the conduct constitutes any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction. "Comparable offense" is a defined term in RCC § 22E-701. To clarify any ambiguity as to whether a person may be an accomplice to a complainant purchasing, possessing, or drinking an alcoholic beverage, the statute specifically includes liability for being an accomplice to a violation of D.C. Code § 25-1002.

Paragraph (a)(3) and subparagraph (a)(3)(B) specify an alternative means of liability—the actor, "in fact," engages in a criminal solicitation of the complainant as described in RCC § 22E-302 for any District offense,[2] a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction. Per the rules of construction in RCC § 22E-207, the "in fact" specified in paragraph (a)(3) applies to the requirements in subparagraph (a)(3)(B). "In fact" is a defined term in RCC § 22E-207

[1] D.C. Code § 22-811.

[2] RCC § 22E-302(b) limits liability under the general RCC solicitation provision to offenses against persons in Subtitle II of this title and felony property offenses in Subtitle III of this title. However, these limitations do not apply to the revised contributing to the delinquency of a minor offense.

which here means that, beyond the culpable mental state requirements specified in RCC § 22E-302, there are no additional culpable mental state requirements as to subparagraph (a)(3)(B). There is no culpable mental state required for the fact that the conduct constitutes any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction. "Comparable offense" is a defined term in RCC § 22E-701. To clarify any ambiguity as to whether a person may solicit a complainant to purchase, possess, or drink an alcoholic beverage, the statute specifically includes liability for soliciting a violation of D.C. Code § 25-1002.

Subsection (b) codifies two exclusions from liability. First, paragraph (b)(1) provides an exclusion from liability for the offense when, "in fact," during a "demonstration," the complainant's conduct constitutes, or if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to all the elements in subsection (b). The phrase "in fact" is a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element, here for the fact that, during a "demonstration," the complainant's conduct constitutes, or would constitute, one of the specified RCC offenses, an attempt to commit one of the specified RCC offenses, or a comparable offense in another jurisdiction. "Comparable offense" and "demonstration" are defined terms in RCC § 22E-701.

Paragraph (b)(2) provides an exclusion from liability when, in fact, the actor satisfies the requirements in D.C. Code § 22-7-403.[3] Paragraph (b)(2) specifies "in fact," a defined term in RCC § 22E-207 that means there is no culpable mental state requirement as to a given element, here that the actor satisfies the requirements in D.C. Code § 22-7-403.

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[3] D.C. Code § 7-403(a), (b)(5)(B):

> (a) Notwithstanding any other law, the offenses listed in subsection (b) of this section shall not be considered crimes and shall not serve as the sole basis for revoking or modifying a person's supervision status:
>
> (1) For a person who:
>
> (A) Reasonably believes that he or she is experiencing a drug or alcohol-related overdose and in good faith seeks health care for himself or herself;
>
> (B) Reasonably believes that another person is experiencing a drug or alcohol-related overdose and in good faith seeks healthcare for that person; or
>
> (C) Is reasonably believed to be experiencing a drug or alcohol-related overdose and for whom health care is sought; and
>
> (2) The offense listed in subsection (b) of this section arises from the same circumstances as the seeking of health care under paragraph (1) of this subsection.
>
> (b) The following offenses apply to subsection (a) of this section:
>
> . . .
>
> (5) Provided that the minor is at least 16 years of age and the provider is 25 years of age or younger:
>
> (B) Contributing to the delinquency of a minor with regard to possessing or consuming alcohol or, without a prescription, a controlled substance as prohibited by § 22-811(a)(2) and subject to the penalties provided in § 22-811(b)(1) . . . ."

Subsection (c) establishes that an actor may be convicted of contributing to the delinquency of a minor upon proof of the commission of the offense, even though the minor complainant has not been arrested, prosecuted, or adjudicated delinquent of an offense.[4]

Subsection (d) codifies an affirmative defense for an actor that engages in the conduct constituting the offense and meets certain requirements. The general provision in RCC § 22E-201 establishes the requirements for the burden of production and the burden of proof for all affirmative defenses in the RCC. First, per paragraph (d)(1), the actor must have the "intent" of safeguarding or promoting the welfare of the complainant. "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that his or her conduct would safeguard or promote the welfare of the complainant. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor's conduct safeguarded or promoted the welfare of the complainant, only that the actor believed to a practical certainty that it would. The RCC general parental defense (RCC § 22E-408) also requires intent to safeguard or promote the welfare of a minor complainant and the commentary to that section discusses this requirement in detail.[5]

Paragraph (d)(2), subparagraph (d)(2)(A), and subparagraph (d)(2)(B) specify two additional requirements for the affirmative defense. Paragraph (d)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (d)(2) applies to all the elements in subparagraph (d)(2)(A) and (d)(2)(B) and no culpable mental state applies to the elements in these subparagraphs. Per subparagraph (d)(2)(A), "in fact" the conduct constituting the offense must be reasonable in manner and degree, under all the circumstances. The RCC general parental defense (RCC § 22E-408) also requires that the conduct be reasonable in manner and degree, under all the circumstances, and the commentary to that section discusses this requirement in detail. Per subparagraph (d)(2)(B), "in fact" the conduct constituting the offense must not create a substantial risk of, or cause, death or serious bodily injury. "Serious bodily injury" is a defined term in RCC § 22E-701. The RCC general parental defense (RCC § 22E-408) also requires that the conduct does not create a substantial risk of, or cause, death or serious bodily injury and the commentary to that section discusses this requirement in detail.

Subsection (e) specifies the penalties for the revised contributing to the delinquency of a minor statute. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (f) cross-references applicable definitions located elsewhere in the RCC and also provides a definition of "chronic truancy" applicable to this statute.

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[4] In addition to the language in subsection (c), RCC § 22E-216 establishes that an actor can be liable for contributing to the delinquency of a minor even if the complainant is under the age of 12 years and is not subject to criminal liability under the RCC.

[5] However, the RCC parental defense includes the prevention or punishment of misconduct in the intent to safeguard or promote welfare, and the affirmative defense in the RCC contributing to the delinquency of a minor statute does not.

Relation to Current District Law. *The revised contributing to the delinquency of a minor statute clearly changes District law in nine main ways.*

First, the revised contributing to the delinquency of a minor statute eliminates as a discrete basis of liability encouraging, causing, etc., a minor to run away from home for the purpose of criminal activity. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, encouraging, causing, etc., a minor to "[r]un away for the purpose of criminal activity from the place of abode of his or her parent, guardian, or other custodian."[6] The colloquial phrase "[r]un away" is not defined by statute. It is unclear whether this provision differs from the current statute's prohibitions on encouraging, causing, etc., a minor to violate a criminal law, a court order, or be truant from school.[7] There is no DCCA case law interpreting this provision. In contrast, the revised contributing to the delinquency of a minor statute eliminates as a discrete basis of liability encouraging, causing, etc., a minor to run away from home for the purpose of criminal activity. To the extent that this conduct overlaps with assisting, encouraging, or soliciting a minor to plan or commit a criminal offense, the revised contributing to the delinquency of a minor statute still provides liability. To the extent that the current provision prohibits conduct beyond assisting, encouraging, or soliciting a minor to plan or commit a criminal offense, there is no liability under the revised contributing to the delinquency of a minor statute. However, an adult that is civilly responsible for the health, welfare, or supervision of a minor that encourages, causes, etc., that minor to run away from home, for any reason, may have liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor ((RCC § 22E-1502) statutes if the adult causes or creates a risk of specified physical or mental harm. This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the revised contributing to the delinquency of a minor statute prohibits being an accomplice to, or soliciting, an offense in another jurisdiction that is comparable to a misdemeanor in the District. The current D.C. Code contributing to the delinquency of a minor statute limits encouraging, causing, etc., a minor to commit a misdemeanor to District law misdemeanors.[8] For felonies, however, the current D.C. Code contributing to the delinquency of a minor statute prohibits encouraging, causing, etc., a minor to commit both District law felonies,[9] and offenses in other jurisdictions that are comparable to

[6] D.C. Code § 22-811(a)(3).

[7] D.C. Code § 22-811(a), (a)(1), (a)(4), (a)(5), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (1) Be truant from school; (4) Violate a court order; (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[8] D.C. Code § 22-811(a), (a)(5) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience.").

[9] D.C. Code § 22-811(a), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction

District law felonies.[10] In contrast, the revised contributing to the delinquency of a minor statute extends to being an accomplice to, or soliciting, an offense in another jurisdiction that is a comparable offense to a misdemeanor in the District. "Comparable offense" is a defined term in the RCC that requires an offense to have elements that satisfy a District offense.[11] There is no clear reason for excluding an offense in another jurisdiction simply because it is comparable to a District law misdemeanor, as opposed to a District law felony. Although felonies are generally more serious charges than misdemeanors, there is still possible or actual legal jeopardy for the minor and the commission or possible commission of a criminal offense. This change improves the clarity, consistency, and proportionality of the revised statute, and removes a gap in liability.

Third, the revised contributing to the delinquency of a minor statute does not criminalize persons other than parents, guardians and others with custody or control of a minor from assisting, encouraging, etc. the minor to be truant. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, assisting, encouraging, etc., a minor to "[b]e truant from school."[12] The current statute does not define "truant" and there is no DCCA case law interpreting this provision. It is unclear how much school a minor must miss in order to be "truant," and more generally how the scope of the truancy prong in the current contributing to the delinquency of a minor statute differs from a violation of the District's compulsory school attendance laws—other than that the latter only applies to "the minor's parent, guardian, or other person who has custody or control of the minor."[13] In contrast, the revised contributing to the delinquency of a

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that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[10] D.C. Code § 22-811(a), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[11] RCC § 22E-701 ("'Comparable offense' means a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime.").

[12] D.C. Code § 22-811(a)(1).

[13] The District's current compulsory school attendance laws state that "The parent, guardian, or other person who has custody or control of a minor covered by § 38-202(a) who is absent from school without a valid excuse shall be guilty of a misdemeanor." D.C. Code § 38-203(d). The penalty is a fine of at least $100, a maximum term of imprisonment of 5 days, or both, for "each offense," which is defined as "[e]ach unlawful absence of a minor for 2 full-day sessions or for 4 half-day sessions during a school month shall constitute a separate offense." D.C. Code § 38-203(e), (f) ("(e) Any person convicted of failure to keep a minor in regular attendance in a public, independent, private, or parochial school, or failure to provide regular private instruction acceptable to the Board may be fined not less than $100 or imprisoned for not more than 5 days, or both for each offense. (f) Each unlawful absence of a minor for 2 full-day sessions or for 4 half-day sessions during a school month shall constitute a separate offense."). A defendant may receive a deferred sentence and be placed on probation for a first offense, and for any conviction, the courts "shall" consider requiring community service as an alternative to the fine, incarceration, or both. D.C. Code § 38-203(g), (h).

Notably, this timeline for triggering criminal liability under D.C. Code § 38-203 differs from current D.C. Municipal Regulations (DCMR) which define "chronically truant" as "absent from school without a legitimate excuse for ten (10) or more days within a single school year." D.C. Mun. Regs. tit. 5-A, § 2199 (defining "chronically truant" as "A school aged child who is absent from school without a

minor statute does not specifically address truancy. Instead, the revised statute only provides criminal liability for persons who are accomplices to a District offense, which includes truancy described in D.C. Code § 38-203. The revised statute's approach piggybacks on the more specific, defined District criminal statutes elsewhere in the D.C. Code to describe the elements that must be proven for liability. While it is questionable whether parents or others who encourage or assist truancy should be subject to criminal (versus civil[14]) consequences,[15] the revised contributing to the delinquency of a minor statute does not further criminalize such conduct. Among other benefits, the revised statute may avoid or limit the potential for First Amendment challenges to applications of the statute in particular cases of speech encouraging truancy.[16] This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

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legitimate excuse for ten (10) or more days within a single school year."). Under the DCMR, only when a student meets this definition of "chronically truant" is a school-based intervention triggered. D.C. Mun. Regs. tit. 5-A, § 2103(4) ("A student who accumulates ten (10) unexcused absences at any time during a school year shall be considered to be chronically truant. The school-based student support team assigned to the student shall notify the school administrator within two (2) school days after the tenth (10th) unexcused absence with a plan for immediate intervention including delivery of community-based programs and any other assistance or services to identify and address the student's needs on an emergency basis.").

[14] Note that a child who is habitually truant may be found to be a "child in need of supervision" per Title 16 of the current D.C. Code. D.C. Code § 16-2301(8) (defining "child in need of supervision" as "a child who- (A)(i) subject to compulsory school attendance and habitually truant from school without justification; (ii) has committed an offense committable only by children; or (iii) is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable; and (B) is in need of care or rehabilitation."). Such a finding gives the Family Court jurisdiction to issue court orders to parents or caretakers to better care for the child. D.C. Code § 16–2320(c) ("If a child is found to be delinquent or in need of supervision, the Division exercising juvenile jurisdiction shall also have jurisdiction over any natural person who is a parent or caretaker of the child to secure the parent or caretaker's full cooperation and assistance in the entire rehabilitative process and may order any of the following dispositions which will be in the best interest of the child: …").

[15] The CCRC has not, at this time, reviewed or made recommendations concerning D.C. Code § 38-203 which continues to subject parents and others to criminal liability for the truancy of a minor. However, the CCRC notes that there exist serious concerns about the disparate impact and harm this offense may have on women of color in the District.

[16] Recognized exceptions to the First Amendment, particularly the "speech integral to criminal conduct" exception, may or may not apply to speech encouraging truancy. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010) ("'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *Id.,* at 382–383, 112 S.Ct. 2538. These 'historic and traditional categories long familiar to the bar,' *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment)—including obscenity, *Roth v. United States,* 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), defamation, *Beauharnais v. Illinois,* 343 U.S. 250, 254–255, 72 S.Ct. 725, 96 L.Ed. 919 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), incitement, *Brandenburg v. Ohio,* 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*), and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949)—are 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)."). Notably, the "speech integral to criminal conduct" exception is not limited to purely criminal conduct and includes at least some tortious activity. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1051 (2016).

Fourth, the revised contributing to the delinquency of a minor statute does not criminalize assisting, encouraging, etc. a minor to engage in a non-criminal violation of a court order. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, assisting, encouraging, etc., a minor to "violate a court order."[17] There is no DCCA case law interpreting this provision. In contrast, the revised contributing to the delinquency of a minor statute does not specifically address violation of court orders. Instead, the revised statute only provides criminal liability for persons who are accomplices to a District offense, which includes violation of a court order that is a criminal contempt under D.C. Code § 11–741 or other contempt-type crimes (e.g., under D.C. Code § 16-1005, D.C. Code § 23–1327, D.C. Code § 23–1328, or D.C. Code § 23–1329). The revised statute's approach piggybacks on the more specific, defined District criminal statutes elsewhere in the D.C. Code to describe the elements that must be proven for liability. Among other benefits, the revised statute may avoid or limit the potential for First Amendment challenges to applications of the statute in particular cases of speech encouraging violation of a court order.[18] This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the revised contributing to the delinquency of a minor statute provides an affirmative defense for an adult defendant that intends to safeguard or promote the welfare of the minor complainant. The current D.C. Code contributing to the delinquency of a minor statute does not have any such affirmative defense, and the D.C. Code does not codify any general defenses. As a result, the current D.C. Code contributing to the delinquency of a minor statute appears to apply to adults who, out of concern for the minor's well-being, encourage, cause, etc., a minor to engage in the prohibited conduct.[19] There is no DCCA case law on this issue. In contrast, the revised contributing to the delinquency of a minor statute has an affirmative defense for an adult defendant that

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[17] D.C. Code § 22-811(a)(4).

[18] Recognized exceptions to the First Amendment, particularly the "speech integral to criminal conduct" exception, may or may not apply to speech encouraging violation of a court order. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010) ("'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' *Id.,* at 382–383, 112 S.Ct. 2538. These 'historic and traditional categories long familiar to the bar,' *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring in judgment)—including obscenity, *Roth v. United States,* 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), defamation, *Beauharnais v. Illinois,* 343 U.S. 250, 254–255, 72 S.Ct. 725, 96 L.Ed. 919 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), incitement, *Brandenburg v. Ohio,* 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*), and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949)—are 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)."). Notably, the "speech integral to criminal conduct" exception is not limited to purely criminal conduct and includes at least some tortious activity. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1051 (2016).

[19] For example, if an adult neighbor is concerned for the minor's well-being and speaks to the minor before school, making the minor late for school, the adult neighbor may have caused the minor to be "truant" within the meaning of the current D.C. Code contributing to the delinquency of a minor statute. Or, if that adult takes the minor to a doctor's appointment after school and causes the minor to miss court-ordered community service, that adult may have caused the minor to violate a court order within the meaning of the current D.C. Code contributing to the delinquency of a minor statute.

intends to safeguard or promote the welfare of the minor complainant. The defense applies regardless of whether the adult has a duty of care to the minor. In addition to the intent requirement, the affirmative defense requires that, in fact, the actor's conduct is reasonable in manner and degree under all the circumstances and does not create a substantial risk of, or cause, death or serious bodily injury. These requirements match several of the requirements in the RCC parental defense (RCC § 22E-408) and are discussed further in the commentary to that statute. This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, the revised contributing to the delinquency of a minor statute eliminates the special recidivist penalty in the current D.C. Code contributing to the delinquency of a minor statute. The special recidivist penalty enhancement applies to all prohibited conduct in the current D.C. Code contributing to the delinquency of a minor statute except encouraging, causing, etc., a minor to commit a felony, and provides a maximum term of imprisonment of three years.[20] In contrast, in the RCC, the general recidivism enhancement (RCC § 22E-606) will provide enhanced punishment for recidivist contributing to the delinquency of a minor, consistent with other offenses. There is no clear basis for singling out contributing to the delinquency of a minor for a recidivist enhancement as compared to other offenses of equal seriousness. The RCC general recidivism enhancement applies to a felony conviction of the revised contributing to the delinquency of a minor statute, but does not apply to a misdemeanor conviction because contributing to the delinquency of a minor is not an offense against persons in the RCC. However, if a defendant is convicted of certain misdemeanor offenses against persons in addition to the RCC contributing to the delinquency of a minor statute, the RCC general recidivist enhancement would apply to that misdemeanor conviction.[21] This change improves the proportionality and consistency of the revised contributing statute.

Seventh, the revised contributing to the delinquency of a minor statute eliminates the special penalties in the current D.C. Code contributing to the delinquency of a minor statute for serious bodily injury or death. The current D.C. Code contributing to the delinquency of a minor statute provides for a maximum term of imprisonment of five years if the prohibited conduct "results in serious bodily injury to the minor [complainant] or any other person"[22] and a maximum term of imprisonment 10 years if prohibited conduct "results in the death of the minor [complainant] or any other person."[23] The current D.C. Code contributing to the delinquency of a minor statute does not define "serious bodily

[20] D.C. Code § 22-811(b)(2) ("A person convicted of violating subsection (a)(2)-(6) of this section, having previously been convicted of an offense under subsection (a)(2)-(6) of this section or a substantially similar offense in this or any other jurisdiction, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 3 years, or both.").

[21] For example, if a defendant is convicted of the revised contributing to the delinquency of a minor statute on the basis of helping the complainant commit misdemeanor assault and is also convicted of misdemeanor assault as an accomplice, the misdemeanor contributing to the delinquency of a minor conviction is not subject to the misdemeanor recidivist enhancement in RCC § 22E-606, but the assault conviction is.

[22] D.C. Code § 22-811(b)(4) ("A person convicted of violating subsection (a) of this section that results in serious bodily injury to the minor or any other person shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[23] D.C. Code § 22-811(b)(5) ("A person convicted of violating subsection (a) of this section that results in the death of the minor or any other person shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.").

injury"[24] and there is no DCCA case law interpreting the term for this statute. In addition, it is unclear in both enhanced penalties if the prohibited conduct must cause serious bodily injury or death, or if "results in" is broader and permits enhanced penalties without causation. There is no DCCA case law on this issue. In contrast, the RCC contributing to the delinquency of a minor statute eliminates the special penalties for contributing to the delinquency of a minor that "results" in serious bodily injury or death. There is no clear basis for singling out contributing to the delinquency of a minor for these enhanced penalties as compared to other offenses of equal seriousness. In addition, the RCC assault statute provides liability for "caus[ing]" any person "bodily injury," including "serious bodily injury," as those terms are defined in RCC § 22E-701, and the RCC homicide statutes provide liability for "caus[ing]" any person death, provided that the other elements of these offenses are satisfied.[25] This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised contributing to the delinquency of a minor statute does not grade being an accomplice to, or soliciting, a felony offense different from a misdemeanor offense. In the current D.C. Code contributing to the delinquency of a minor statute, encouraging, causing, etc., the commission of a misdemeanor has a maximum term of imprisonment of 6 months if the enhanced penalties for recidivism, serious bodily injury, or death do not apply.[26] Encouraging, causing, etc., the commission of a felony is subject to a maximum term of imprisonment of 5 years if the enhanced penalties for serious bodily injury or death do not apply.[27] In contrast, the revised contributing to the delinquency of a minor statute grades being an accomplice to, or soliciting, any offense the same—regardless whether the offense is a misdemeanor or felony. The commission of a felony is generally more serious than misdemeanor offenses. The single flat penalty for all offenses

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[24] The current D.C. Code aggravated assault statute requires "serious bodily injury," but does not statutorily define the term. D.C. Code § 22-404.01. However, "serious bodily injury" is statutorily defined for the current D.C. Code sexual abuse statutes (D.C. Code § 22-3001(7)), and the DCCA has generally applied this definition to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). It is unclear whether the DCCA would similarly apply the definition of "serious bodily injury" in the current D.C. Code sexual abuse statutes to the current D.C. Code contributing to the delinquency of a minor statute.

[25] In addition, the RCC assault statute and the RCC murder statute provide enhanced penalties if the actor is reckless as to the fact that the complainant is a "protected person," defined in RCC § 22E-701 to include a person that is under 18 years of age and at least four years younger than an actor who is 18 years of age or older. These are the same age and age gap requirements for an adult actor and a minor complainant that are in the RCC contributing to the delinquency of a minor statute.

[26] D.C. Code § 22-811(b)(1) ("Except as provided in paragraphs (2) [recidivist penalty enhancement], (4) [penalty enhancement for conduct that "results in" serious bodily injury] and (5) [penalty enhancement for conduct that "results in" death] of this subsection, a person convicted of violating subsection (a)(1)-(6) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 6 months, or both.").

[27] D.C. Code § 22-811(b)(3) ("Except as provided in paragraphs (4) [penalty enhancement for conduct that "results in" serious bodily injury] and (5) [penalty enhancement for conduct that "results in" death] of this subsection, a person convicted of violating subsection (a)(7) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 5 years, or both.").

in the revised statute effectively raises the penalty for minor misdemeanors (Classes C-E) to a Class B offense. However, where a person is an accomplice to or solicits a serious felony the actor should be charged with and subject to correspondingly higher penalties as provided under RCC § 22E-210 and RCC § 22E-302. This change improves the proportionality of the revised statute.

Ninth, the revised contributing to the delinquency of a minor statute does not purport to assign prosecutorial authority to the Attorney General for the District of Columbia (OAG), clarifying that it is an offense that the United States Attorney for the District of Columbia (USAO) prosecutes. The current D.C. Code contributing to the delinquency of a minor statute states that OAG "shall" prosecute all violations that have a maximum term of imprisonment of six months, while USAO shall prosecute violations subject to higher sentences.[28] The legislative history for the current D.C. Code contributing to the delinquency of a minor offense indicates that the Council regarded it as a new offense,[29] and the sole rationale for assignment of prosecutorial authority to OAG was the likelihood that OAG would be involved in prosecution of the underlying violations by the

[28] The current D.C. Code contributing to the delinquency of a minor statute states that "The Attorney General for the District of Columbia, or his or her assistants, shall prosecute a violation of subsection (a) of this section for which the penalty is set forth in subsection (c)(1) of this section." D.C. Code § 22-811(e). The reference to paragraph "(c)(1)" appears to be an error. There is no paragraph (c)(1) in the current statute and subsection (b) codifies the penalties. Per paragraph (b)(1), all violations of the current D.C. Code contributing to the delinquency of a minor statute, except contributing, causing, etc., a minor to commit a felony, have a maximum term of imprisonment of 6 months, provided that the enhanced penalties for prior convictions, serious bodily injury, or death do not apply. D.C. Code § 22-811(b)(1) ("Except as provided in paragraphs (2), (4) and (5) of this subsection, a person convicted of violating subsection (a)(1)-(6) of this section shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not more than 6 months, or both.").

[29] *See* Testimony of Robert J. Spagnoletti, Attorney General for the District of Columbia, Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006" at 27 ("The District does not have a law that prohibits contributing to the delinquency of a minor."). While it is true that at the time there was no contributing to the delinquency of a minor statute, the legislative history failed to note that, in 1963, the authority to prosecute the crime of contributing to the delinquency of a minor was provided to OAG (then Corporation Council) by Congress under D.C. Code §§ 11-1583, 11-1554. Public Law 88-241, December 23, 1963. D.C. Code § 11-1554 provided that "[t]he Juvenile Court has original and exclusive jurisdiction to determine cases of persons 18 years of age or over charged with willfully contributing to, encouraging, or tending to cause by any act or omission, a condition which would bring a child under the age of 18 years within the provisions of section 11-1551." Under then D.C. Code § 11-1583 (a)(3), the Corporation Counsel of the District of Columbia or any of his assistants shall "prosecute cases arising under sections 11-1554 and 11-1556 and the sections specified by section 11-1557, in which a person 18 years of age or over is charged with an offense." The Act Reorganizing the District of Columbia Courts, however, replaced the entirety of what was Title 11 of the D.C. Code, and created a Family Division in the Superior Court, which would handle, among others, cases of juvenile delinquency, paternity, support, and intra-family offenses (civil protective orders). Public Law 91-358, July 29, 1970 ("Title 11 of the District of Columbia Code is amended to read as follows" and did not move or restate 11-1551, 11-1554, 11-1557 in any other portion of the D.C. Code). Procedures related to the Family Division in the D.C. Superior Court and in particular, juvenile matters, were moved to Title 16 of the D.C. Code. Id. (renaming 11-1551 in 16-2303). While Public Law 91-358 did not specifically state that it was repealing sections 11-1554, 11-1556, and 11-1557, it appears that Congress intended to repeal it, as those sections did not appear in either Title 11 or 16 and the table in the 1973 version of the D.C. Code stated that these provisions were repealed by the Reorganization Act.

minor.[30] However, controlling DCCA case law based on the Home Rule Act precludes Council assignment of prosecutorial authority to OAG unless the offenses falls into one of the categories in D.C. Code § 23-101(a).[31] In contrast to current law, the revised contributing to the delinquency of a minor statute does not purport to assign any prosecutorial authority to OAG because doing so is inconsistent with District case law based on the Home Rule Act. There is no evidence that the current contributing to the delinquency of a minor statute meets or was intended to meet the exceptions to USAO prosecution for a penal statute in the nature of a police or municipal regulation, or otherwise. This change improves the enforceability and consistency of the revised statutes.

Beyond these nine changes to current District law, nine other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised contributing to the delinquency of a minor statute no longer specifically or generally prohibits permitting or allowing a minor to engage in the prohibited conduct. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, "permit[ting]" or "allow[ing]" a minor to violate criminal laws or a court order, or be truant from school.[32] The plain language of the current D.C. Code statute allows criminal liability based upon a person's failure to act, even if the adult defendant does not have a legal duty to act. Imposing liability for an omission when there is no prior legal duty to act is generally disfavored.[33] The DCCA has not interpreted the scope of "permit" or "allow" in the current D.C. Code contributing to the delinquency of a minor statute.[34] However, in *Conley v. United States,* in holding unconstitutional the

[30] *Id.* at 28-29 ("The misdemeanor offense would be prosecuted by OAG and the felony offense would be prosecuted by the USAO. The rationale for this bifurcated system of prosecution is based on the likelihood that OAG would be involved in the criminal and/or civil prosecution of most of the underlying offenses that would give rise to a misdemeanor violation of this Act, while the USAO is better situated to prosecute the felony violations.").

[31] *See, generally: In re Crawley*, 978 A.2d 608 (D.C. 2009); *In re Hall*, 31 A.3d 453, 456 (D.C. 2011); and *In re Settles*, 218 A.3d 235 (D.C. 2019).

[32] D.C. Code § 22-811(a), (a)(1), (a)(4), (a)(5), (a)(7) ("(a) It is unlawful for an adult, being 4 or more years older than a minor, to . . . permit, or allow the minor to: (1) Be truant from school; (4) Violate a court order; (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience; (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[33] *See* the commentary to RCC § 22E-202(c), (d).

[34] In dicta in *Joya v. United States*, the DCCA noted that it "need not resolve" the scope of "permit" and "allow" in the contributing to the delinquency of a minor statute. *Joya v. United States*, 53 A.3d 309, 322 n. 28 (D.C. 2012). The issue in *Joya v. United States* was how collateral estoppel applied to a charge of contributing to the delinquency of a minor based upon a robbery for which appellant was acquitted. *Joya*, 53 A.3d at 311-12, 319-23. The government argued that a person could be found guilty under the contributing to the delinquency of a minor statute for "allow[ing]" or "permit[ting]" a minor to engage in felony criminal conduct. *Id.* at 322 n.28. Appellant argued that "allow" and "permit" "as used in the [contributing to the delinquency of a minor] statute suggest that there must be some type of special relationship between the defendant and the minor" and that "absent such an implicit requirement . . . the statute could effectively create an affirmative duty for innocent bystanders to prevent minors from committing crimes—something there is no evidence the legislature intended." *Id.* The DCCA stated "we need not resolve this issue now." *Id.*

District's former statute criminalizing presence in a motor vehicle containing a firearm, the DCCA interpreted the U.S. Supreme Court's decision in *Lambert v. California*[35] to stand for the proposition that "it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy."[36] Resolving this ambiguity, the revised contributing to the delinquency of a minor statute no longer specifically or generally prohibits permitting or allowing a minor to engage in the prohibited conduct. Neither the current D.C. Code nor the RCC contributing to the delinquency of a minor statute requires that the adult defendant have a responsibility for the minor or a legal duty to act, and it is disproportionate to impose criminal liability for an omission. Depending on the facts of the case, an adult that has a responsibility under civil law for the health, welfare, or supervision of the minor may still have liability under the RCC criminal abuse of a minor statute (RCC § 22E-1501) or the RCC criminal neglect of a minor statute (RCC § 22E-1502) for failure to act or "permitting or allowing" the minor to engage in the conduct the revised contributing to the delinquency of a minor statute prohibits. This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the revised contributing to the delinquency of a minor statute prohibits the same conduct as the general RCC solicitation statute (RCC § 22E-302). The current D.C. Code contributing to the delinquency of a minor statute makes it unlawful to "invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor" to violate criminal laws.[37] There is no DCCA case law interpreting this language and it is unclear whether "solicit" differs from other terms in the current statute, such as "invite," "recruit," "encourage," and "incite." There is no District case law interpreting the meaning of "solicit" in the current D.C. Code contributing to the delinquency of a minor statute. Resolving this ambiguity, the revised contributing to the delinquency of a minor statute prohibits the same conduct as the general RCC solicitation statute (RCC § 22E-302)—"commands, requests, or tries to persuade" the complainant "to engage in or aid the planning or commission of specific conduct, which, if carried out," will constitute a criminal offense.[38] As in the RCC solicitation statute, solicitation under subparagraph (a)(3)(B) also requires that the defendant act with the same culpability as required by the underlying criminal offense, as stated in RCC § 22E-302(a). This change improves the clarity and consistency of the revised statute.

Third, the revised contributing to the delinquency of a minor statute prohibits the same conduct as the general RCC accomplice liability statute (RCC § 22E-210). The current D.C. Code contributing to the delinquency of a minor statute makes it unlawful to "invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor" to violate criminal laws.[39] There is no DCCA case law interpreting this language and it is unclear how the various types of prohibited conduct differ. Resolving this ambiguity, the revised contributing to the delinquency of a minor

[35] 355 U.S. 225 (1957).
[36] *Conley v. United States*, 79 A.3d 270, 273 (D.C. 2013).
[37] D.C. Code § 22-811(a).
[38] RCC § 22E-302(b) limits liability under the general RCC solicitation provision to offenses against persons in Subtitle II of this title and felony property offenses in Subtitle III of this title. However, these limitations do not apply to the revised contributing to the delinquency of a minor offense.
[39] D.C. Code § 22-811(a).

statute prohibits the same conduct as the general RCC accomplice liability statute (RCC § 22E-210)—"assists" the complainant "with the planning or commission of conduct" or "encourages" the complainant "to engage in specific conduct" that constitutes a violation of a criminal offense, including a violation of D.C. Code § 25-1002. As in the RCC accomplice liability statute, accomplice liability under subparagraph (a)(3)(A) also requires that the defendant act with the same culpability as required by the underlying criminal offense, as stated in RCC § 22E-210(a). This change improves the clarity and consistency of the revised statute.

Fourth, the revised contributing to the delinquency of a minor statute no longer separately prohibits encouraging, causing, etc., a minor to possess or consume a trace amount of a controlled substance. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging, causing, etc., a minor to "[p]ossess or consume . . . without a valid prescription, a controlled substance as that term is defined in [D.C. Code] § 48-901.02(4)."[40] It is unclear whether this provision applies to any amount of a controlled substance or only a measurable amount and there is no DCCA case law on this issue.[41] Resolving this ambiguity, the revised contributing to the delinquency of a minor statute no longer specifically includes possessing or consuming a controlled substance as a discrete form of liability. Instead, the revised contributing to the delinquency of a minor statute prohibits being an accomplice to a crime, which includes the RCC Possession of a Controlled Substance offense (RCC § 48-904.01a). The RCC possession offense, like the current D.C. Code possession offense, requires that a person possess a "measurable amount" of a controlled substance. Assisting, encouraging, or soliciting a minor to possess or consume an unmeasurable (trace) amount of a controlled substance is insufficient for liability under the RCC contributing to the delinquency of a minor statute, although an adult with a responsibility under civil law for the health, welfare, or supervision of a minor may still have liability under the RCC criminal abuse of a minor statute (RCC § 22E-1501) or RCC criminal neglect of a minor statute (RCC § 22E-1502) if the adult causes or creates a risk of specified physical or mental harm. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the revised contributing to the delinquency of a minor statute requires a "reckless" culpable mental state for the age of the complainant. The current D.C. Code contributing to the delinquency of a minor statute[42] does not specify any culpable mental states and there is no DCCA case law on this issue. Resolving this ambiguity, the revised contributing to the delinquency of a minor statute requires a "reckless" culpable mental

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[40] D.C. Code § 22-811(a), (a)(2) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (2) Possess or consume . . . without a valid prescription, a controlled substance as that term is defined in§ 48-901.02(4).").

[41] Current D.C. Code § 48-904.01 prohibits knowingly or intentionally possessing a "controlled substance" without a valid prescription or order and grades the offense based on whether the controlled substance is phencyclidine in liquid form. D.C. Code § 48-904.01(d)(1), (d)(2). The statutory language of current D.C. Code § 48-904.01 does not require a "measurable amount" of a controlled substance, but DCCA case law interpreting the offense does. *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); *see also Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance). It is unclear whether the DCCA would similarly interpret the current D.C. Code contributing to the delinquency of a minor statute to require a "measurable amount" of a controlled substance.

[42] D.C. Code § 22-811.

state for the age of the complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[43] and legal experts[44] for any non-regulatory crimes. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[45] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[46] A "reckless" culpable mental state in the revised contributing to the delinquency of a minor statute is consistent with the culpable mental state required for the age of the complainant in other RCC offenses pertaining to minors, such as criminal abuse of a minor (RCC § 22E-1501), criminal neglect of a minor (RCC § 22E-1502), and enticing a minor into sexual conduct (RCC § 22E-1305). This change improves the consistency and proportionality of the revised offense.

Sixth, the revised contributing to the delinquency of a minor statute, by the use of the phrase "in fact," requires strict liability for the age of the actor and the required four year age gap. The current D.C. Code contributing to the delinquency of a minor statute requires that the actor be at least 18 years of age and at least four years older than the complainant, but does not specify what culpable mental state, if any, applies to these elements.[47] There is no DCCA case law on these issues. Resolving these ambiguities, the revised contributing to the delinquency of a minor statute, by the use of the phrase "in fact," requires strict liability for the age of the actor and the required four year age gap. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[48] However, the revised contributing to the delinquency of a minor statute requires a culpable mental state of recklessness for the age of the minor complainant, and an actor may be held strictly liable for elements of an offense that aggravate what is already illegal conduct.[49]

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[43] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)).

[44] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea.*'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[45] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[46] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[47] D.C. Code § 22-811(a), (f)(1), (f)(2) (stating "It is unlawful for an adult, being 4 or more years older than a minor . . ." and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.").

[48] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[49] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea

Strict liability for the age of the actor and the four year age gap is consistent with other RCC offenses that require this age for the actor and this age gap, such as third degree and sixth degree sexual abuse of a minor (RCC § 22E-1302), enticing a minor into sexual conduct (RCC § 22E-1305), and sexually suggestive conduct with a minor statute (RCC § 22E-1304). This change improves the consistency and proportionality of the revised offense.

Seventh, the revised contributing to the delinquency of a minor statute, by use of the phrase "in fact," applies strict liability to the fact that the conduct constitutes any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction. The current D.C. Code contributing to the delinquency of a minor statute prohibits, in relevant part, encouraging, causing, etc., a minor to violate a criminal offense in the District or elsewhere.[50] The statute does not specify any culpable mental states and it is unclear whether the actor must have subjective awareness that the planned or commissioned conduct will result in a crime. There is no DCCA case law on these issues. Resolving these ambiguities, the revised contributing to the delinquency of a minor statute, by use of the phrase "in fact," applies strict liability to the fact that the conduct constitutes any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[51] However, requiring that the defendant have subjective awareness of the fact that planned or commissioned conduct is a crime would allow a mistake of law to preclude liability for contributing to the delinquency of a minor, which is generally disfavored in the RCC and current District law.[52] Allowing a mistake of law to preclude liability is inconsistent with the requirements in the RCC accomplice liability (RCC § 22E-210) and solicitation (RCC § 22E-302) provisions, including that the adult defendant must act with the culpability, if any, required for the underlying criminal offense. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised statute codifies an exclusion from liability when, in fact, during a "demonstration," the complainant's conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction. The current D.C. Code contributing to the delinquency of a minor statute prohibits encouraging, causing, etc., a minor to "violate" certain criminal laws "except for

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which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)).

[50] D.C. Code § 22-811(a), (a)(5), (a)(7) ("(a) It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience; (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").

[51] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[52] *See* Commentary to RCC § 22E-208.

acts of civil disobedience"[53] and does not specify what culpable mental state, if any, applies to this element. There is no case law on the scope of "acts of civil disobedience" or the applicable culpable mental state. Resolving this ambiguity, the revised statute excludes from liability when, in fact, during a "demonstration," the complainant's conduct constitutes, or, if carried out, would constitute, a trespass under RCC § 22E-2601, a public nuisance under RCC § 22E-4202, blocking a public way under RCC § 22E-4203, an unlawful demonstration under RCC § 22E-4204, an attempt to commit such an offense, or a comparable offense in another jurisdiction. While the scope of "acts of civil disobedience" in the current D.C. Code contributing to the delinquency of a minor statute is unclear, the revised statute draws a clear line at certain acts of civil disobedience statute during a demonstration. This change improves the clarity of the revised statute.

Ninth, the revised contributing to the delinquency of a minor statute does not categorically require multiple penalties for contributing to the delinquency of a minor and a conviction for an underlying offense. The current D.C. Code contributing to the delinquency of a minor statute states that "The penalties under this section are in addition to any other penalties permitted by law." [54] The scope of the provision, whether civil or criminal, is unclear. However the reference to "penalties" may allow or require multiple criminal punishments arising from the same course of conduct. It is also unclear whether the statutory language requires consecutive sentences for contributing to the delinquency of a minor and other offenses, or if concurrent sentences are permitted. There is no relevant legislative history or DCCA case law interpreting this provision. Resolving this ambiguity, in the revised contributing to the delinquency of a minor statute, the RCC merger provision (RCC § 22E-214) determines whether multiple offenses from the same course of conduct merge, consistent with other RCC offenses. Given that the revised contributing to the delinquency of a minor statute is limited to accomplice (RCC § 22E-210) or solicitation liability (RCC § 22E-302), these offenses are lesser included offenses of and would merger into the revised contributing to the delinquency of a minor statute. This change improves the clarity, consistency, and proportionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised contributing to the delinquency of a minor statute does not use the terms "adult" or "minor." The current D.C. Code contributing to the delinquency of a minor statute defines an "adult" as "a person 18 years of age or older at the time of the offense"[55] and a "minor" as "a person under 18 years of age at the time of the offense."[56] The revised contributing to the delinquency of a minor statute codifies these requirements

[53] D.C. Code § 22-811(a), (a)(5), (a)(7) ("(a) It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience; (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony, or any criminal law of the United States, or the criminal law of any other jurisdiction that involves conduct that would constitute a felony if committed in the District of Columbia, except for acts of civil disobedience.").
[54] D.C. Code § 22E-811.
[55] D.C. Code § 22-811(f)(1).
[56] D.C. Code § 22-811(f)(2).

directly into the offense as elements—the actor must be at least 18 years of age and the complainant must be under the age of 18 years—and separate terms and definitions are unnecessary. In addition, the revised contributing to the delinquency of a minor statute deletes as surplusage the "at the time of the offense" requirement in the definitions of "adult" and "minor" in the current D.C. Code contributing to the delinquency of a minor statute. This change improves the clarity of the revised statute.

Second, the revised contributing to the delinquency of a minor statute no longer includes as a discrete basis of liability encouraging or causing a minor to join a criminal street gang. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging or causing a minor to "[j]oin a criminal street gang as that term is defined in [D.C. Code] § 22-951(e)."[57] This provision overlaps with the current D.C. Code contributing to the delinquency of a minor statute prohibition on encouraging or causing a minor to commit a misdemeanor.[58] The RCC contributing to the delinquency of a minor statute prohibits assisting, encouraging, or soliciting a minor complainant to engage in conduct that constitutes a District offense, which includes the District's current criminal street gang statute.[59] It is unnecessary to codify a provision in the revised statute that is specific to encouraging or causing[60] a minor to join a criminal street gang. This change improves the clarity of the revised statutes.

Third, the revised contributing to the delinquency of a minor statute no longer specifically includes as a discrete basis of liability encouraging or causing a minor to possess or consume alcohol. The current D.C. Code contributing to the delinquency of a

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[57] D.C. Code § 22-811(a), (a)(6) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (6) Join a criminal street gang as that term is defined in § 22-951(e)(1).").

[58] Under current D.C. Code § 22-951, causing a person to join a criminal street gang is a misdemeanor with a maximum term of imprisonment of 6 months. D.C. Code § 22-951(a)(1), (a)(2) ("(a)(1) It is unlawful for a person to solicit, invite, recruit, encourage, or otherwise cause, or attempt to cause, another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang. (2) A person convicted of a violation of this subsection shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 6 months, or both."). Encouraging or causing a minor to join a criminal street gang violates D.C. Code § 22-951, which, in turn, violates the prohibition in the current D.C. Code contributing to the delinquency of a minor statute on encouraging or causing a minor complainant to commit a misdemeanor. *See* D.C. Code § 22-811(a), (a)(5) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience.").

[59] D.C. Code § 22-951(a)(1), (a)(2) ("(a)(1) It is unlawful for a person to solicit, invite, recruit, encourage, or otherwise cause, or attempt to cause, another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang. (2) A person convicted of a violation of this subsection shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 6 months, or both.").

[60] The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits "permit[ting]" or "allow[ing]" a minor to join a criminal street gang. D.C. Code §§ 22-811(a), (a)(6). As is discussed elsewhere in this commentary as a possible change to current District law, the revised contributing to the delinquency of a minor statute does not include "permitting" or "allowing" any of the prohibited conduct, although there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes for an adult that is responsible under civil law for the health, welfare, or supervision of the minor. To the extent that the current D.C. Code contributing to the delinquency of a minor statute prohibits "permit[ting]" or "allow[ing]" a minor to join a criminal street gang, the revised contributing to the delinquency of a minor statute does not.

minor statute specifically prohibits encouraging or causing a minor complainant to "[p]ossess or consume alcohol."[61] The revised contributing to the delinquency of a minor statute prohibits being an accomplice to a minor complainant to engage in conduct that constitutes "any District offense, a violation of D.C. Code § 25-1002, or a comparable offense or comparable violation in another jurisdiction." This specific reference to a violation of D.C. Code § 25-1002 ensures that there is liability under the revised contributing to the delinquency of a minor statute for being an accomplice to a complainant if they "purchase, attempt to purchase, possess, or drink an alcoholic beverage in the District."[62] With this reference to D.C. Code § 25-1002 established, it is unnecessary to specially codify in the revised statute a provision that is specific to encouraging or causing a minor complainant to "[p]ossess or consume alcohol."[63] This change improves the clarity of the revised statutes.

Fourth, the revised contributing to the delinquency of a minor statute no longer includes as a discrete basis of liability encouraging or causing a minor to possess or consume a "measurable amount" of a controlled substance without a valid prescription. The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits encouraging or causing a minor to "[p]ossess or consume . . . without a valid prescription, a controlled substance as that term is defined in [D.C. Code] § 48-901.02(4).[64] As is discussed elsewhere in this commentary as a possible change to current District law, it is unclear whether this provision applies to any amount of a controlled substance or only a "measurable amount." To the extent that this provision applies to a "measurable amount," it overlaps with the current D.C. Code contributing to the delinquency of a minor statute prohibition on encouraging or causing a minor to commit a misdemeanor or

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[61] D.C. Code § 22-811(a), (a)(2) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (2) Possess or consume alcohol . . . .").

[62] Current D.C. Code § 25-1002 prohibits a person under 21 years of age from "purchas[ing], attempt[ing] to purchase, possess[ing], or drink[ing] an alcoholic beverage in the District, except as provided under subchapter IX of Chapter 7." D.C. Code § 22-1002(a). A violation of current D.C. Code § 25-1002 is a "misdemeanor," although the statute also states that "No person under the age of 21 shall be criminally charged with the offense of possession or drinking an alcoholic beverage under this section, but shall be subject to civil penalties under subsection (e) of this section." D.C. Code § 25-1002(a), (c)(4)(D). Although a minor is not subject to criminal prosecution, a violation of current D.C. Code § 25-1002(a) still appears to be an "offense," and the RCC contributing to the delinquency of a minor statute treats it as such. Assisting, encouraging, etc. a minor complainant to engage in conduct that violates current D.C. Code § 25-1002(a) is sufficient for liability under the RCC contributing to the delinquency of a minor statute.

[63] The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume alcohol. D.C. Code § 22-811(a), (a)(2). As is discussed elsewhere in this commentary as a possible change to current District law, the revised contributing to the delinquency of a minor statute does not include "permitting" or "allowing" any of the prohibited conduct, although there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes for an adult that is responsible under civil law for the health, welfare, or supervision of the minor. To the extent that the current D.C. Code contributing to the delinquency of a minor statute prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume alcohol, the revised contributing to the delinquency of a minor statute does not.

[64] D.C. Code § 22-811(a), (a)(2) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (2) Possess or consume . . . without a valid prescription, a controlled substance as that term is defined in§ 48-901.02(4).").

felony.[65] The RCC contributing to the delinquency of a minor statute prohibits assisting, encouraging, or soliciting a minor to engage in conduct that constitutes a District offense, including the RCC possession of a controlled substance offense (RCC § 48-904.01a), and it is unnecessary to codify a provision that is specific to encouraging or causing a minor to possess or consume a controlled substance.[66] This change improves the clarity of the revised statutes.

Fifth, the revised contributing to the delinquency of a minor statute does not codify a separate provision stating that "it is not a defense" that the minor complainant does not engage in the prohibited conduct or is not charged with, adjudicated delinquent for, or convicted of an offense. Subsection (d) of the current D.C. Code contributing to the delinquency of a minor statute states that "It is not a defense to a prosecution under this section that the minor does not engage in, is not charged with, is not adjudicated delinquent for, or is not convicted as an adult, for" any of the prohibited conduct.[67] Instead, subsection (c) of the revised contributing to the delinquency of a minor statute states that an actor "may be convicted of an offense under this section even though the complainant has not been arrested, prosecuted, convicted, or adjudicated delinquent for an offense." Subsection

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[65] Current D.C. Code § 48-904.01 prohibits knowingly or intentionally possessing a controlled substance without a valid prescription or order and grades the offense based on whether the controlled substance is phencyclidine in liquid form. D.C. Code § 48-904.01(d)(1), (d)(2) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than the amount set forth in § 22-3571.01, or both. (2) Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both."). The statutory language of current D.C. Code § 48-904.01 does not require a "measurable amount" of a controlled substance, but DCCA case law interpreting the offense does. *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).
Encouraging or causing a minor to possess or consume a measurable amount of a controlled substance without a valid prescription violates D.C. Code § 48-904.01, which, in turn, violates the prohibition in the current D.C. Code contributing to the delinquency of a minor statute on encouraging or causing a minor complainant to commit a misdemeanor or a felony. *See* D.C. Code § 22-811(a), (a)(5), (a)(7) ("It is unlawful for an adult, being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate . . . the minor to: . . . (5) Violate any criminal law of the District of Columbia for which the penalty constitutes a misdemeanor, except for acts of civil disobedience. . . . (7) Violate any criminal law of the District of Columbia for which the penalty constitutes a felony . . . .").

[66] The current D.C. Code contributing to the delinquency of a minor statute specifically prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume a controlled substance without a valid prescription. D.C. Code § 22-811(a), (a)(2). As is discussed elsewhere in this commentary as a possible change to current District law, the revised contributing statute does not include "permitting" or "allowing" any of the prohibited conduct, although there may be liability under the RCC criminal abuse of a minor (RCC § 22E-1501) or RCC criminal neglect of a minor (RCC § 22E-1502) statutes for an adult that is responsible under civil law for the health, welfare, or supervision of the minor. To the extent that the current D.C. Code contributing to the delinquency of a minor statute prohibits "permit[ting]" or "allow[ing]" a minor to possess or consume a controlled substance without a valid prescription, the revised contributing to the delinquency of a minor statute does not.

[67] D.C. Code § 22-811(d).

(c) of the revised statute is consistent with a provision in the general RCC accomplice liability statute (RCC § 22E-210). Subsection (c) of the revised statute is substantively identical to subsection (d) of the current D.C. Code contributing to the delinquency of a minor statute, with one exception—the revised subsection (c) does not specify that the minor "does not engage in" the prohibited conduct. This language is surplusage given the requirements of the revised statute (accomplice or solicitation liability) and deleting it is not intended to change current District law. This change improves the clarity of the revised statute.

Sixth, the revised contributing to the delinquency of a minor statute codifies an exclusion from liability when the actor satisfies the requirements in D.C. Code § 7-403. This is consistent with current law,[68] although the current D.C. Code contributing to the delinquency of a minor statue doesn't reference D.C. Code § 7-403. This change improves the clarity and consistency of the revised statutes.

[68] D.C. Code § 7-403 states that contributing to the delinquency of a minor under current D.C. Code § 22-811(a)(2) and (b)(1) "shall not be considered crimes and shall not serve as the basis for revoking or modifying a person's supervision status" when healthcare is sought for an overdose:

> (a) Notwithstanding any other law, the offenses listed in subsection (b) of this section shall not be considered crimes and shall not serve as the sole basis for revoking or modifying a person's supervision status:
>
> (1) For a person who:
>
> (A) Reasonably believes that he or she is experiencing a drug or alcohol-related overdose and in good faith seeks health care for himself or herself;
>
> (B) Reasonably believes that another person is experiencing a drug or alcohol-related overdose and in good faith seeks healthcare for that person; or
>
> (C) Is reasonably believed to be experiencing a drug or alcohol-related overdose and for whom health care is sought; and
>
> (2) The offense listed in subsection (b) of this section arises from the same circumstances as the seeking of health care under paragraph (1) of this subsection.
>
> (b) The following offenses apply to subsection (a) of this section:
>
> . . .
>
> (5) Provided that the minor is at least 16 years of age and the provider is 25 years of age or younger:
>
> (B) Contributing to the delinquency of a minor with regard to possessing or consuming alcohol or, without a prescription, a controlled substance as prohibited by § 22-811(a)(2) and subject to the penalties provided in § 22-811(b)(1) . . . ."

D.C. Code § 7-403(a), (b)(5)(B).

COMMENTARY:
OFFENSES OUTSIDE TITLE 22 &
OFFENSES RECOMMENDED FOR REPEAL

RCC § 7-2502.01A. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

Explanatory Note. *This section establishes the possession of an unregistered firearm, destructive device, or ammunition offense and penalty gradations for the Revised Criminal Code (RCC). The offense proscribes possessing a firearm or ammunition without having registered a firearm under D.C. Code § 7-2502.07. The revised statute replaces the first sentence of D.C. Code § 7-2502.01(a) (concerning possession of an unregistered firearm or destructive device); 7-2506.01(a) (Persons permitted to possess ammunition); and 7-2507.06 (Penalties); and 24 DCMR § 2343.2 (Ammunition carried by licensee). This section is added to the list of excepted code provisions in D.C. Code § 7-2507.06(a).*

Subsection (a) specifies the elements of first degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (a) specifies that a person must knowingly possess[1] an unregistered firearm, destructive device, or restricted pistol bullet. "Knowingly" is a defined term[2] and applied here means that the person must be practically certain that they possess the firearm or destructive device. "Possesses" is a defined term and includes both actual and constructive possession.[3] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[4] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[5]

Paragraph (a)(1) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing an unregistered firearm. "Firearm" is a defined term,[6] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[7] but excludes antiques.[8] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess a firearm[9] or that they possess component parts that could

[1] Knowledge of a gun's presence may be inferred from surrounding circumstances; direct evidence is not required. *Logan v. United States*, 489 A.2d 485 (D.C. 1985); *see also Matter of T.M.*, 577 A.2d 1149 (D.C. 1990). However, the government must show a connection between the seized weapon and the criminal venture in order to enable the jury reasonably to infer the venturer's knowledge of the weapon. *Easley v. United States*, 482 A.2d 779 (D.C. 1984).
[2] "Knowingly" is defined in RCC § 22E-206.
[3] RCC § 22E-701.
[4] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[5] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).
[6] D.C. Code § 7-2501.01.
[7] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[8] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[9] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).

be arranged to make a whole firearm.[10] Paragraph (a)(1) requires proof that the accused lacked a firearm registration certificate on the day in question.[11] Paragraph (a)(1) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person has a registration certificate.[12] It is not a defense that the person was unaware of the duty to register the firearm.[13] It is not a defense that the firearm cannot be registered lawfully in the District.[14]

Paragraph (a)(2) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing a destructive device. The term "destructive device" is a defined[15] term that includes certain explosives and lacrimators but excludes B-B guns and flare guns. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "destructive device."

Paragraph (a)(3) provides that a person commits first degree possession of an unregistered firearm, destructive device, or ammunition by possessing one or more restricted pistol bullets. The term "restricted pistol bullet" is defined[16] to include several categories of pistol and rifle ammunition that are likely to pierce through bullet-resistant tactical vests. The term does not include hollow-point bullets. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "restricted pistol bullet."

Subsection (b) specifies the elements of second degree possession of an unregistered firearm, destructive device, or ammunition. Subsection (b) specifies that a

[10] *Myers v. United States*, 56 A.3d 1148 (D.C. 2012).
[11] *See Herrington v. United States*, 6 A.3d 1237, 1244-45 (D.C. 2010) (stating a legislature may not presume criminality from Second Amendment-protected conduct and put the burden of persuasion on the accused to prove facts necessary to establish innocence); *see also Walker v. United States*, 982 A.2d 723, 738 (D.C. 2009) (explaining to convict a defendant on an aiding and abetting theory, the government must show that the principal (not the aider and abettor) was not licensed) (citing *Halicki v. United States*, 614 A.2d 499, 503-04 (D.C.1992)); *Tabaka v. Dist. of Columbia*, 976 A.2d 173, 175 (D.C. 2009) (explaining that a record of no permit is testimonial, triggering the Confrontation Clause of the Sixth Amendment to the United States Constitution).
[12] RCC § 22E-207.
[13] *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978); *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987); *District of Columbia v. Lewis*, 136 WLR 2609 (Super. Ct. 2008).
[14] *See United States v. Carmel,* 548 F.3d 571, 579 (7th Cir.2008) (holding that defendant could have complied with statute prohibiting possession of unregistered firearms "simply by declining to possess…illegal machine guns," which could not be registered because they could not legally be possessed); *United States v. Grier,* 354 F.3d 210, 214–15 (3d Cir.2003) (same); *United States v. Bournes,* 339 F.3d 396, 399 (6th Cir.2003) (same); *United States v. Elliott,* 128 F.3d 671, 672 (8th Cir.1997) (same); *Hunter v. United States,* 73 F.3d 260, 261–62 (9th Cir.1996) (same); *United States v. Ardoin,* 19 F.3d 177, 179–80 (5th Cir.1994) (same); *United States v. Jones,* 976 F.2d 176, 183 (4th Cir.1992) (same); *but see United States v. Dalton*, 960 F.2d 121, 124 (10th Cir.1992) (reversing conviction for possession of unregistered machine gun, holding that a conviction for a crime that "ha[s] as an essential element [the defendant's] failure to do an act that he is incapable of performing" violates due process).
[15] D.C. Code § 7-2501.01.
[16] RCC § 22E-701.

person must knowingly possess a specified object.[17] "Knowingly" is a defined term[18] and applied here means that the person must be practically certain that they possess the object. "Possesses" is a defined term and includes both actual and constructive possession.[19] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[20] Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession.[21]

Subsection (b) provides that a person commits second degree possession of an unregistered firearm, destructive device, or ammunition by possessing ammunition without having a registered firearm of the same caliber. "Ammunition" is a defined term,[22] which means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they possess one of the objects that is included in the definition of "ammunition." Subsection (b) uses the term "in fact" to specify that there is no culpable mental state required as to whether the person lacked a firearm registration certificate on the day in question.[23] It is not a defense that the person was unaware of the duty to have a registered firearm. It is not a defense that a firearm of the same caliber cannot be registered lawfully in the District.

Subsection (c) establishes six exclusions from liability.[24] Paragraph (c)(1) excludes from liability possession of a firearm frame, receiver, muffler, or silencer.[25] Possession of a silencer is punished as possession of a prohibited weapon or accessory.[26] Paragraph (c)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here, that the actor possesses a firearm frame, receiver, muffler, or silencer.

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[17] Knowledge of ammunition's presence may be inferred from surrounding circumstances; direct evidence is not required. *See Ko v. United States*, 722 A.2d 830 (D.C. 1998) (upholding conviction of unlawful possession of ammunition on evidence that defendant, who had purchased a restaurant, found ammunition owned by seller in office, put that ammunition in his desk drawer, and made no attempt for several months to return ammunition to the seller).

[18] "Knowingly" is defined in RCC § 22E-206.

[19] RCC § 22E-701.

[20] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).

[21] *See, e.g., Walker v. United States*, 982 A.2d 723 (D.C. 2009) (holding while factfinder could infer that defendant knew of presence of gun, gun was inferentially in companion's sole possession throughout time police observed defendant and companion); *Matter of L.A.V.*, 578 A.2d 708 (D.C. 1990).

[22] RCC § 22E-701.

[23] *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017); *Herrington v. United States*, 6 A.3d 1237 (D.C. 2010).

[24] RCC § 22E-201(b)(1) ("If there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of at least one element of the exclusion from liability beyond a reasonable doubt.").

[25] D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers.

[26] RCC § 22E-4101.

Paragraph (c)(2) excludes from liability possession of a lacrimator or sternutator.[27] Paragraph (c)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here, that the actor possesses a lacrimator or sternutator.

Paragraph (c)(3) excludes from liability possession of a firearm by a nonresident who is traveling through the District with the firearm that they have registered in another state. Paragraph (c)(3) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (c)(3) applies to all the elements in paragraph (c)(3), subparagraph (c)(3)(A), and subparagraph (c)(3)(B) and its sub-subparagraphs and sub-sub-subparagraphs, and there is no culpable mental state for any of these requirements. Subparagraph (c)(3)(A) excludes nonresidents who are participating in a lawful recreational firearm-related activity[28] inside the District. Subparagraph (c)(3)(B) excludes non-residents who are traveling to or from a lawful recreational firearm-related activity outside the District. Subparagraph (c)(3)(B) requires that the person comply with any law enforcement officer's demand for proof that they meet the exclusion criteria. "Law enforcement officer" is a defined in RCC § 22E-701. Subparagraph (c)(3)(B) also requires that the firearm be safely transported consistent with RCC § 22E-4109.

Paragraph (c)(4) excludes from liability possession of ammunition by any person who holds an ammunition collector's certificate issued before the Firearms Control Regulation Act of 1975 became effective. Paragraph (c)(4) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here, that the actor holds an ammunition collector's certificate effective on or before September 24, 1976.

Paragraph (c)(5) excludes empty cartridge casings, shells, and spent bullets from the reach of the second degree possession of an unregistered firearm, destructive device, or ammunition offense.[29] Paragraph (c)(5) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here, that the actor possesses one or more empty cartridge cases, shells, or spent bullets.

Paragraph (c)(6) cross-references applicable exclusions from liability for certain weapons offenses in the RCC. Paragraph (c)(6) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor satisfies the criteria in RCC § 22E-4118.

Subsection (d) establishes an affirmative defense for a person who is voluntarily surrendering a weapon. The person must comply with the requirements of a District or

[27] D.C. Code § 7-2501.01 defines "destructive device" to include any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known.
[28] E.g., safety training course, firing range practice, gun show, shooting competition.
[29] For example, a person who keeps a shotgun shell as a souvenir, after a day of recreational skeet shooting, does not commit a second degree possession of unregistered firearm, destructive device, or ammunition offense.

federal voluntary surrender statute or rule.[30] Per RCC § 22E-201(b), the defense has the burden of proving an affirmative defense by a preponderance of the evidence.

Subsection (e) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.[31]

Subsection (f) provides the penalty for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (f)(3) provides that the Attorney General may allow a person charged with possession of an unregistered firearm, destructive device, or ammunition to resolve the charge using the District's post-and-forfeit procedure.[32]

Subsection (g) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (h) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised possession of an unregistered firearm, destructive device, or ammunition offense clearly changes current District law in eight main ways.*

First, the revised statute eliminates repeat offender penalty enhancements consistent with other nonviolent revised offenses. Current D.C. Code § 7-2507.06 provides two different penalties for an unregistered firearm. Subsection (a) specifies a maximum penalty of one year of incarceration, a fine of $2,500, or both.[33] Paragraph (a)(2) of D.C. Code § 7-2507.06 specifies that a second offense is punishable by a maximum penalty of five years of incarceration, a fine of $12,500, or both, unless the person is in their dwelling place, place of business, or on their land and possesses a firearm that could otherwise be registered.[34] (Subparagraph (b)(1)(A) of D.C. Code § 7-2507.06 specifically authorizes the Attorney General to offer an alternative administrative disposition without conviction, but this provision is superfluous because general authority to offer such a disposition exists in D.C. Code § 5-335.01.) In contrast, the RCC does not provide an offense-specific penalty enhancement for a second or subsequent offense. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced

[30] *See, e.g.,* D.C. Code §§ 7-2507.05; 7-2510.07(f)(1); *see also Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991). *See also* RCC § 22E-502, Temporary Possession.

[31] Because provisions of statutes governing offenses of possession of an unregistered firearm (UF) and unlawful possession of ammunition (UA) are "police or municipal ordinances or regulations," prosecutorial authority lies with the Office of the Attorney General of the District of Columbia (OAG), rather than Office of the United States Attorney (USAO), irrespective of the fact that a violation of these provisions carries a maximum penalty of both a fine and imprisonment. *In re Hall*, 31 A.3d 453 (D.C. 2011).

[32] Although diversion would be permissible without this statutory language, codifying the Council's intent to afford a noncriminal negotiated resolution to many (or most) people charged with this offense provides better notice to the public and criminal justice system actors.

[33] D.C. Code § 22-3571.01.

[34] D.C. Code § 22-3571.01.

burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statute.

Second, the revised offense does not include liability for possession of a frame, receiver, muffler, silencer, lacrimator or sternutator. Current D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers and defines "destructive device" to include any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known. Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories are "bearable arms" protected by the Second Amendment.[35] With limited exceptions for military and law enforcement,[36] the RCC criminalizes mere possession of a silencer as contraband *per se*[37] and, because any possession is illegal, does not regulate their registration, storage, or carrying. The RCC does not criminalize possession of self-defense sprays.[38] This change improves the proportionality and logically reorganizes the revised offenses.

Third, the revised statute punishes possession of a restricted pistol bullet as possession of an unregistered firearm, destructive device, or ammunition[39] only. Current 24 DCMR § 2343.2 states, "A person issued a concealed carry license by the Chief may not carry any restricted pistol bullet as that term is defined in the Act." However, mere possession—much less actual possession or carrying—of a restricted pistol bullet by any person, including the holder of a carry license, is prohibited under other provisions in current law.[40] In contrast, the revised code effectively repeals 23 DCMR § 2343.2 as duplicative of the prohibition on restricted pistol bullets in the revised possession of a prohibited weapon or accessory offense.[41] This change improves the logical organization of the revised code and reduces unnecessary overlap between District offenses.

Fourth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of an unregistered firearm, destructive device, or ammunition offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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[35] *See United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).
[36] RCC § 22E-4118.
[37] RCC § 22E-4101, possession of a prohibited weapon or accessory.
[38] See First Draft of Report #40.
[39] RCC § 7-2502.01A(b)(2).
[40] With limited exceptions, a person who has any ammunition (defined in D.C. Code § 7-2501.01 to include restricted pistol bullets) without having a registered firearm of the same caliber, may be prosecuted under D.C. Code § 7-2506.01. A person who has a registered firearm is nevertheless prohibited from having one or more restricted pistol bullets under D.C. Code § 7-2506.01(a)(3).
[41] RCC § 22E-4101(a)(2)(F).

Fifth, the revised statute's Administrative Disposition[42] provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor…may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for initially charging any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.[43] This change improves the clarity and consistency of the revised offenses.

Sixth, the revised offense punishes possession of one restricted bullet as severely as possession of two or more. Current D.C. Code § 7-2507.06(a) provides a maximum penalty of one year in jail for possession of a single restricted pistol bullet and a maximum of 10 years in prison for possession of two or more. D.C. Code § 7-2507.06(b)(1)(B) authorizes the Attorney General to offer an alternative administrative disposition without conviction for possession a single restricted pistol bullet but not for possession of two or more.[44] In contrast, the revised offense provides a single penalty gradation for possession of restricted ammunition. It is unclear why such a sharp difference in penalty is supported by possessing one bullet versus possessing two or more bullets.[45] This change improves the proportionality of the revised offense.

Seventh, the RCC codifies a single list of exclusions from liability for possessory weapons offenses that are incorporated into the revised possession of an unregistered firearm, destructive device, or ammunition offense by reference.[46] The current D.C. Code provisions list incongruent exceptions for law enforcement officers, weapons dealers, government employees, and nonresidents who possess an unregistered firearm, destructive device, or ammunition.[47] In contrast, RCC § 22E-4118 provides a single, comprehensive

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[42] The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.

[43] *See* American Bar Association, Criminal Justice Standards for the Prosecution Function Fourth Addition Standard 3-4.2(b), 3-4.3(a), and 3-4.4 (February 13, 2015).

[44] This provision is technically superfluous since general authority to offer such a disposition exists in D.C. Code § 5-335.01.

[45] Firearms frequently hold six rounds of ammunition or more. Ammunition is often sold in boxes of 50 rounds or more.

[46] RCC § 22E-4118.

[47] The following three examples provide an illustrative, though inexhaustive, list. First, a person who participates in a firearms training and safety class is not liable for transporting a registered firearm to or

list of exclusions from liability, reconciling the exclusion circumstances described in current law. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[48] This change improves the clarity, consistency, and completeness of the revised code.

Eighth, the revised offense codifies a voluntary surrender affirmative defense. D.C. Code §§ 7-2507.05 and 7-2510.07(f)(1) preclude prosecution for certain possessory weapons offenses where the person is voluntarily surrendering the weapon to law enforcement. The current statutes do not address the elements or burden of proof for a defense based on one of these provisions, however District case law has explained the showing that must be made by the defense.[49] The revised statute specifies that any voluntary surrender that is made pursuant to District or federal law is an affirmative defense that must be proven by the defense by a preponderance of the evidence.[50] This change improves the clarity, consistency, and proportionality of the revised offense.

Beyond these eight changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute holds an actor strictly liable as to the existence of a firearm registration certificate. Current D.C. Code §§ 22-4502.01, 22-4506.01, and 22-4507.06 do not specify a culpable mental state for any element of the unregistered firearm, destructive device, or ammunition offenses.[51] District case law has not addressed whether a reasonable or unreasonable mistake of fact as to having validly registered a firearm is a defense.[52] The revised offense makes no allowance for such a defense. A firearm owner is required to comply with all District regulations, including receiving training on the responsibilities of ownership.[53] This change clarifies the revised offense.

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from the class and is not liable for possessing ammunition during the class, however, there is no exception in current law for possessing a firearm during a firearm training and safety class. *See, e.g.*, D.C. Code § 22-4504.02(a); 22-4505(c); 7-2506.01(a)(5). Second, a member of the military avoids prosecution for possession of an assault weapon, machine gun, or sawed-off shotgun, however, there is no military exception for possession of a large-capacity ammunition feeding device. D.C. Code § 22-4514(a); 7-2506.01(b). Third, consistent with 18 U.S.C. 926C, D.C. Code § 22-4505(b) provides that a retired Metropolitan Police Officer who carries a registered firearm is not liable for carrying a dangerous weapon, however, D.C. Code § 22-4514(a) does not include a similar exception for possession of a prohibited weapon.

[48] RCC § 22E-402.

[49] *See Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980) (citing *Logan v. United States*, 402 A.2d 822 (D.C. 1979); *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974)); *Stein v. United States*, 532 A.2d 641, 646 (D.C. 1987); *Yoon v. United States*, 594 A.2d 1056 (D.C. 1991).

[50] *See* RCC § 22E-201(b); *see also* RCC § 22E-502, Temporary Possession.

[51] District case law requires knowledge for actual or constructive possession of any item. *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).

[52] Consider, for example, a person who mistakenly believes their registration expires in July instead of June. Consider also a person who inherits a firearm believing the registration certificate was transferred to them in probate.

[53] *See* D.C. Code § 7-2502.03(a)(10).

Second, the RCC's exclusion for nonresidents traveling through the District, in paragraph (c)(3) of the revised offense, requires that the person exhibit proof that they meet the exclusion criteria to any "law enforcement officer" who demands it. D.C. Code § 7-2502.01(b)(3) requires that a nonresident in these circumstances comply with such a request made by a Metropolitan Police Officer "or other bona fide law enforcement officer." The term "bona fide law enforcement officer" is not defined in the statute and District case law has not interpreted its meaning. In contrast, the revised offense uses the standardized definition of "law enforcement officer" that is employed throughout the RCC.[54] The RCC definition of "law enforcement officer" includes special police officers, corrections officers, and other government actors who do not have arrest powers, which may be broader than the phrase "bona fide law enforcement officer" in current law. This change improves the clarity and consistency of the revised offense and may eliminate an unnecessary gap in liability.

Third, the revised statute refers to "possession" and does not include explicit references to transferring, offering for sale, selling, giving, or delivering a destructive device. D.C. Code § 7-2502.01(a) makes it unlawful to receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device. Such conduct is also prohibited by D.C. Code §§ 7-2504.01(b) and 7-2505.01. In contrast, the RCC's definition of possess[55] includes both actual possession and constructive possession. A person who knowingly transfers, offers, sells, gives, or delivers a destructive device appears to either violate the revised statute by having the ability and desire to exercise control over the object, or, when falsely advertising an object for sale, is engaged in conduct criminalized elsewhere.[56] This change improves the consistency of the revised statutes and reduces unnecessary overlap between offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute applies a standardized definition for the "knowingly" culpable mental state required for possession of an unregistered firearm, destructive device, or ammunition liability. The current statutes do not specify a requisite mental state,[57] however, District case law requires knowledge for actual or constructive possession of any item.[58] The revised statute uses the RCC's general provisions that define "knowingly" and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[59] These changes clarify and improve the consistency of District statutes.

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[54] RCC § 22E-701.
[55] RCC § 22E-701.
[56] *See* D.C. Code § 22-1511 (Fraudulent advertising).
[57] D.C. Code §§ 7-2502.01; 7-2506.01.
[58] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).
[59] RCC § 22E-207.

Second, the revised code defines "possession" in its general part.[60] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[61] The RCC definition of "possession,"[62] with the requirement in the offense that the possession be "knowing,"[63] matches the meaning of possession in current DCCA case law.[64] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Third, the revised offense does not specifically include a self-defense provision. Current D.C. Code § 7-2502.01(b)(4) specifies that a person will not be subject to prosecution "who temporarily possesses a firearm…while in the home or place of business of the registrant…[if] the person reasonably believes that possession of the firearm is necessary to prevent imminent death or great bodily harm to himself or herself." An offense-specific self-defense provision is duplicative in the RCC. Per subsection (h) of the revised statute, the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense, including general provisions that preclude liability where a person acts in defense of one's self, a third person, or property.[65] This change improves the consistency of the revised offenses.

Fourth, the revised statute requires the government prove that a person who possesses ammunition does not have a registered firearm of the same caliber. Current D.C. Code § 7-2506.01(a) states that no person shall possess ammunition unless one of five circumstances is present. The current statute does not specify whether the government has the burden of proving the absence of these circumstances or whether the defense must affirmatively raise any of the circumstances as a defense. However, the District of Columbia Court of Appeals ("DCCA") has required the government to prove the circumstance described in D.C. Code § 7-2506.01(a)(3): the absence of a firearm

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[60] RCC § 22E-701.
[61] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[62] RCC § 22E-701.
[63] RCC § 22E-206.
[64] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").
[65] *See* RCC §§ 22E-403; 22E-404.

registration certificate.[66] The revised offense clarifies that the absence of a firearm registration certificate is an element that must be proven beyond a reasonable doubt, whereas the other exceptions[67] are not elements of the offense. Consistent with the RCC's general assignment of the burden of proof for exclusions from liability, if there is any evidence of a statutory exclusion at trial, then the government must prove the absence of at least one element of that exclusion beyond a reasonable doubt.[68] This change improves the clarity and consistency of the revised offense.

Fifth, the revised statute is severed from D.C. Code § 7-2502.01 and given its own section in the revised code. This change clarifies that the exclusion, defense, penalties, and definitions do not apply to remaining provisions in D.C. Code § 7-2502.01 that are not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

[66] In *Logan v. United States*, the District of Columbia Court of Appeals ("DCCA") construed the statute to mean that possession of ammunition is presumptively unlawful and, thus, the government does not have the burden of proving that a defendant is not a licensee, an authorized government officer, agent or employee, a registrant of firearms of the same caliber as the ammunition possessed, or a certified dealer. 489 A.2d 485, 492-93 (D.C. 1985). However, in *Herrington v. United States*, the DCCA held that *Logan* was unconstitutional as applied to a person who possesses ammunition in their own home. 6 A.3d 1237, 1241-45 (D.C. 2010). The court reasoned that, where the Second Amendment imposes substantive limits on what conduct may be defined as a crime, a legislature may not "circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct and puts the burden of persuasion on the accused to prove facts necessary to establish innocence." *Id.* at 1244. The court did not reach the question of whether the holding in *Logan* would be unconstitutional as applied to a person outside the home. The revised offense resolves this ambiguity.

[67] RCC §§ 7-2502.01A(c)(1); 22E-4118.

[68] RCC § 22E-201(b)(1).

RCC § 7-2502.15. Possession of a Stun Gun.

Explanatory Note. *This section establishes the possession of a stun gun offense for the Revised Criminal Code (RCC). The offense proscribes possession of a stun gun by persons under 18 and possession of a stun gun in a prohibited location. The revised offense replaces D.C. Code §§ 7-2502.15 (Possession of stun guns) and 7-2507.06(b)(1)(E) (Penalties).*

Subsection (a) specifies that to commit possession of a stun gun, a person must knowingly[1] possess a stun gun. "Stun gun" is a defined term and includes weapons that inflict injury by direct contact (commonly referred to as "stun guns") and weapons that can be fired from a distance (e.g., TASERs). "Possession" is also a defined term and includes both actual and constructive possession.[2] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[3]

Paragraph (a)(1) prohibits knowing possession of a stun gun by any person who is under 18 years of age. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is under 18 years of age.

Paragraph (a)(2) prohibits possession of a stun gun by any person in a specified location. Subparagraph (a)(2)(A) specifies that the first type of location where stun guns are prohibited is a District government-occupied building, building grounds, or part of a building. The term "building" is defined in RCC § 22E-701. "Building grounds" refers to the area of land occupied by the facility and its yard and outbuildings, with a clearly identified perimeter. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a location that is occupied by the District of Columbia.

Subparagraph (a)(2)(B) specifies that the second type of location that may ban stun guns under penalty of criminal prosecution under this section is a location that is a building, building grounds, or part of a building that is occupied by a preschool, primary or secondary school, public youth center, or a children's day care center.[4] The term "building" is defined in RCC § 22E-701 and does not include open campus space. "Building grounds" refers to the area of land occupied by the facility and its yard and outbuildings, with a clearly identified perimeter. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a specified location.

Subparagraph (a)(2)(C) specifies that the third type of location that may ban stun guns under penalty of criminal prosecution under this section is one that displays signage that clearly and conspicuously indicates stun guns are not permitted there. Whether a sign is clear and conspicuous may depend on facts such as its placement, legibility, and word

[1] "Knowingly" is defined in RCC § 22E-206.
[2] RCC § 22E-701; *see also Rivas v. United States*, 783 A.2d 125, 128 (D.C. 2001).
[3] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[4] These locations include buildings that are being used for the specified purpose. They do not include, for example, an address that is used only to receive mail for an online education program.

choice.[5] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that he or she is in a location where such signage is displayed.

Subsection (b) cross-references applicable exclusions from liability for certain weapons offenses in the RCC. Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor satisfies the criteria in RCC § 22E-4118.

Subsection (c) codifies an effective consent affirmative defense to the possession of a stun gun offense.[6] The effective consent defense requires either the complainant's "effective consent" to the actor's conduct or that the actor reasonably believes[7] that a person lawfully in charge of the location gives effective consent to the conduct charged to constitute the offense. Subsection (c) specifies "in fact," a defined term in RCC § 22E-207 that is used to indicate that there is no culpable mental state requirement as to a given element. Per the rules of interpretation in RCC § 22E-207, "in fact" applies to every element of the affirmative defense in subsection (c), and no culpable mental state, as defined in RCC § 22E-205, applies to the defense. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[8] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an explicit or implicit coercive threat, or deception."

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (e) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (f) cross-references applicable definitions in the RCC.

Subsection (g) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

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[5] This is a more flexible standard than provided in the District's current municipal regulation of signage preventing entry onto private property with a concealed firearm. 24 DCMR § 2346 (requiring a sign at the that is at least eight (8) inches by ten (10) inches in size and contains writing in contrasting ink using not less than thirty-six (36) point type).

[6] *See* D.C. Code § 7-2502.15(c) ("Unless permission specific to the individual and occasion is given…").

[7] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist. It is an unusual scenario where an actor actually has effective consent but mistakenly believes he or she does not, and commits a crime. However, in such a situation, there may be attempt liability for attempted possession of a stun gun under the RCC general provision for attempt in RCC § 22E-301, which includes that the actor "would have come dangerously close to completing that offense if the situation was as the [actor] perceived it to be."

[8] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

Relation to Current District Law. *The revised possession of a stun gun offense clearly changes current District law in five main ways.*

First, the revised offense does not separately prohibit using a stun gun. Current law provides, "No person who possesses a stun gun shall use that weapon except in the exercise of reasonable force in defense of person or property"[9] and that "brief possession [by a person under 18 years of age] for self-defense in response to an immediate threat of harm shall not be a violation of this subsection."[10] In contrast, the RCC punishes using a dangerous weapon (a defined term that includes a stun gun[11]) unlawfully against another person in a wide array of offenses against persons, such as assault,[12] or criminal threats.[13] Where a person acts in defense of one's self, a third person, or property, a general defense may apply.[14] The revised code does not criminalize using a stun gun in any other manner.[15] This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised offenses.

Second, the revised code does not specifically criminalize possession of a stun gun in a correctional facility as a weapons offense. Current law prohibits possession of a stun gun in a "penal institution, secure juvenile residential facility, or halfway house" as both possession of a stun gun[16] and as unlawful possession of contraband.[17] In contrast, the revised offense applies generally to buildings, grounds, or parts thereof occupied by the District of Columbia, which effectively reaches many correctional facilities in the District. For both District and non-District occupied correctional facilities, the RCC first degree correctional facility contraband offense[18] punishes possession of a dangerous weapon (a defined term that includes a stun gun[19]) by a person who is confined to a correctional facility or secure juvenile detention facility and also punishes bringing a dangerous weapon to a person who is confined in such a facility.[20] The RCC does not separately criminalize possession of a stun gun in a halfway house, however the Director of the Department of Corrections may suspend or revoke work release for any breach of discipline or infraction of institution regulations.[21] This change eliminates unnecessary overlap between revised offenses and improves the consistency of the revised code.

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[9] D.C. Code § 7-2502.15(b).
[10] D.C. Code § 7-2502.15(a).
[11] RCC § 22E-701.
[12] RCC § 22E-1202.
[13] RCC § 22E-1204.
[14] *See* RCC §§ 22E-403; 22E-404.
[15] Consider, for example, a person who uses a stun gun to see test its operation or to inflict an injury to one's self.
[16] D.C. Code § 7-2502.15(c)(2).
[17] D.C. Code § 22-2603.02.
[18] RCC § 22E-3403(a).
[19] RCC § 22E-701.
[20] Notably, the correctional facility contraband offense does not reach persons who bring a dangerous weapon to a facility without intent to give it to someone who is confined. If a person brings a dangerous weapon to a facility with intent to use it unlawfully, that conduct is punished as possession of a dangerous weapon during a crime, under RCC § 22E-4104.
[21] D.C. Code § 24-241.05(a).

Third, the RCC separately codifies a standard list of exclusions from liability for possessory weapons offenses.[22] Current D.C. Code § 7-2502.15(c), by cross-reference to § 7-2509.01, provides an exception for police officers, special police officers, and campus police officers who carry stun guns. In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement falls under the general provisions' justification defense for execution of public duty.[23] This change improves the clarity, consistency, and completeness of the revised code.

Fourth, the revised statute's Administrative Disposition[24] provision does not specify the factors the Attorney General must consider before offering diversion. Current D.C. Code § 7-2506.07(b) narrows prosecutorial discretion in at least one way. Paragraph (b)(1) permits an administrative disposition only, "provided, that the person is not concurrently charged with another criminal offense arising from the same event, other than an offense pursuant to § 7-2502.01 or § 7-2506.01." Paragraph (b)(2) states, "the prosecution, in the operation of its discretion, may consider, among other factors, whether at the time of his or her arrest, the person was a resident of the District of Columbia and whether the person had knowledge of § 7-2502.01, § 7-2506.01, or § 7-2507.06(a)(3)(B)." And, paragraph (b)(5) states, "The Mayor…may provide procedures and criteria to be used in determining when the prosecution, in the operation of its discretion, may offer the option of an administrative disposition pursuant to this subsection." While the provisions in paragraphs (b)(2) and (b)(5) appear to be discretionary, the provision in paragraph (b)(1) of D.C. Code § 7-2506.07 is a requirement. In contrast, the RCC does not codify the criteria to be considered for initially charging any particular offense and instead leaves the factors to be weighed in charging decisions to the discretion of the prosecutor.[25] This change improves the clarity and consistency of the revised offenses.

Fifth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a stun gun offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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[22] RCC § 22E-4118.
[23] RCC § 22E-402.
[24] The Administrative Disposition referenced is the post-and-forfeit procedure described in D.C. Code § 5-335.01. No separate rules are intended to apply to possession of a stun gun as opposed to other post-and-forfeit eligible offenses.
[25] *See* American Bar Association, Criminal Justice Standards for the Prosecution Function Fourth Addition Standard 3-4.2(b), 3-4.3(a), and 3-4.4 (February 13, 2015).

Beyond these five changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute specifies that knowledge the culpable mental states required for each element of the revised possession of a stun gun offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[26] The revised statute requires that a person know that they possess a stun gun and that they know the nature of their location. A reading of the statute that makes a person strictly liable for would leave no margin for a reasonable mistake of fact or law by someone otherwise engaged in legal activity.[27] The revised statute does not impose criminal liability where a person exercises their constitutionally protected right to carry a stun gun[28] in a reasonably responsible manner. The revised offense applies a standardized definition for the "knowingly" culpable mental state required for possession of stun gun liability. This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute codifies an effective consent affirmative defense. Current law prohibits possession of a stun gun in specified locations "Unless permission specific to the individual and occasion is given."[29] The statute does not address who must provide permission, whether permission must be freely given, whether the accused must be aware or certain of the permission, or which party has the burden of proving permission or lack of permission. Case law has not addressed these issues. To resolve these ambiguities, the revised possession of a stun gun statute details the meaning, burden of proof, and limitations of an effective consent defense to the revised possession of a stun gun offense. This change improves the clarity, consistency, and proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

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[26] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[27] Consider, for example, a person who carries a stun gun for self-defense and enters a coffeehouse in a government building that they mistakenly—but understandably—believe to be a private office building. Consider also, a person who cannot read English, who brushes past a large sign stating, "No stun guns allowed," to ask a security staff person whether stun guns are permitted.

[28] *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

[29] D.C. Code § 7-2502.15(c).

First, the revised statute requires signage that clearly and conspicuously indicates stun guns are not permitted. Current law criminalizes possession of a stun gun in "Any building or grounds clearly posted by the owner or occupant to prohibit the carrying of a stun gun."[30] The revised statute's language is substantively the same as the current statute, but phrased so as to be consistent with other RCC offenses. This change improves the consistency and proportionality of the revised offenses.

Second, the revised code defines "possession" in its general part.[31] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[32] The RCC definition of "possession,"[33] with the requirement in the offense that the possession be "knowing,"[34] matches the meaning of possession in current DCCA case law.[35] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

Third, the revised statute replaces the phrase "A building or office occupied by the District of Columbia, its agencies, or instrumentalities"[36] with the simpler "A building, building grounds, or part of a building, occupied by the District of Columbia" in subparagraph (a)(1)(A). The word "instrumentalities" as used in D.C. Code § 7-2502.15 is not defined in the statute and case law has not interpreted its meaning. Broadly construed, "instrumentalities" may include every person and business contracted to work on behalf of the District government, which would capture many locations that do not have heightened security concerns.[37]

Fourth, the revised statute clarifies the list of prohibited locations related to children. Current D.C. Code § 7-2502.15(c)(3) disallows stun guns in "[a] building or portion thereof, occupied by a children's facility, preschool, or public or private elementary or secondary school." The revised offense eliminates the superfluous reference to "public

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[30] D.C. Code § 7-2502.15(c)(4).
[31] RCC § 22E-202.
[32] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[33] RCC § 22E-701.
[34] RCC § 22E-206.
[35] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v. United States,* 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. U.S.*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195–1196 (D.C.1990).").
[36] D.C. Code § 7-2502.15(c)(1).
[37] Consider, for example, a restaurant that provides catering services to a District government event.

or private" and substitutes for the vague reference to "children's facility" the terms "public recreation center" and "children's day care center." The latter terms are locations similarly protected from firearms[38] and drug activity[39] under the revised code.

Fifth, the revised statute replaces the phrases "A building or office occupied by…" and "A building or portion thereof, occupied by"[40] with the simpler "A building, building grounds, or part of a building…" This clarifies that a person does not commit an offense by entering another part of the building that is not occupied by a District government office or children's facility and improves the consistency of the revised offense.[41]

[38] RCC § 22E-4102.
[39] *See* RCC § 48-904.01b(g)(7)(C)(i).
[40] D.C. Code § 7-2502.15(c)(3).
[41] Consider, for example, two locations of the same chain of grocery stores, one occupying the ground floor of a District office building and the other occupying the ground floor of a privately-owned building. Each store has its own private entrance. In such an instance, the revised offense treats these locations alike and prohibits possession of a stun gun only if the store displays clear and conspicuous signage.

RCC § 7-2502.17. Carrying an Air or Spring Gun.

Explanatory Note. *This section establishes the carrying an air or spring gun offense for the Revised Criminal Code (RCC). The offense proscribes carrying an air- or spring-operated gun outside. The revised offense replaces 24 DCMR § 2301 (Possession of Weapons)*.

Paragraph (a)(1) specifies that to commit carrying an air or spring gun, a person must knowingly[1] possess an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, or bowgun. "Possesses" is a defined term and includes both actual and constructive possession.[2] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[3]

Paragraph (a)(2) specifies that a person must carry the air or spring gun outside a building. The term "building" is defined in RCC § 22E-701. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the location is not inside a building.

Paragraph (a)(3) specifies that a person must carry the air or spring gun in a manner that it is both conveniently accessible and within reach.[4] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the air or spring gun is conveniently accessible and within reach.

Paragraph (b)(1) excludes three categories of conduct from criminal liability under this section. Paragraph (b)(1) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (b)(1) applies to all the elements in subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C), and there is no culpable mental state for any of these requirements. First, a person is not liable under this statute[5] for using an air or spring gun outside as part of a lawful[6] theatrical performance,[7] athletic contest,[8] or athletic or cultural presentation.[9] Second, a person is not liable for using an air or spring gun in a licensed firing range.[10] Third, a person is not liable for using

[1] "Knowingly" is defined in RCC § 22E-206.
[2] RCC § 22E-701.
[3] *See, e.g., In re M.I.W.*, 667 A.2d 573 (D.C. 1995); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[4] For example, where there is an obstacle to a person's access to a weapon, such as a locked trunk, the person has not carried a weapon under the revised statute. *See, e.g., Henderson v. United States*, 687 A.2d 918, 922 (D.C. 1996); *Porter v. United States*, 282 A.2d 559, 560 (D.C. 1971).
[5] However, if the use of the air or spring gun in a public place causes any person present to reasonably believe that he or she is likely to suffer immediate criminal harm involving bodily injury, taking of property, or damage to property, it may amount to disorderly conduct per RCC § 22E-4201.
[6] For example, a person who orchestrates a B-B gun shooting contest on public property or private property without permission may commit a Trespass. *See* RCC § 22E-2601.
[7] For example, an actor in a play may use an air or spring gun to simulate a firearm in a shooting scene.
[8] For example, a referee may use an air or spring gun to signal the start of a race.
[9] For example, a person may have a blowgun while giving an educational presentation at the National Museum of the American Indian.
[10] Notably, although training at a firearms range is required to obtain and maintain a license to carry a pistol, the District does not currently have any firing ranges or a process to apply to open one.

an air or spring gun in a location where use of the gun is permitted by the Metropolitan Police Department ("MPD"). MPD may permit the use of an air or spring gun in a particular location at a specified time or at all times.

Paragraph (b)(2) provides an exception for responsibly transporting an air or spring gun. Paragraph (b)(2) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element. Per the rules of interpretation in RCC § 22E-207, the "in fact" specified in paragraph (b)(2) applies to all the elements in subparagraphs (b)(2)(A) and (b)(2)(B), and there is no culpable mental state for any of these requirements. Subparagraph (b)(2)(A) limits the exception to persons over 18 years of age. Subparagraph (b)(2)(B) requires that the air or spring gun be both unloaded and securely wrapped.

Paragraph (b)(3) cross-references applicable exclusions from liability for certain weapons offenses in the RCC. Paragraph (b)(3) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor satisfies the criteria in RCC § 22E-4118.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC.

Subsection (f) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised carrying an air or spring gun statute clearly changes current District law in three main ways.*

First, the revised statute does not specifically criminalize possession by a person under 18 of a "bean shooter, sling, projectile, [or] dart" in a public place. Current 24 DCMR § 2301.1 prohibits any person under 18 years of age from carrying in public "any gun, pistol, rifle, bean shooter, sling, projectile, dart, or other dangerous weapon of any character." The terms "bean shooter," "sling," "projectile," and "dart" are not defined in the DCMR or in District case law. It is unclear whether these terms would reach objects with commonplace recreational uses, such as a ball, a frisbee, or toys that launch foam or plastic rockets or other objects.[11] In contrast, the revised carrying an air or spring gun statute does not cover a "bean shooter, sling, projectile, [or] dart" by a person under 18 in public. Such behavior may, in some instances be punishable in the RCC as carrying a dangerous weapon[12] or possession of a dangerous weapon with intent to commit crime.[13] This change improves the clarity, consistency, and proportionality of the revised offenses and reduces unnecessary overlap.

[11] Notably, the D.C. Code separately regulates the any projectile or dart that is explosive, incendiary, or poisonous. *See* D.C. Code §§ 7-2501.01 and 7-2502.01.
[12] RCC § 22E-4102.
[13] RCC § 22E-4103.

Second, the RCC separately codifies a list of exclusions from liability for possessory weapons offenses.[14] Current 24 DCMR § 2301.2 states, "Nothing in this section shall be construed as to prohibit a member of a duly authorized military organization from the proper use of the guns and other equipment used as a member of the organization." In contrast, RCC § 22E-4118 provides an exception for all military, law enforcement, and government employees who handle weapons, as well as civilians who are authorized to manufacture, sell, or repair weapons. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[15] This change improves the clarity, consistency, and completeness of the revised code.

Third, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the carrying an air or spring gun offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these three changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statute is silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[16] This change clarifies the revised statute.

Second, the revised offense requires that the air or spring gun be "conveniently accessible and within reach" and "outside a building." Current 24 DCMR § 2301.3 makes it unlawful for a person to "to carry or have in his or her possession outside any building…an air rifle, air gun, air pistol, B-B gun, spring gun, blowgun, bowgun, or any

[14] RCC § 22E-4118.
[15] RCC § 22E-402.
[16] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

similar type gun." It is unclear whether the phrase "outside any building" applies to both carrying and possessing or to possession only. District case law has not interpreted its meaning. To resolve this ambiguity, the revised offense criminalizes possession only if the weapon is conveniently accessible and within reach and outside a building.[17] This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,[18] which improves the consistency of the revised code.

Third, the revised offense excludes from liability possession of an air or spring gun if it occurs with the permission of the Metropolitan Police Department ("MPD"). Current 24 DCMR § 2301.5(c) permits the use of an air or spring gun "at other locations where the *use* of the guns is authorized by the Chief of Police" (emphasis added). The word "use" is not defined in the statute and District case law has not clarified whether MPD must authorize both the possession and the firing of air and spring guns. In contrast, the revised statute clarifies that MPD has the flexibility to authorize possession of an air or spring gun in a specific area, without permitting shooting in the same location.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised code defines "possession" in its general part.[19] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[20] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Second, the revised code uses a consistent definition for the term "building," which appears in multiple offenses. The term building is not defined in Title 24, Chapter 23 of the DCMR. In contrast, the RCC codifies a definition to be used uniformly throughout the code.

Third, the revised offense uses the phrase "firing range" instead of "shooting gallery." Current 24 DCMR § 2301.5(b) permits adults to use an air or spring gun at "a licensed shooting gallery." This term is not defined in the DCMR or in District case law. The firearms regulations in the D.C. Code do not refer to "shooting galleries," but do refer to "firing ranges."[21] The revised offense uses the Title 7 terminology to avoid confusion.[22]

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[17] For example, a person does not commit carrying an air or spring gun by constructively possessing a B-B gun that is not nearby or carrying a B-B gun in his or her own home.

[18] RCC § 22E-4102; *see also Wilson v. United States*, 198 F.2d 299, 300 (D.C. Cir. 1952) (explaining the phrase "on or about their person," in current law, is intended to mean "in such proximity to the person as to be convenient of access and within reach").

[19] RCC § 22E-701.

[20] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).

[21] D.C. Code § 7-2507.03.

[22] Additionally, Merriam Webster defines "shooting gallery" to include "a building (usually abandoned) where drug addicts buy and use heroin." *See* Merriam-Webster Online Dictionary at https://www.webster-dictionary.org/definition/shooting%20gallery.

Fourth, the revised offense does not include the phrase "or similar type gun." The specified types of air and spring gun are already broad, undefined terms. The inclusion of a broader catchall is eliminated as duplicative and potentially confusing.

Fifth, the revised offense excludes liability for possession of an air or spring gun during an educational or cultural presentation. Current 24 DCMR 2301.5(a) excludes liability for possession during a "theatrical performance," however, the regulation does not define the term and District case law has not addressed its meaning. The revised statute clarifies that an educational or cultural presentation is included, even if it does not occur in a theater as part of dramatic performance.

RCC § 7-2507.02A. Unlawful Storage of a Firearm.

Explanatory Note. *This section establishes the unlawful storage of a firearm offense for the Revised Criminal Code (RCC). The offense requires firearm owners to store firearms securely and responsibly. The revised offense replaces D.C. Code §§ 7-2507.02(b)-(d) (Responsibilities regarding storage of firearms) and 24 DCMR § 2348.1 (Safe storage of firearms at a place of business).*

Paragraph (a)(1) specifies that to commit unlawful storage of a firearm, a person must knowingly possess a firearm. "Knowingly" is a defined term that here requires the person to be practically certain that they possess the firearm.[1] "Firearm" is a defined term,[2] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[3] but excludes antiques.[4]

Subparagraphs (a)(1)(A) – (C) specify three ways a firearm owner can store a firearm to avoid prosecution under this section. Subparagraph (a)(1)(A) provides that there is no liability if a person possesses the firearm in a place that is conveniently accessible and within reach. Subparagraphs (a)(1)(B) and (a)(1)(C) provide that there is no liability if a person stores a firearm in a securely locked container or in a location that a reasonable person would believe to be secure. The words "securely" and "secure" mean secure from access by people other than the firearm owner.

Paragraph (a)(2) specifies that to commit unlawful storage of a firearm, a registrant must act at least negligently with respect to who might access the firearm.[5] That is, the person should be aware of a substantial risk that that a minor or an unauthorized person will be able to access the firearm. Negligence also requires that the risk is of such a nature and degree that, considering the nature of and motivation for the person's conduct and the circumstances the person is aware of, the person's failure to perceive that risk is a gross deviation from the ordinary standard of care.[6]

Paragraph (a)(2) specifies two impermissible risks that will trigger criminal liability.

Subparagraph (a)(2)(A) prohibits storage in a location where a minor is able to access the firearm without the permission of a parent or guardian. Per the rules of interpretation in RCC § 22E-207, the person must be negligent as to the other person being a minor and as to the minor being able to access the weapon without permission.

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[1] RCC § 22E-206.
[2] RCC § 22E-701.
[3] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[4] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[5] "Negligently" is defined in RCC § 22E-206.
[6] RCC § 22E-206.

Subparagraph (a)(2)(B) prohibits storage in a location where a person who is barred under District law from having a firearm[7] is able to access the firearm. Per the rules of interpretation in RCC § 22E-207, the person must be negligent as to the other person being unauthorized to possess a firearm under District law and as to the other person being able to access the weapon.

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (c)(2) allows a sentence increase if it is a proven beyond a reasonable doubt that a person under 18 years of age used the firearm to cause a bodily injury to himself or herself or to cause a criminal harm[8] involving a bodily injury. The term "bodily injury" is defined in RCC § 22E-701 to mean physical pain, illness, or any impairment of physical condition.

Subsection (d) cross-references applicable definitions in the RCC.

Subsection (e) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised unlawful storage of a firearm offense clearly changes current District law in eight main ways.*

First, the revised statute includes two penalty gradations for unlawful storage of a firearm. Current D.C. Code § 7-2507.02 paragraph (c)(1) specifies a maximum penalty of 180 days of incarceration and fine of $1,000. Paragraph (c)(2) allows a maximum penalty of 5 years of incarceration and fine of $5,000, if the negligence results in a minor causing an injury to any person. A violation of 24 DCMR § 2348.1 is subject to a fine of $300 and is not punishable by jail time.[9] In contrast, the revised statute provides a single offense gradation plus an enhancement of one penalty class if a minor causes an injury. This change logically reorders and improves the consistency and proportionality of the revised statutes.

Second, the revised statute makes a possible basis of liability negligence that a person prohibited from possessing a firearm under District law, generally, is able to access the firearm.[10] Current 24 DCMR § 2348.1 prohibits storing a firearm where a person "reasonably should know that…a person prohibited from possessing a firearm under D.C. Official Code § 22-4503 can gain access to the firearm." In contrast, the revised statute refers broadly to persons prohibited from possessing a firearm under District law generally (not just persons referred to in D.C. Code § 22-4503). However, given other changes to

[7] RCC § 22E-4105 bars several categories of people from having a firearm, including people with a recent conviction for a felony, weapons offense, or intrafamily offense, as well as people who are fugitives from justice or subject to a court order prohibiting possession of firearms.
[8] The penalty enhancement does not apply where a minor's use of a firearm is legally justified or excused. *See generally* Chapter 4 and Chapter 5 of this title.
[9] 24 DCMR § 100.6.
[10] RCC § 22E-4105.

firearm possession offenses in the RCC, the revised offense is in some ways broader[11] and in other ways narrower[12] than current law. This change improves the consistency and proportionality of the revised offenses.

Third, the revised offense requires that a minor or an unauthorized person is able to access the firearm. Current D.C. Code § 7-2507.02(b) requires a risk that a minor is *likely* to gain access to the firearm. Current 24 DCMR § 2348.1 requires only a risk that a minor or unauthorized person can gain access to the firearm. The revised statute incorporates the marginally broader language in Title 7. This change improves the consistency and proportionality of the revised offense.

Fourth, the revised offense specifies that storage in a manner permitting access by a minor is unlawful only if the minor lacks permission from a parent or guardian to access the weapon. Current D.C. Code § 7-2507.02(b) requires that a person "reasonably should know that a minor is likely to gain access to the firearm *without the permission of the parent or guardian*" (emphasis added). However, current 24 DCMR § 2348.1 includes no such qualifying language. The revised statute incorporates the marginally narrower language in Title 7. This change improves the consistency and proportionality of the revised offense.

Fifth, the revised offense specifies that a person does not commit unlawful storage of a firearm if the weapon is in a secure container or other reasonably secure location. Current D.C. Code § 7-2507.02(b)(1) provides an exception where a person "[k]eeps the firearm in a securely locked box, secured container, or in a location which a reasonable person would believe to be secure." However, current 24 DCMR § 2348.1 includes no such qualifying language. The revised statute incorporates the marginally narrower language in Title 7. This change improves the consistency and proportionality of the revised offense.

Sixth, the revised offense is not limited to lawful registrants. D.C. Code § 7-2507.02(b) provides that "[n]o person" shall store a firearm irresponsibly,[13] whereas 24 DCMR § 2348.1 states "[n]o registrant." The revised statute incorporates the broader language in Title 7. This change reduces an unnecessary gap in liability.

Seventh, the revised statute does not regulate storage of a muffler or silencer but does regulate the storage of an antique pistol. Current D.C. Code § 7-2501.01 defines "firearm" to include frames, receivers, mufflers, and silencers, and consequently the storage of these items is within the scope of D.C. Code § 7-2507.02(b). Unlike firearms, the United States Supreme Court has not yet considered whether these parts and accessories

[11] For example, RCC § 22-4105 (Possession of a Firearm by an Unauthorized Person) replaces D.C. Code § 22-4503 (Unlawful possession of a firearm) and bars people with a conviction for a violent intrafamily offense within the last 10 years, as compared to a 5-year ban under current law.

[12] For example, RCC § 22-4105 (Possession of a Firearm by an Unauthorized Person) replaces D.C. Code § 22-4503 (Unlawful possession of a firearm) and limits prior convictions incurred in another jurisdiction to offenses that are comparable to a felony, weapons offense, or violent intrafamily offense under District law.

[13] This section was enacted shortly after the United States Supreme Court held the District's prohibition against rendering any lawful firearm in the home operable for purpose of immediate self-defense violated the Second Amendment to the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

are "bearable arms" protected by the Second Amendment.[14] In contrast, the revised unlawful storage of a firearm statute, by use of the definition of "firearm" in RCC § 22E-701, does not cover frames, receivers, mufflers, or silencers, but does cover antique pistols.[15] With limited exceptions for military and law enforcement,[16] the RCC criminalizes mere possession of a silencer as contraband *per se*[17] and, because any possession is illegal, does not regulate their registration, storage, or carrying. This change improves the proportionality and logically reorganizes the revised offenses.

Eighth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the unlawful storage of a firearm offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these eight changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised offense specifies that a person does not commit unlawful storage of a firearm if the weapon is "conveniently accessible and within reach." Current D.C. Code § 7-2507.02(b)(2) provides an exception where a person "[c]arries the firearm on his person or within such close proximity that he can readily retrieve and use it as if he carried it on his person." However, current 24 DCMR § 2348.1 includes no such qualifying language. It is not immediately clear how a person can both "store" a firearm and "carry" it and District case law has not addressed the issue. In contrast, the revised offense specifies that there is no unlawful storage liability if the weapon is conveniently accessible and within reach. This change aligns the elements of the revised offense with the elements of other carrying offenses, such as carrying a dangerous weapon,[18] and improves the consistency of the revised code.

Second, the revised offense authorizes a distinct penalty enhancement if a person under age 18 uses the firearm to cause a criminal harm involving bodily injury or to cause a bodily injury to himself or herself. Current D.C. Code § 7-2507.02(c)(2) provides that if "the minor causes injury or death to himself or another" the maximum penalty increases from 180 days of incarceration and a $1,000 fine to 5 years of incarceration and a $5,000 fine. D.C. Code § 7-2507.02(c)(3) provides that the penalty enhancement does not apply

[14] *See United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), *cert. denied*, 2019 WL 235139, U.S. (June 10, 2019).
[15] The definition of "firearm" in D.C. Code § 7-2501.01 excludes antique pistols.
[16] RCC § 22E-4118.
[17] RCC § 22E-4101, possession of a prohibited weapon or accessory.
[18] RCC § 22E-4102.

"if the minor obtains the firearm as a result of an unlawful entry or burglary to any premises by any person." Neither statute explicitly provides for general justification defenses that may nevertheless exist at common law. There is no District case law on point, and no relevant legislative history on the meaning of the exception for burglary or unlawful entry. In contrast, the revised offense authorizes a penalty enhancement only if the use of the firearm causes a criminal harm involving bodily injury or results in an intentional or accidental self-inflicted bodily injury to the minor, and no special exceptions for unlawful entry or burglary apply. "Bodily injury" is a defined term in the RCC.[19] The degree of the enhancement corresponds to the classification schedule inRCC § 22E-601 and, like other revised offenses,[20] is limited to a severity increase of one class. No special exception for unlawful entry or burglary is provided as such a provision is either unnecessary given the offense elements or irrelevant to the harm of negligent storage.[21] This change improves the consistency and proportionality of District statutes.

Third, the revised code applies a "knowingly" culpable mental state to most offense elements and defines knowledge and negligence consistent with other revised offenses. The current statutes require that a person "knows or reasonably should know" of a risk that an unauthorized person will be able to access the firearm.[22] The current statutes do not specify a culpable mental state for other elements, such as the weapon being a firearm. However, the revised statute applies the standard culpable mental state definitions used throughout the RCC.[23] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[24] This change improves the clarity, consistency, and proportionality of the revised offense.

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[19] RCC § 22E-701.

[20] E.g., RCC §§ 22E-1101 (Murder); 22E-1206 (Stalking); 22E-1301 (Sexual Assault); 22E-1602 (Forced Commercial Sex); 22E-1603 (Trafficking in Labor or Services); 22E-1604 (Trafficking in Commercial Sex); 22E-1605 (Sex Trafficking of a Minor or Adult Incapable of Consenting).

[21] The meaning of the current D.C. Code § 7-2507.02(c)(3) exception "if the minor obtains the firearm as a result of an unlawful entry or burglary to any premises by any person" is unclear. If the exception is meant to exclude liability for minors who gain access to the firearm by unlawful entry or burglary, such an exception is unnecessary as a firearm possessor would not be negligent as to the possibility that a minor would gain access by such criminal acts. If the exception is meant to exclude liability for minors who gain access to the firearm for use in self-defense while experiencing a burglary or unlawful entry, such an exception is irrelevant to the fact that there was negligent storage (e.g., a parent left the weapon on a table).

[22] D.C. Code § 7-2507.02 and 24 DCMR § 2348.1.

[23] RCC § 22E-206.

[24] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, lsat *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised code defines "possession" in its general part.[25] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[26] In contrast, the RCC codifies a definition to be used uniformly for all possessory elements throughout the code.

Second, the revised statute does not specially codify a policy statement for the unlawful storage of a firearm offense. Current D.C. Code § 7-2507.02(a) states, "It shall be the policy of the District of Columbia that each registrant should keep any firearm in his or her possession unloaded and either disassembled or secured by a trigger lock, gun safe, locked box, or other secure device." However, the remainder of the statute does not require that a firearm be unloaded or disassembled. Nor does the statute require that a firearm be locked away or secured, unless it is readily apparent that an unauthorized person is likely to be able to access the weapon. The policy statement also is not referenced elsewhere in the D.C. Code. The revised unlawful storage of a firearm statute eliminates this language as potentially confusing or misleading as to the extent of criminal liability.[27] This change improves the clarity and consistency of the revised statutes.

Third, the revised statute is severed from D.C. Code § 7-2507.02 and given its own section in the revised code. This change clarifies that the penalties and definitions do not apply to subsection (a) of D.C. Code § 7-2507.02, which is not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

[25] RCC § 22E-202.
[26] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[27] The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.1.1 specifies that "findings" and "purposes" sections are strongly discouraged because they may create confusion or ambiguity in the law.

RCC § 7-2509.06A. Carrying a Pistol in an Unlawful Manner.

Explanatory Note. *This section establishes the carrying a pistol in an unlawful manner offense for the Revised Criminal Code (RCC). The offense prohibits ways of carrying a pistol that may result in an accidentally discharge, pose a risk to public safety, or cause a breach of peace. The revised offense replaces 24 DCMR §§ 2343.1 (Ammunition carried by licensee) and 2344 (Pistol carry methods).*

Paragraph (a)(1) specifies that to commit carrying a pistol in an unlawful manner, a person must knowingly[1] possess a pistol. "Pistol" is a defined term,[2] which includes inoperable weapons that may be redesigned, remade or readily converted or restored to operability[3] but excludes antiques.[4] "Possesses" is a defined term and includes both actual and constructive possession.[5] However, paragraphs (a)(2) and (a)(3) limit the offense applies to places outside the person's home or place of business and require that the pistol is conveniently accessible and within reach. Per the rules of interpretation in RCC § 22E-207, the actor must know—that is, be practically certain—that he or she possesses a pistol in such a location.[6]

Paragraph (a)(2) establishes four means of carrying a pistol unlawfully. A person carries a pistol unlawfully if they are outside their home or business and have conveniently accessible and within reach more ammunition than will fully load the pistol twice or if they have more than 20 rounds of ammunition, whichever is least.[7] A person also carries a pistol unlawfully if they know that any part of it is visible to the public.[8] This provision applies equally to a person who is in a public place or inside a motor vehicle.[9] Lastly, a person carries a pistol unlawfully if they know that they have failed to use a holster to firmly secure it.[10] The firearm must be holstered so as to reasonably prevent loss, theft, or accidentally discharge.[11] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they have excess ammunition, the pistol isn't entirely hidden from public view, or the pistol is not holstered.

Subsection (b) cross-references applicable exclusions from liability for certain weapons offenses in the RCC. Subsection (b) specifies "in fact," a defined term in RCC §

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[1] RCC § 22E-206.
[2] RCC § 22E-701.
[3] *Townsend v. United States*, 559 A.2d 1319 (D.C. 1989).
[4] Unless there is evidence that the firearm is antique, the government is not required to prove beyond a reasonable doubt that the firearms are not antique as an element of the offense in its case-in-chief. *Toler v. United States*, 198 A.3d 767 (D.C. 2018).
[5] RCC § 22E-701 (stating that: "'Possess,' and other parts of speech, including 'possesses,' 'possessing,' and 'possession' means: (A) Hold or carry on one's person; or (B) Have the ability and desire to exercise control over.").
[6] *See Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992) (explaining, that a person who has no knowledge that he or she has a pistol, despite the fact that it is located on his or her person, does not exercise direct physical control over the pistol).
[7] *See* RCC § 7-2509.06A(a)(1) - (a)(2); 24 DCMR § 2343.1.
[8] RCC § 7-2509.06A(a)(3).
[9] *See* 24 DCMR § 2344.1.
[10] RCC § 7-2509.06A(a)(4).
[11] *See* 24 DCMR § 2344.2.

22E-207 that indicates there is no culpable mental state requirement for a given element, here the fact that the actor satisfies the criteria in RCC § 22E-4118.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC.

Subsection (f) specifies that Chapters 1 – 6 of the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised carrying a pistol in an unlawful manner offense clearly changes current District law in two main ways.*

First, the revised offense is not limited to licensed pistols. 24 DCMR §§ 2343.1 and 2344 apply only to "[a] person issued a concealed carry license by the Chief" and "[a] licensee." The revised offense applies to people who possess a firearm without a license to carry. The unlawful carry method poses the same danger whether the person is licensed or not. This change reduces an unnecessary gap in liability.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the carrying a pistol in an unlawful manner offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these two changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute requires that the accused act knowingly with respect to each element of the offense. The current statutes[12] are silent as to the applicable culpable mental state requirement, and no case law exists on point. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[13] This change clarifies the revised statute.

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[12] 24 DCMR §§ 2343 – 2344.

[13] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S.

Second, the revised statute criminalizes possession of a pistol in a location that is conveniently accessible and within reach.[14] Current 24 DCMR § 2343.1 refers to conduct "while carrying the pistol," 24 DCMR § 2344.1 refers to "carry any pistol in a manner that it is entirely hidden from view of the public when carried on or about a person, or when in a vehicle," and 24 DCMR § 2344.2 refers to "carry any pistol." The term "carry" in these regulations is not defined by the DCMR and there is no District case law on point. To resolve this ambiguity as to the meaning of "carry," the revised statute requires that the pistol be "in a location that is accessible and within reach." This plain language formulation is consistent with the definition of "carrying" as construed by the DCCA for other offenses. This change improves the clarity and consistency of the revised offense.

Third, the RCC codifies a list of exclusions from liability for possessory weapons offenses.[15] Current 24 DCMR §§ 2343 – 2344 do not include any exceptions for law enforcement officers, weapons dealers, or others who routinely need to carry a firearm outside of a holster or in public view. Likewise, current 24 DCMR §§ 2343 – 2344 do not exclude from liability methods of carrying or storing a pistol in one's home or place of business.[16] In contrast, RCC § 22E-4118 provides a comprehensive list of exclusions from liability, accounting for these and other legitimate circumstances. Moreover, legitimate use of weapons by law enforcement and others fall under the general provisions' justification defense for execution of public duty.[17] This change improves the clarity, consistency, and completeness of the revised code.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised statute is severed from D.C. Code § 7-2509.06 and given its own section in the revised code. This change clarifies that the revised statute does not replace D.C. Code § 7-2509.06, which is not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[14] RCC § 22E-202.

[15] RCC § 22E-4118.

[16] The lack of any exception for homes or businesses may lead to some absurd consequences, such as providing liability for any transfer, storage, cleaning, etc. of a firearm in a home or business because such activities would necessarily involve unholstering the weapon (contra 24 DCMR § 2344.2).

[17] RCC § 22E-402.

D.C. Code § 16-705. Jury trial; trial by court.

Explanatory Note. *This section establishes the jury or nonjury trial provision for the Revised Criminal Code (RCC) and other D.C. Code provisions. The revised statute replaces D.C. Code § 16-705 (Jury trial; trial by court).* The revised D.C. Code § 16-705 concerns the extension of a statutory right to a jury trial in multiple circumstances. The revised statute changes the numbering, but does not alter the language of, current D.C. Code § 16-705 regarding jury size.

Subsection (a) states that the provisions in the subsection are only in effect until midnight on a date three years from the date of enactment of the RCC. After that time, subsection (b) is in effect. The subsection applies to any criminal case in Superior Court.

Paragraph (a)(1) of the revised statute provides that a trial for an offense shall be by jury under all the conditions in the following 7 subparagraphs, except as specified in paragraph (a)(2).

Subparagraph (a)(1)(A) of the revised statute permits a defendant to demand a jury trial when, according to constitutional standards, the defendant is entitled to a jury for the offense.

Subparagraph (a)(1)(B) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by a fine or penalty of more than $1,000, by imprisonment for more than 60 days, or by more than six months in the case of contempt of court.

Subparagraph (a)(1)(C) of the revised statute permits a defendant to demand a jury trial when charged with an inchoate form of an offense—i.e. attempt, solicitation, or conspiracy—that would be punishable by a fine or penalty of more than $1,000, by imprisonment for more than 60 days, or by more than six months in the case of contempt of court.

Subparagraph (a)(1)(D) of the revised statute permits a jury demand for a charge under Chapter 12 of Title 22E, including robbery, assault, criminal threats, and offensive physical contact, if the person who is alleged to have been subjected to the criminal offense [1] is a law enforcement officer as defined in § 22E-701.

Subparagraph (a)(1)(E) of the revised statute provides a right to a jury trial to a charge for a "registration offense" as defined under the District's sex offender registration statutes.

Subparagraph (a)(1)(F) of the revised statute extends a right to a jury for any charge[2] which, as a matter of law, could result in deportation of the defendant or denial of naturalization to the defendant under federal immigration law, were the defendant convicted of the crime and proven to be a non-citizen. This provision does not require any

[1] The term "complainant" is defined in RCC § 22E-701 as a "person who is alleged to have been subjected to the criminal offense," such that the phrasing here is identical to "complainant" in RCC § 22E-701.
[2] The application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes.

proof or assertion that the defendant is, in fact, a non-citizen or that federal authorities, in fact, would deport the defendant if convicted. The question under subparagraph (a)(1)(F) is purely a question of law—whether the charged offense could result in deportation under federal immigration law if the defendant were a non-citizen.

Subparagraph (a)(1)(G) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of imprisonment of more than 60 days or more than $1,000.[3]

Paragraph (a)(2) specifies that a trial shall be by a single judge whose verdict has the same force and effect as that of a jury when either of two conditions describe in sub-paragraphs (a)(2)(A) and (a)(2)(B) are met.

Sub-paragraph (a)(2)(A) includes for a trial by the court any case not specified in the preceding paragraphs (a)(1)(A) – (a)(1)(G).

Sub-paragraph (a)(2)(B) includes for a trial by the court any case specified in the preceding paragraphs (a)(1)(A) – (a)(1)(G) when the defendant, in open court, expressly waives trial by jury and requests trial by the court more than 10 days before the scheduled trial or, with the consent of the court, within 10 days of the scheduled trial.

Subsection (b) states that the provisions in the subsection are only in effect after midnight on a date three years from the date of enactment of the RCC. Prior to that time, subsection (a) is in effect. The subsection applies to any criminal case in Superior Court.

Paragraph (b)(1) of the revised statute provides that a trial for an offense shall be by jury under all the conditions in the following 3 subparagraphs, except as specified in paragraph (b)(2).

Subparagraph (b)(1)(A) of the revised statute permits a defendant to demand a jury trial when, according to constitutional standards, the defendant is entitled to a jury for the offense.

Subparagraph (b)(1)(B) of the revised statute permits a defendant to demand a jury trial when charged with any offense punishable by a fine or penalty of more than $250, by imprisonment for any length of time, or by more than six months in the case of contempt of court.

Subparagraph (b)(1)(C) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of a fine or penalty of more than $250.[4]

Paragraph (b)(2) specifies that a trial shall be by a single judge whose verdict has the same force and effect as that of a jury when either of two conditions describe in sub-paragraphs (b)(2)(A) and (b)(2)(B) are met.

Sub-paragraph (b)(2)(A) includes for a trial by the court any case not specified in the preceding paragraphs (b)(1)(A) – (b)(1)(C).

Sub-paragraph (b)(2)(B) includes for a trial by the court any case specified in the preceding paragraphs (b)(1)(A) – (b)(1)(C) when the defendant, in open court, expressly

[3] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation).
[4] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation).

waives trial by jury and requests trial by the court more than 10 days before the scheduled trial or, with the consent of the court, within 10 days of the scheduled trial.

Subsection (c) states that if a criminal case includes 2 or more charges and at least one offense is jury demandable, the trial for all offenses charged against that defendant shall be by jury unless the defendant in open court expressly waives trial by jury and requests trial by the court. If there is such a request, then the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.

Subsection (d) of the revised statute is identical to the current D.C. Code except for the numbering change.

Relation to Current District Law. Revised D.C. Code § 16-705 changes current District law primarily by extending the offenses and circumstances under which a defendant is entitled to a jury trial. The revised statute also changes the ability of the prosecution or court to deny consent to a defendant's waiver of a jury or demand for a jury.

In general, current D.C. Code § 16-705 establishes the circumstances under which a criminal defendant is entitled to a jury trial,[5] the process for waiving a jury trial,[6] the procedure for adjudicating cases in which a defendant is not entitled to a jury trial or a jury trial is waived,[7] and the procedure for jury trials.[8] Under current D.C. Code § 16-705, a criminal defendant is entitled to a jury trial in six instances: (1) where a jury trial is guaranteed by the United States Constitution;[9] (2) where the defendant is charged with an offense punishable by a fine over $1,000;[10] (3) where a defendant is charged with two or more offenses punishable by a cumulative fine of over $4,000;[11] (4) where a defendant faces imprisonment for more than 6 months for contempt of court;[12] (5) where a defendant is charged with an offense punishable by more than 180 days imprisonment;[13] and (6) where a defendant is charged with two or more offenses punishable by imprisonment for more than two years.[14] The current statute also clarifies that when a defendant is charged

[5] D.C. Code §§ 16-705(a)-(b-1).
[6] D.C. Code § 16-705(a); D.C. Code § 16-705(b)(2); D.C. Code § 16-705(b-1).
[7] D.C. Code §§ 16-705(a)-(b-1).
[8] D.C. Code § 16-705(c).
[9] D.C. Code § 16-705(a). According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).
[10] D.C. Code § 16-705(b)(1)(A).
[11] D.C. Code § 16-705(b)(1)(B).
[12] D.C. Code § 16-705(b)(1)(A).
[13] D.C. Code § 16-705(b)(1)(A).
[14] D.C. Code § 16-705(b)(1)(B).

with two or more offenses, if one of the offenses is jury demandable, all offenses shall be tried by jury unless waived.[15]

In contrast, the revised statute changes D.C. Code § 16-705 to expand the right of a criminal defendant to demand a jury trial in several ways. The statute takes a bifurcated approach to change, providing one set of rules for expanded access to jury demandability when the RCC is enacted into law, and a second set of rules three years after enactment. This bifurcated approach provides an immediate expansion of jury rights that still excludes many misdemeanors and stops well short of what most states provide. During this interim three year period, government agencies and practitioners may engage in training necessary for a broader expansion of jury rights to meet the national norm. The ultimate goal of the recommendation is to ensure jury demandability for all crimes bearing imprisonment time or significant financial penalties.

Subsection (a) provides many immediate changes to current law. First, in contrast to the current standard of more than 180 days,[16] subparagraph (a)(1)(B) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries a maximum imprisonment penalty of more than 60 days, or a fine of more than $1,000. Second, in contrast to current law which makes no distinction as to whether a charge is an attempt or other inchoate form of an offense that is jury demandable, subparagraph (a)(1)(C) of the revised statute treats inchoate forms of a specified jury-demandable offense as jury demandable, regardless whether their imprisonment penalty is 60 days or less. Third, the revised statute creates entirely new statutory rights to a jury for any charge which, under subparagraph (a)(1)(D) or subparagraph (a)(1)(E) is an offense in Chapter 12 (Robbery, Assault, and Threats) of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in § 22E-701,[17] or a charge for a "registration offense" as defined in § 22-4001(8). Fourth, the revised statute, in subparagraph (a)(1)(F), codifies a statutory right to a jury for a charge that, as a matter of law, could result in deportation or denial of naturalization were the defendant proven to be a non-citizen and convicted of the crime. This change appears to expand D.C. Court of Appeals (DCCA) case law that provides a right to a jury on constitutional grounds for a non-citizen defendant who is subject to possible deportation if

[15] D.C. Code § 16-705(b-1).
[16] D.C. Code § 16-705(b)(1)(A).
[17] At the time of writing, legislation was currently pending Council approval that would amend D.C. Code § 16-705(b)(1) in a narrower but consistent manner than the RCC recommendation, to provide a right to a jury under circumstances where the alleged victim of an assault is a law enforcement officer in a new subparagraph (C). *See* Comprehensive Policing And Justice Reform Second Temporary Amendment Act Of 2020, 2020 District of Columbia Laws 23-151 (Act 23-399). (""(C)(i) The defendant is charged with an offense under: "(I) Section 806(a)(1) of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1322; D.C. Official Code § 22–404(a)(1)); "(II) Section 432a of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405.01); or "(III) Section 2 of An Act To confer concurrent jurisdiction on the police court of the District of Columbia in certain cases, approved July 16, 1912 (37 Stat. 193; D.C. Official Code § 22–407); and "(ii) The person who is alleged to have been the victim of the offense is a law enforcement officer, as that term is defined in section 432(a) of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405(a)); and").

convicted of the offense.[18] Finally, subparagraph (a)(1)(G) of the revised statute reduces from two years to 60 days the cumulative term of imprisonment that a defendant must be subject to under two or more charges in order to demand a jury.

Subsection (b) provides more far-reaching changes to current law. First, in contrast to the current standard of more than 180 days,[19] subparagraph (b)(1)(B) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries any imprisonment penalty, or a fine of more than $250. Similarly, under subparagraph (b)(1)(C) the revised statute reduces from $1,000 to $250 the cumulative fine or penalty that a defendant must be subject to under two or more charges in order to demand a jury.

The CCRC also recommends deletion of current D.C. Code language requiring judicial and prosecutorial consent either to a defendant's waiver of a jury trial, (except that, if the waiver occurs within 10 days of a scheduled trial the court must consent to a waiver of a jury trial), or to invoke a right to a jury trial that is not required by the Constitution. Under current D.C. Code § 16-705(a), the plain language of the statute requires that a jury trial be held for offenses to which a defendant has a right to a jury under the Constitution, unless the defendant requests trial by the court "and the court and the prosecuting officer consent thereto."[20] This language appears to allow the court or a prosecutor, by withholding their consent to a defendant's request for a trial by court, to require a defendant to have a jury trial where the Constitution provides a jury trial right. Also, under current D.C. Code § 16-705(b)(2), the plain language of the statute requires that a trial by the court be held for offenses to which a defendant does not have a right to a jury under the Constitution, unless the defendant requests trial by jury "and the court and the prosecuting officer consent thereto."[21] This language appears to allow the court or a prosecutor, by

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[18] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury."). The *Bado* decision does not explicitly state that a defendant must prove that he or she is a non-citizen in order to avail themselves of the right to a jury for a deportable offense, although this appears to be implicit in the *Bado* decision's reliance on Supreme Court precedent in *Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989)* and repeated emphasis that the *Blanton* court relied on the consequences to a *particular* defendant. *See also Miller v. United States,* 209 A.3d 75, 79 (D.C. 2019)("Although the trial record did not reveal that Ms. Miller is not a citizen, the United States has not relied on that circumstance to argue that the error in this case was not obvious for purposes of the plain-error standard. We therefore do not address that issue. … Second, the United States's proposed reading of Bado appears to rest on the premise that a defendant has a constitutional right to a jury trial only if conviction would in a practical sense make the defendant's situation worse than it otherwise would be. Bado, however, repeatedly states that the relevant inquiry is whether the defendant "faces" or "is exposed" to the penalty at issue, or alternatively whether the penalty "could be" imposed, if the defendant is convicted. E.g., 186 A.3d at 1246, 1249-50, 1252, 1253, 1256, 1257, 1261.").

[19] D.C. Code § 16-705(b)(1)(A).

[20] D.C. Code § 16-705(a) ("In a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial without a jury, the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.").

[21] D.C. Code § 16-705 ("(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if –(1)(A) The

withholding their consent to a defendant's request for a jury trial, to require a defendant to have a trial by the court trial where the Constitution does not provide a jury trial right. It is unclear how requiring prosecutorial and court consent to demand a jury under D.C. Code § 16-705(b)(2) may limit jury demandability for offenses in the D.C. Code with a penalty of 6 months which are presumptively "petty," non-jury demandable offenses under the Constitution.[22] There is confusion in at some legislative history as to the Council's intent in categorizing some offenses as 180 day versus 6 month offenses to demarcate jury-demandability,[23] and there no case law on point.

In contrast, the RCC codifies a right to a jury as a personal right and does not allow a court or prosecutor either to require a jury trial when the defendant timely wishes to waive their right to a jury trial, or to require a trial by court when the defendant wishes to exercise their right to a jury trial for an offense that is not required to be jury demandable under the Constitution. Jurisdictions have taken a range of views on this matter, some treating a defendant's waiver of a jury as a personal right as in the RCC, some treating a defendant's waiver of a jury as subject only to court consent, and others treating a defendant's waiver of a jury as subject to both court and prosecutorial consent.[24] The revised statute resolves

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defendant is charged with an offense which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days (or for more than six months in the case of the offense of contempt of court); or (B) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 2 years; and (2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.").

[22] According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

As a District offense with a 6 month penalty is presumptively a "petty" offense under *Blanton,* such an offense would appear to fall under D.C. Code § 16-705(b) and by default be subject to a trial by the court unless the defendant requests a trial by jury and the prosecutor consents. It is unclear if more recent legislative decisions setting a 6 month penalty for certain offenses were made with knowledge that prosecutorial discretion could still be exercised to deny jury demands for offenses with a 6 month penalty.

[23] The Council's earliest post-*Blanton* legislation changing dozens of penalties to 180 day maximum imprisonment misstated the *Blanton* holding, with the apparent assumption that a 6 month penalty would be jury demandable under *Blanton* even though the Court holding was that offenses 6 months or less were presumptively petty. *See* Committee on the Judiciary, *Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994,"* (Jan. 26, 1994) at 3 ("Under *Blanton v. City of Las Vegas*, the Supreme Court indicated that it would presume that offenses punishable by less than 6 months imprisonment are "petty offenses" and not subject to 6th amendment guarantees for trial by Jury.").

[24] *See Waiver of Jury Trials, 0030 SURVEYS 24 (Westlaw); People v. Dist. Court of Colorado's Seventeenth Judicial Dist*., 843 P.2d 6, 11 (Colo. 1992) (*en banc*). Notably, Maryland specifically provides that, "The State does not have the right to elect a trial by jury." Md. Rule 4-246.

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significant ambiguity under the current D.C. Code as to the status of offenses subject to a 6 month penalty by clarifying that all offenses specifically described in the revised statute are jury demandable and shall be by jury unless the defendant waives the right. The revised statute also addresses possible administrative concerns by requiring court consent to waiver of a jury trial within 10 days of a scheduled trial. These changes improve the clarity and proportionality of the revised statutes.

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The rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District.

For most of the past century, the District has provided a more expansive jury trial right than it does today.[25] Between 1926 and 1993, criminal defendants were entitled to a jury trial in all cases punishable by a fine or penalty of $300 or more, or by imprisonment for more than 90 days.[26] In 1992, however, the D.C. Council passed the Criminal and Juvenile Justice Reform Amendment Act, increasing the penalty threshold for a jury trial more than threefold and doubling the imprisonment threshold.[27] Although this was a dramatic change to the substantive jury trial right, its impact on the actual number of jury trials in the District was minimal. As Fred B. Ugast, then Chief Judge of D.C. Superior Court subsequently explained, because the vast majority of charged misdemeanors at the time had maximum penalties of one year, the amendment did not result in a significant change in jury trial rates.[28] However, the year after the Criminal and Juvenile Justice Reform Amendment Act went into effect, the Council passed the Omnibus Criminal Justice Reform Amendment Act of 1994.[29] The legislation reduced the penalties of more than forty misdemeanor offenses to remove criminal defendants' rights to demand a jury trial.[30] Today, jury trial rates in misdemeanor cases remain well below 1%.[31]

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[25] *See* Act of June 17, 1870, 41st Cong., (1870) (16 Stat. 153) (providing right to trial by jury *de novo* on appeal from all actions in Police Court); Act of March 3, 1891, 51st Cong., (1891) (26 Stat. 848) (providing right to trial by jury in Police Court for all cases punishable by penalty $50 or more or imprisonment for thirty days or more); Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119) (providing right to trial by jury in Police Court for all cases punishable by penalty of $300 or more or by imprisonment for more than ninety days).

[26] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[27] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[28] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" attached "Copy of letter dated September 20, 1993 from Chief Judge Fred B. Ugast of the Superior Court ("Last year, the Council passed an amendment to D.C. Code §16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases.").

[29] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[30] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[31] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor jury trials as a percentage of misdemeanor dispositions at: 0.13% in 2003, 0.15% in 2004, 0.16% in 2005, 0.10% in 2006, 0.27% in 2007, 0.18% in 2008, 0.11% in 2009, 0.10% in 2010, 0.13% in 2011, 0.23% in 2012, 0.21% in 2013, 0.09% in 2014, 0.20% in 2015, 0.07% in 2016, 0.08% in 2017, and 0.07% in 2018.

Both the Criminal and Juvenile Justice Reform Amendment Act of 1992 and the Omnibus Criminal Justice Reform Amendment Act of 1994 were passed at a time when responding to violent crime was the Council's priority as part of a conscious effort to promote expediency in the criminal process. Although there was no claim that the legislation would result in cost savings, the stated aim of the legislation was to promote judicial efficiency:

> Title V reduces the penalty of more than 40 crimes to 180 days, presumptively making them non-jury demandable. Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date.[32]

In 1993, the year the Criminal and Juvenile Justice Reform Amendment Act went into effect and the year the Omnibus Criminal Justice Reform Amendment Act was introduced, violent crime in the District had reached an all-time high. According to the FBI's Uniform Crime Reporting Program, rates of violent crime in the District peaked in 1993 at 2,922 per 100,000 people.[33] The D.C. Council was reaching for all available options to respond. As noted in the committee report for the Omnibus Criminal Justice Reform Amendment Act of 1994:

> Over the past few years, the Council has passed much legislation in an attempt to curtail the crime and violence in the District of Columbia. However, crime and violence continues to hold the District of Columbia within its grip. . . .
>
> . . . The Council in its continued fight, must look at all options to increase public safety, including redefining crimes, reviewing management, and reallocating resources.[34]

Yet, overall violent crime in the District has been in steady decline since 1993.[35] In 2018, violent crime in the District reached 996 per 100,000 people, a 66% decrease from

[32] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4.
[33] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.
[34] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 2.
[35] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

1993,[36] and the lowest since the 1967.[37] This decrease in violent crime rates in the District in recent decades undermines the primary rationale for prioritizing judicial expediency over due process.

In addition, the impact of expanding jury demandability on judicial resources is unclear. Assuming that both judicial and prosecutorial resources are relatively constant and inelastic in the near future, and that jury trials require greater resources than bench trials, the result of expanding jury demandability may be an increase in non-trial dispositions (plea, diversion, or dismissal) for lower level cases. This is because any judicial impact depends on prosecutorial charging decisions which are highly discretionary, dynamic, and likely to change with resource pressure.

Expansion of the jury trial right would almost certainly increase to some degree the number of misdemeanor jury trials held annually. While the overall rate of jury trials has been variable, it has been at historic lows in recent years. The rate of jury trials has steadily declined for decades across the United States, with jury trials making up only a small fraction of overall dispositions.[38] In the District, felony jury trial rates averaged 7% over the past 15 years,[39] with the vast majority of charges resulting in either dismissal (36%)[40] or a guilty plea (52%).[41] Similarly, the vast majority of misdemeanor cases in the District

[36] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.
[37] Federal Bureau of Investigation, UCR Data Tool, Violent Crime Rates in the District of Columbia, 1960-2014, https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm.
[38] *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. L. Stud. 459 (2004); Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782.
[39] Compiled from District of Columbia Courts Annual Reports, showing felony jury trials as a percentage of felony dispositions at: 5% in 2003, 5% in 2004, 4% in 2005, 5% in 2006, 7% in 2007, 8% in 2008, 8% in 2009, 10% in 2010, 9% in 2011, 9% in 2012, 10% in 2013, 10% in 2014, 9% in 2015, 6% in 2016, 5% in 2017, and 4% in 2018.
[40] Compiled from District of Columbia Courts Annual Reports, showing felony dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of felony dispositions at: 46% in 2003, 44% in 2004, 40% in 2005, 31% in 2006, 33% in 2007, 34% in 2008, 31% in 2009, 27% in 2010, 27% in 2011, 27% in 2012, 25% in 2013, 29% in 2014, 32% in 2015, 38% in 2016, 43% in 2017, and 41% in 2018.
[41] Compiled from District of Columbia Courts Annual Reports, showing felony guilty pleas as a percentage of felony dispositions at: 34% in 2003, 35% in 2004, 28% in 2005, 62% in 2006, 59% in 2007, 58% in 2008, 60% in 2009, 63% in 2010, 63% in 2011, 62% in 2012, 64% in 2013, 59% in 2014, 58% in 2015, 56% in 2016, 51% in 2017, and 54% in 2018.

resolve through dismissal (42%),[42] a plea (30%),[43] or diversion (14%).[44] Misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions.[45] There is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials.

Further cutting against the judicial efficiency argument is the fact that the vast majority of states successfully provide full jury trial rights to their citizens. Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[46] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo* on appeal, effectively guaranteeing a jury trial right in every case.[47] Another three states have developed systems that stop short of a full jury trial right, but are more expansive than the constitutional minimum.[48] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[49]

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[42] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of misdemeanor dispositions at: 46% in 2003, 41% in 2004, 39% in 2005, 36% in 2006, 40% in 2007, 39% in 2008, 44% in 2009, 40% in 2010, 43% in 2011, 39% in 2012, 36% in 2013, 40% in 2014, 43% in 2015, 49% in 2016, 47% in 2017, and 51% in 2018.

[43] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor guilty pleas as a percentage of misdemeanor dispositions at: 21% in 2003, 23% in 2004, 26% in 2005, 41% in 2006, 36% in 2007, 34% in 2008, 31% in 2009, 36% in 2010, 32% in 2011, 29% in 2012, 31% in 2013, 30% in 2014, 28% in 2015, 27% in 2016, 28% in 2017, and 27% in 2018.

[44] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor diversion as a percentage of misdemeanor dispositions at: 8% in 2003, 9% in 2004, 5% in 2005, 10% in 2006, 11% in 2007, 14% in 2008, 15% in 2009, 14% in 2010, 17% in 2011, 23% in 2012, 25% in 2013, 21% in 2014, 20% in 2015, 18% in 2016, 18% in 2017, and 16% in 2018.

[45] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor bench trials as a percentage of misdemeanor dispositions at: 3% in 2003, 4% in 2004, 4% in 2005, 5% in 2006, 5% in 2007, 5% in 2008, 6% in 2009, 8% in 2010, 6% in 2011, 7% in 2012, 6% in 2013, 7% in 2014, 7% in 2015, 5% in 2016, 5% in 2017, and 5% in 2018.

[46] The following thirty-five states ensure the right to a jury trial in the first instance for virtually all criminal offenses: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details. Some states provide this right by judicial interpretation of state constitutional provisions while others have legislatively enacted it.

[47] Arkansas, North Carolina, and Virginia. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[48] Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City). See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[49] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

Yet, even if the rationale of judicial efficiency or financial[50] cost still holds for the District today, for several reasons, it is not clear that these considerations should outweigh a right to a jury of one's peers.

First, the right to a jury is a foundational right of the American legal system. It is one of the only rights enumerated in the original, unamended Constitution[51] and is given additional protection in the Sixth Amendment.[52] The constitutional language itself is unequivocal, ensuring the right to a jury trial for "all Crimes"[53] and in "all criminal prosecutions."[54] As many historians, legal scholars, and Supreme Court Justices have pointed out, the jury trial serves a score of critical democratic functions.[55] It ensures that community standards are represented in local courtrooms.[56]

Second, the Council itself, in considering legislation impacting the jury trial right in the District, has repeatedly discussed and considered numerous circumstances in which the jury serves a particularly important role in weighing the outcome of a case. This includes cases where civil liberties are at stake,[57] cases where subjectivity plays a large role in demarcating criminal conduct,[58] and cases where law enforcement officers' credibility

[50] Considering that the 1994 reduction in jury-demandable offenses had no anticipated monetary impact, it is likewise unlikely that the reverse process, an expansion of jury-demandable offenses, would result in additional cost. Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4 (indicating no monetary savings as a result of the amendment).
[51] U.S. Const. art. III, § 2, cl. 1 (The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury).
[52] U.S. Const. amend. VI, cl. 1 (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed).
[53] U.S. Const. art. III, § 2, cl. 1.
[54] U.S. Const. amend. VI, cl. 1.
[55] *See*, *e.g.*, Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wisc. L. R. 133, 136-37 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).
[56] *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).
[57] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, —that is, allowing for a jury trial—is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones will permit law enforcement against otherwise permitted activity—freedom of association, for instance—and thus the bill permits trial by jury.").
[58] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e. a jury) to answer the question whether there is guilt beyond a reasonable doubt."); Committee on the Judiciary Report on Bill 18-151, the "Omnibus Public Safety and Justice Amendment Act of 2009," at 33 ("A key change recommended by the Committee has to do ensuring a defendant's right to a jury trial. The primary factor in the Committee's decision to ensure this right relates to the subjective nature of stalking. It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. As stated by PDS, '[s]talking is an offense for which the community, not a single judge, should sit in judgment. Community norms should inform decisions about whether behavior is criminal or excusable.'").

is at issue.[59] While these Council statements have been made in the context of specific offenses, these rationales apply much more broadly across misdemeanors.[60]

Third, rights-based arguments aside, the limitations on jury demandability produce two main problems in specific cases.

First, the existence of a divide between jury-demandable and non-jury demandable cases in which the former require greater prosecutorial and judicial resources than the latter distorts charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction is less likely,[61] a prosecutor may be incentivized to do so—he or she often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and there is no record as to the reason for choosing one charge over another.[62] However, there are two examples that indicate the impact of this practice.

One example of how restriction of jury demandability distorts charging is the use of attempt charges to avoid jury trials in threat cases. D.C. Code § 22-407 criminalizes

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[59] *See* Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17 (emphasizing the importance of the jury in moderating prosecutorial charging decisions and the importance of removing the judge from having to make officer credibility findings as support for making assault on police officer offenses jury demandable).

[60] For example, for a charge of current D.C. Code § 22–1307, Crowding, obstructing, or incommoding (a 90 day offense) or other misdemeanor public order offenses the complainant of record and sole witness may be a law enforcement officer. Arguably, as with assault on a police officer, the same rationale of removing the judge from having to make officer credibility findings in a case would support making this offense jury demandable.

[61] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

[62] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

threats to do bodily harm.[63] Because the authorized maximum penalty for threats to do bodily harm is six months, a criminal defendant charged with the offense is entitled to a jury trial.[64] The District's attempt statute, however, has a maximum authorized penalty of 180 days for non-crime of violence offenses, making an attempted threat to do bodily harm non-jury demandable.[65] Although it is legally possible to attempt a threat without actually completing a threat, the likelihood of this factual scenario both occurring and resulting in prosecution is exceedingly low.[66] Nonetheless, of the 6,556 charges brought under D.C. Code § 22-407 between 2009 and 2018, 56% were for attempted threats rather than completed threats.[67] As there is no practical difference in the authorized imprisonment penalty between the attempt and completed offense (the difference between 6 months and 180 days), such a high percentage of charges for attempted threats of bodily injury suggests charging decisions may be based on jury demandability rather than how the facts fit the law.

Another example of example of how restriction of jury demandability distorts charging is evidenced by the shift in the number of charges brought under D.C. Code § 22-405(b)—assault on a police officer (APO)—before and after the offense became jury demandable. In 2016, the D.C. Council passed the Neighborhood Engagement Achieves Results (NEAR) Act, which split the existing 180 day, non-jury demandable APO offense into a new APO offense and a resisting arrest offenses and increased the penalty for both to six months.[68] The apparent legislative purpose of this shift was to make sure that these offenses were decided by juries rather than judges.[69] But charging data suggests that this has not been the effect of the law. The number of charges for violations of D.C. Code § 22-405(b) remained relatively consistent within the range of 1,592 and 1,712 for every two-year period between 2009 and 2016.[70] However, after the NEAR Act, for the period of

[63] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.").
[64] D.C. Code § 22-407; D.C. Code § 16-705.
[65] D.C. Code § 22-1803; D.C. Code § 16-705.
[66] *See Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001) (holding that "if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense" but recognizing that "[a]s a practical matter, such unconsummated threats may be unprovable").
[67] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Also, of the 1,869 convictions under D.C. Code § 22-407 between 2009 and 2018, 72% were for attempted threats rather than completed threats. *Id.*
[68] Neighborhood Engagement Achieves Results Amendment Act of 2016 (effective June 30, 2016), D.C. Law 21-125.
[69] *See* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Ward 5 Councilmember Kenyan McDuffie, who wrote the NEAR Act, tells City Paper that the goal was the make the crime jury-demandable."); Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.
[70] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Specifically, the numbers were: 1,712 in 2009-2010, 1,592 in 2011-2012, 1,659 in 2013-2014, 1,697 in 2015-2016. *Id.*

2017 to 2018, the combined number of charges for APO[71] and resisting arrest[72] dropped by about a thousand charges to a mere 529[73] This represents a more than 66% decrease in charging from the previous years. However, the number of charges brought for violations of D.C. Code § 22-404(a)—simple assault—saw a corresponding uptick with the passage of the NEAR Act. For two-year periods between 2009 and 2016 simple assault charges were in the range of 3,221 to 3,865, but rose about a thousand charges to 5,282 for the period of 2017 to 2018.[74] The elements of the simple assault offense are identical to the prior APO offense, except that the complainant's status as a law enforcement officer need not be proven. And the NEAR Act did not explicitly preclude prosecutors from using their discretion to charge what previously had been an APO case as a simple assault. As there is no practical difference in the authorized imprisonment penalty between the revised offenses (revised APO and resisting arrest) and simple assault (the difference between 6 months and 180 days), the shift in charges so simple assault suggests these charging decisions may be based on jury demandability rather than how the facts fit the law.

The second main problem caused by the limitation of the right to a jury is that the maximum term of imprisonment is sometimes an inaccurate proxy for the real seriousness of a criminal charge to a particular person. Some offenses carry severe consequences for those charged despite having relatively low terms of incarceration yet are not afforded a jury trial.

One example of how an imprisonment penalty misrepresents the seriousness of a criminal charge is D.C. Code § 22-3010.01—misdemeanor sexual abuse of a child or minor—a 180-day offense that currently is not entitled to a jury trial.[75] But the offense is a "registration offense" under D.C. Code § 22-4001(8)(A).[76] Because of this, a person convicted of misdemeanor sexual abuse of a child or minor is subject to mandatory sex offender reporting requirements for ten years following their conviction or release.[77] The collateral consequences of sex offender registration—including burdensome restrictions on residency, internet usage, and access to public housing have been extensively documented.[78] The long-term and public nature of reporting requirements, the increased exposure to criminal liability for failures to report, and the additional social and structural

[71] The 2017-2018 charges for the unrevised and revised APO, D.C. Code § 22-405, were 355, with 80 convictions (a 23% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.
[72] The 2017-2018 charges for D.C. Code § 22-405.01 were 174, with 25 convictions (a 14% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.
[73] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.
[74] The charges for D.C. Code § 22-404(a) were: 3,221 in 2009-2010, 3,506 in 2011-2012, 3,432 in 2013-2014, 3,865 in 2015-2016, and 5,282 in 2017-2018.
[75] D.C. Code § 22-3010.01. See also misdemeanor sexual abuse, D.C. Code § 22–3006, carrying a 180 day (non-jury demandable) maximum imprisonment penalty.
[76] D.C. Code § 22-4001(8)(A).
[77] D.C. Code § 22-4003.
[78] *See*, *e.g.*, Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 532-539 (2007); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (September 2007).

consequences that accompany sex offender registration indicate that the seriousness of a misdemeanor sexual abuse or other charge involving sex offender registration may warrant elevated due process rights as a matter of policy.[79]

A second example of how imprisonment penalties do not accurately represent the seriousness of a criminal charge is when that charge could result in deportation. In 2018, an *en banc* decision of the D.C. Court of Appeals in *Bado v. United States* first held that a criminal defendant is entitled to a jury trial under the United States Constitution if charged with an offense that could result in deportation.[80] Although this decision addressed the fundamental issue of severe consequences resulting from juryless convictions, it has also produced its own set of challenges. As Senior Judge Washington noted in his concurring opinion, the court's decision created an odd dichotomy in which non-citizens are now entitled to more due process in the District's Superior Court than citizens for the exact same offense.[81] While the *Bado* decision extends jury demandability to relevant crimes for non-citizens, these non-citizens are in the difficult position of having to reveal their immigration status in open court in order to claim a constitutional right.[82]

The partial restoration of a jury right may have significant benefits to public safety insofar as this change in District law helps to restore community support for the criminal justice system.[83] In his concurring opinion to the *Bado* decision, Judge Washington urged the D.C. Council to adopt a full jury trial right and stating:

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial.[84]

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[79] The DCCA has previously held that, as a matter of law, a right to a jury does not exist for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008).

[80] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.")

[81] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018) (en banc) ("I write separately because I am concerned that our decision today, while faithful to the dictates of *Blanton*, creates a disparity between the jury trial rights of citizens and noncitizens that lay persons might not readily understand. That disparity is one that the legislature could, and in my opinion, should address. The failure to do so could undermine the public's trust and confidence in our courts to resolve criminal cases fairly.").

[82] This point previously has been raised the Public Defender Service for the District of Columbia, a CCRC Advisory Group Member. *See* CCRC Comments on First Draft of Report #41 Ordinal Ranking of Maximum Imprisonment Penalties, 2 (November 15, 2019).

[83] Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)

[84] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (en banc).

However, the revised statute does not address all rights-based and other problems with restriction of jury-demandability. As long as the right to a jury trial is restricted for some charges and the prosecution of those charges require fewer resources or are more likely to result in a conviction, there will continue to be incentives to base charging decisions on jury demandability rather than what charge best fits the facts of the case at hand. In addition, as noted above, the revised statute's codification of the *Bado* holding requires non-citizen defendants to disclose their citizenship status in court in order to avail themselves of jury demandability. Finally, there may be significant judicial efficiency costs that arise from litigation over the right to a jury for specific charges and individual defendants—efficiency costs that would not exist if the District followed the majority of states in extending a right to a jury in every criminal case carrying an imprisonment penalty.

The revised statute is a compromise solution to restore jury demandability that mitigates the potential impact on judicial efficiency. The revised statute, however, should not be construed as a permanent judgment as to the appropriate balance between judicial efficiency and the right to a jury of one's peers. A future expansion of jury-demandability to all criminal offenses may be feasible and warranted in the near future.

RCC § 16-1005A. Criminal Contempt for Violation of a Civil Protection Order.

Explanatory Note. *This section establishes the criminal contempt for violation of a civil protection order provision for the Revised Criminal Code (RCC). The offense prohibits violating a temporary or final protection order issued in any jurisdiction. It replaces subsections (f), (g),[1] (g-1), (h), and (i) of D.C. Code § 16-1005, Hearing, evidence, protection order.*

Paragraph (a)(1) requires that the person knows that they are subject to a temporary or final civil protection order issued in the District or a valid foreign protection order. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they are subject to a protection order.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether the circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists.[3]

Subparagraph (a)(1)(A) specifies that there are three types of protection orders that cannot be violated. The phrase "in fact" indicates that the accused is strictly liable[4] with respect to whether the order was a temporary protection order, final protection order, or valid foreign protection order. Invalidity of the order is not a defense.[5] The reference to temporary civil protection orders includes both orders issued outside of court business hours (termed emergency temporary protection orders) and those issued during regular business hours. A respondent is not subject to a temporary order until they are properly served with a notice of the hearing and an order to appear, a copy of the petition, and the temporary protection order.[6] The reference to final civil protection orders includes orders entered by consent without admission of guilt.[7] The term "valid foreign protection order" is a defined term with the meaning specified in D.C. Code § 16-1041.

Subparagraphs (a)(1)(B) – (a)(1)(D) require that the release order is in writing,[8] advises the person of the consequences for violating the order, and is sufficiently clear and

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[1] The District of Columbia Court of Appeals has held that the elements of the offense are the same whether charged under § 16-1005(f) (violation of CPO as contempt) or § 16-1005(g) (violation of CPO as independent offense). *Ba v. U.S.*, 809 A.2d 1178, 1182 n.6 (D.C. 2002).

[2] Consider, for example, a person who is unable to read or understand the protection order due to illiteracy or a language barrier. That person may not be practically certain that they are now subject to a protection order.

[3] Consider, for example, a person who is handed a protection order and angrily tears it up and throws it in the garbage before reading it. That person may be said to know that they were subject to the order, even though they were not practically certain of it.

[4] RCC § 22E-207.

[5] A person is not entitled to attack the validity of a court order in a contempt proceeding. *See, e.g., Shewarega v. Yegzaw*, 947 A.2d 47, 51 (D.C. 2008) (respondent not entitled to attack validity of a CPO in contempt proceeding; he was obligated to obey the court order unless and until it was reversed or vacated). "Compliance with court orders is required until they are reversed on appeal or are later modified." *Baker*, 891 A.2d at 212 (quoting *Kammerman v. Kammerman*, 543 A.2d 794, 798–99 (D.C. 1988)). *See also Thomas v. U.S.*, 934 A.2d 389, 391 (D.C. 2007).

[6] *See* D.C. Code § 16-1004(d), requiring compliance with notice and service rules of the Superior Court of the District of Columbia.

[7] *See* D.C. Code § 16-1005(i).

[8] *See* D.C. Code §§ 16-1004 and 1005 requiring that protection orders be made in writing.

specific to serve as a guide for the person's conduct.[9] Per the rules of interpretation in RCC § 22E-207, a person is strictly liable as to whether the order is compliant with these requirements.

Paragraph (a)(2) requires that the person fail to comply[10] with the protection order. Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206, which here means the person must be practically certain that they failed to comply with one or more provisions in the order. Under RCC § 22E-203, the person's conduct must be voluntary.[11] A person must be afforded a reasonable opportunity to comply with the condition.[12]

Subsection (b) specifies that a person does not commit an offense when they have the effective consent of a judicial officer to be excused from the provision of the order that is the subject of the charged offense.[13] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[14] "Consent" is also defined in RCC § 22E-701. The term

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[9] *Hector v. U.S.*, 883 A.2d 129, 131 (D.C. 2005) (explaining "A defendant cannot be convicted of criminal contempt where he or she is not put on notice of the specific conditions of the [CPO] order."); *Smith v. U.S.*, 677 A.2d 1022, 1031 (D.C. 1996) (reversing contempt for violating CPO where no evidence that defendant was informed by court that "no contact" order meant no contact through writing as well as no physical contact); *In re Jones*, 898 A.2d 916, 920 (D.C. 2006) (stating, the order must be "specific and definite, or clear and unambiguous.").

[10] The failure must be to comply with a mandatory condition. For example, if the order permits, but does not require, parental visitation, a person does not violate the order by declining to visit.

[11] A person does not commit an offense if the act or omission was not subject to the person's control. For example, a person does not violate a condition to attend a domestic violence intervention program if they are incarcerated, hospitalized, or stranded. *See, e.g., Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness."); *Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction under a similar statute where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."); *but see Grant v. U.S.*, 734 A.2d 174, 177 (D.C. 1999) (holding that "[a]ddiction to heroin [does] not constitute a defense to the charge of contempt based upon violating a condition of pretrial release not to use drugs.").

[12] For example, a person does not violate a condition to stay away from a complainant where the complainant is physically chasing after the person and the person makes reasonable efforts to distance themselves. *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty).

[13] Consider, for example, a judge in one case orders a person to complete a domestic violence intervention program and a judge in another case orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.

[14] RCC § 22E-701.

"in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[15]

Subsection (c) establishes jurisdiction where a person communicates to a person located in the District from a location outside the District.[16]

Subsection (d) specifies the penalty for the revised offense.[17] [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] In some cases, the conduct criminalized under this section may also constitute criminal contempt under D.C. Code §§ 11-741 or 11-944[18] or failure to appear in violation of a court order under RCC § 23-1327[19] and, in that situation, convictions for the offenses must merge under RCC § 22E-214(a)(4).[20]

Subsection (e) cross-references applicable definitions in the RCC and D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 16 offense.

Relation to Current District Law. *The revised criminal contempt for violation of a civil protection order statute clearly changes current District law in two main ways.*

First, the revised statute does not criminalize failure to appear for a hearing on a civil protection order as criminal contempt. Current D.C. Code § 16-1005(f) states, "respondent's failure to appear as required by subsection (a) of this section, shall be punishable as [criminal] contempt." In contrast, the revised statute does not distinctly punish such conduct as criminal contempt. Unlike failure to appear as a defendant in a criminal case, which is punished under RCC § 22E-1327, failure to appear in a civil case or quasi-civil case does not frustrate the court's ability to proceed.[21] Accordingly, for violation of a civil protection order a default judgment and civil contempt may be more appropriate sanctions,[22] although criminal contempt also remains available under D.C. Code § 11-944. This change reduces unnecessary overlap and improves the consistency and proportionality of the revised statutes.

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[15] RCC § 22E-207.

[16] *See* 16-1005(h).

[17] This section operates independently of and in addition to statute eliminating limitation on length of sentence for criminal contempt, thus the sentencing limit effectively does not apply. *Caldwell v. U.S.*, 1991, 595 A.2d 961 (D.C. 1991).

[18] *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991); *Vest v. United States*, 834 A.2d 908 (D.C. App. 2003).

[19] *See, e.g., Swisher v. U.S.*, 572 A.2d 85, 89 (D.C. 1990).

[20] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."

[21] Due process and procedural rules may require a defendant's presence in a criminal case. *See, e.g.,* FRCrP 43. However, in a civil case, the court can proceed in the defendant or respondent's absence and grant the plaintiff or petitioner relief by default. D.C. Code § 16-1004(3) authorizes the entry of a final civil protection order by default, if a respondent fails to appear. This is a particularly robust sanction because, unlike a default or default judgment in a purely civil case, a civil protection order appears in a criminal records search, triggering a multitude of collateral consequences for the respondent.

[22] *See, e.g.,* D.C. Code § 16-2325.01(c) (authorizing civil contempt instead of criminal contempt for failure to appear as a participant in a delinquency or neglect proceeding).

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the revised offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, consistency, completeness, and proportionality of the revised offense.

Beyond these two changes to current District law, three other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code §§ 16-1005(f) and (g) do not specify a culpable mental state requirement. District case law has held that a person must act "willfully, i.e. that he had a 'wrongful state of mind.'"[23] However, case law does not provide a clear definition of "willfully." Resolving this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[24] and "in fact,"[25] applying the former to the actor's failure to comply with the order and the latter to the nature and issuance of the order. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are subject to a protection order, and, to avoid liability, avoids confirming or fails to investigate whether they are subject to a protection order. These changes clarify and improve the consistency of District statutes.

Second, the revised statute includes a defense where the accused acts with the effective consent[26] of a judicial officer. Current D.C. Code § 16-1005(f) – (i) are silent as to whether a person may be excused from complying with an order with the consent of a judicial officer.[27] Resolving this ambiguity, the revised statute makes clear that the court is empowered to excuse the accused from complying. This change improves the clarity and proportionality of the revised offense.

Third, the revised statute requires that the release order be in writing,[28] advise the person of the consequences for violating the order, and be clear and specific. Current D.C. Code § 16-1005 is silent as to whether or how a person's conditions of release be specified

[23] *See Davis v. U.S.*, 834 A.2d 861, 867 (D.C. 2003) (reversing a conviction where a defendant was removed from a required 22-week program "willfully.")
[24] RCC § 22E-206.
[25] RCC § 22E-207.
[26] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.
[27] Consider, for example, a judge who in one case orders a person to complete a domestic violence intervention program and a judge in another case who orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.
[28] *See* D.C. Code §§ 16-1004 and 1005 requiring that protection orders be made in writing.

in an order. District case law has held that evidence of contempt is insufficient where the civil protection order is not sufficiently clear and specific to serve as a guide to defendant's conduct.[29] However, case law has not addressed whether other criteria, such as notice of the potential penalties for failure to comply, must also be satisfied. To resolve this ambiguity, the revised statute codifies this point and requires notice similar to what is required for criminal contempt for violation of a release condition under RCC § 22E-1329A. This change clarifies and improves the consistency of District statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute does not specify that children must be prosecuted as children. Current D.C. Code § 16-1005(g-1) states, "Enforcement proceedings under subsections (f) and (g) of this section in which the respondent is a child as defined by § 16-2301(3) shall be governed by subchapter I of Chapter 23 of this title." This language appears to be superfluous and potentially confusing, as no other criminal offense definition includes a similar cross-reference. This change clarifies the revised statute and does not change District law.

Second, the revised statute does not specify that final civil protection orders include orders entered by consent without admission. Current D.C. Code § 16-1005(i) states, "Orders entered with the consent of the respondent but without an admission that the conduct occurred shall be punishable under subsection (f), (g), or (g-1) of this section." This language appears to be superfluous, however, the Explanatory Note makes clear that a court order includes a consent order. This change clarifies the revised statute and does not change District law.

Third, the revised statute is severed from D.C. Code § 16-1005 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsections (a) – (e) of current D.C. Code § 16-1005, which are not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

[29] *Hector v. U.S.*, 883 A.2d 129, 131 (D.C. 2005) (explaining "A defendant cannot be convicted of criminal contempt where he or she is not put on notice of the specific conditions of the [CPO] order."); *Smith v. U.S.*, 677 A.2d 1022, 1031 (D.C. 1996) (reversing contempt for violating CPO where no evidence that defendant was informed by court that "no contact" order meant no contact through writing as well as no physical contact); *In re Jones*, 898 A.2d 916, 920 (D.C. 2006) (stating, the order must be "specific and definite, or clear and unambiguous.").

RCC § 16-1021. Parental Kidnapping Definitions.

Explanatory Note. *This section defines relevant terms for Subchapter II of Chapter 10 of Title 16. This section replaces current D.C. Code § 16-1021.*

The revised section defines terms as used in Subchapter II of Chapter 10 of Title 16. Paragraph (1) defines the term "child" as a person under the age of 16. Paragraph (2) defines the term "lawful custodian" to mean a person who is authorized to have custody under District law, or by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child. This term is intended to include persons who are authorized to have custody under District law, whether or not that authority is pursuant to a court order. Paragraph (3) defines the term "relative" to mean a parent, other ancestor, brother, sister, uncle, or aunt, or one who has been lawful custodian at some prior time.

Relation to Current District Law. *The revised statute makes one change that constitutes a substantive change to current District law.*

The revised definition of "lawful custodian" includes any person who is authorized to have custody over a child *under District law*. Under the current D.C. Code definition, "lawful custodian" only includes persons who have custody "by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child."[1] Under the plain language of the current definition, parents who have lawful custody of their children other than pursuant to a court order[2] are not "lawful custodians," so taking a child from such a parent would not constitute parental kidnapping under current law. There is no case law on point. By contrast, under the revised definition of "lawful custodian," any parent who has custodial rights under District law constitutes is included in the definition of "lawful custodian." This change improves eliminates a gap in liability and improves the proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised definition section does not define the term "District." Omitting this term is not intended to change current District law. The term "District" as used in this subchapter is still intended to refer to the District of Columbia.

[1] D.C. Code § 16-1021(3).
[2] For example, children with their birth parents who have not been through court proceedings.

RCC § 16-1022. Parental Kidnapping.

Explanatory Note. *This section establishes the parental kidnapping offense, and replaces the current parental kidnapping statute in the D.C. Code. The offense criminalizes taking, concealing, or detaining a child who has another lawful custodian, with intent to prevent a lawful custodian from exercising rights to custody. The offense only applies to relatives of the child or persons acting at the direction of a relative of the child. The revised statute also incorporates statutes that define relevant terms; establish defenses to prosecution; specify that the offense is continuous; specify payment of expenses; specify prosecutorial authority; and establish procedures for expungement. This revised parental kidnapping statute replaces current D.C. Code §§ 16-1022, 1024, and 1025; and portions of D.C. Code § 16-1023 relating to defenses, parental kidnapping as a continuous offense, and reimbursement of expenses.*

Subsection (a) specifies the elements of first degree parental kidnapping. Paragraph (a)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (a)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District for more than 24 hours. Paragraph (a)(3) requires that the child was, in fact, outside the custody of the lawful custodian for more than 30 days. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state required as to whether the child was outside of the custody of a lawful custodian for more than 30 days.

Subsection (b) specifies the elements of second degree parental kidnapping. Paragraph (b)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (b)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District for more than 24 hours. Paragraph (b)(3) requires that the actor did not release the child without injury in a safe place prior to arrest. This element is satisfied if the child is not released at all prior to arrest, or if the child is released prior to arrest in a place that creates a risk of harm or injury.

Subsection (c) specifies the elements of third degree parental kidnapping. Paragraph (c)(1) requires that the actor must have committed fourth degree parental kidnapping. Paragraph (c)(2) requires that the actor knowingly takes, conceals, or detains the child outside of the District for more than 24 hours. This paragraph also specifies that a "knowingly" culpable mental state applies, a term defined at RCC § 22E-206 to mean that the actor must have been practically certain that he would take, conceal, or detain the child outside of the District.

Subsection (d) specifies the elements of fourth degree parental kidnapping. Paragraph (d)(1) requires that the actor knowingly takes, conceals, or detains a person who has another lawful custodian. The term "lawful custodian" is defined D.C. Code § 16-

1021. Paragraph (d)(1) specifies a culpable mental state of "knowledge," a term defined in RCC § 22E-206 to mean the actor must be practically certainty that he would take, conceal, or detain a person. The actor must also be practically certain the person has another lawful custodian.

Paragraph (d)(2) requires that the actor takes, conceals, or detains a person with intent to prevent a lawful custodian from exercising rights to custody of the child. "Intent" is a term defined in RCC § 22E-206 that here means that the actor was practically certain that he would prevent a lawful custodian from exercising rights to custody of the child. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually interfered with another lawful custodian's right to custody, only that the actor believed to a practical certainty that he would interfere with a right to custody. A right to custody need not be permanent; intent to interfere with limited rights to custody or temporary visitation rights would suffice under this subparagraph.

Paragraph (d)(3) requires that the person taken, concealed, or detained, in fact, is under the age of 16. The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state as to the person's age.

Paragraph (d)(4) requires that the actor is a relative of the child, or a person who believes he or she is acting pursuant to direction of a relative of the child. This element may be satisfied even if the actor unreasonably believes that he or she is acting that direction of a relative. Per the rule of interpretation in RCC § 22E-207, the term "in fact" in paragraph (d)(4) also applies to this paragraph. There is no culpable mental state required as to whether the actor is a relative of the child, or person who believes he or she is acting pursuant to direction of a relative of the child.[1]

The term "in fact" is defined in RCC § 22E-207, and specifies that there is no culpable mental state as to whether the actor is a relative of the child, or believes he or she is acting pursuant to direction of a relative.

Subsection (e) establishes three exclusions to liability. Paragraph (e)(1) establishes that a parent who reasonably believes[2] he or she is fleeing from imminent physical harm to the parent is not liable under this section. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.[3] Paragraph (e)(2)

[1] Although no culpable mental state as defined in RCC § 22E-205 is required, paragraph (d)(4) still requires that the actor subjectively believed that he or she was acting at the direction of a relative.

[2] Any circumstance element or result element that is the object of the phrase "reasonably believes" need not be proven to actually exist.

[3] *See, e.g.,* Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). "…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed. … The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts."

establishes that an actor is not liable under this section if the other parent effectively consented to the act constituting the offense. The term "effective consent" is defined in RCC § 22E-701, and requires that the consent was obtained other than by deception or coercive threat. Paragraph (e)(3) establishes that an actor is not liable under this section if he or she acted to protect the child from imminent physical harm.

Subsection (f) establishes a defense to prosecution under this section. Under paragraph (f)(1), the actor may file a petition that states that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child; and seeks to establish custody, to transfer custody, or to revise or to clarify an existing custody order. If the actor files a petition with the Superior Court of the District of Columbia within 5 business days of the acts constituting the offense, a court finding that at the time the act was done, a failure to do the act would have resulted in a clear and present danger to the health, safety, or welfare of the child shall be a defense to prosecution under this section.

Subsection (g) specifies that parental kidnapping is a continuous offense that continues long as the child is concealed, detained, or otherwise unlawfully physically removed from the lawful custodian.

Subsection (h) specifies relevant penalties for parental kidnapping. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (h)(5) specifies that expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this section, and reasonable costs incurred by the lawful custodian or child victim shall be reimbursed to the lawful custodian. Paragraph (h)(6) specifies that notwithstanding the authorized maximum penalties, first and second degree parental kidnapping are designated as felonies[4] for purposes of D.C. Code 23-563.[5]

Subsection (i) cross references terms defined elsewhere in the subchapter, and in the RCC.

Subsection (j) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised parental kidnapping statute makes three substantive changes to current District law.*

First**,** the revised parental kidnapping offense no longer provides liability for a parent concealing the child from another parent, absent additional intent. Under the current statute, parental kidnapping includes a parent concealing a child from the child's other parent, even if there is no additional intent to interfere with the other parent's custodial rights. The plain language would appear to criminalize a parent with custody at a given time refusing to give the child's whereabouts to another parent who does not have custody

[4] Designating the parental kidnapping offense as a felony is an exception to the general definition of "felony" under RCC 22E-701, which defines "felony" as "an offense punishable by a term of imprisonment that is more than one year" or "in other jurisdictions, an offense punishable by death."

[5] D.C. Code § 23-563 states that a warrant or summons for a felony under § 16-1022 issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.

at that time. There is no case law on point. By contrast, the revised parental kidnapping statute requires that the actor had intent to interfere with a lawful custodian's custodial rights. This change improves the proportionality of the revised offense.

Second, the revised definition of "lawful custodian" under D.C. Code § 16-1021 includes any parent who is authorized to have custody over a child *under District law*. Under the current definition, "lawful custodian" only includes persons who have custody "by an order of the Superior Court of the District of Columbia or a court of competent jurisdiction of any state, or a person designated by the lawful custodian temporarily to care for the child."[6] Under the plain language of the current definition, parents who have lawful custody of their children other than pursuant to a court order[7] are not "lawful custodians," so taking a child from such a parent would not constitute parental kidnapping under current law. There is no case law on point. By contrast, under the revised definition of "lawful custodian," taking a child from any parent who has custodial rights under District law constitutes parental kidnapping, even if the custodial rights are not pursuant to a court order. This change improves eliminates a gap in liability and improves the proportionality of the revised offense.

Third, the revised parental kidnapping statute's penalty grades that are predicated on taking, concealing, or detaining a person outside of the District require that the actor did so for more than 24 hours. Under current law, penalty gradations based on taking, concealing, or detaining a child outside of the District does not include any minimum time duration.[8] By contrast, first, second, and third degree parental kidnapping require that the person was taken, concealed, or detained outside of the District for more than 24 hours. This revision prevents disproportionately severe penalties when an actor briefly takes a child over the border. This change improves the proportionality of the revised offense.

Beyond these three substantive changes to current District law, nine other aspects of the revised parental kidnapping statute may constitute substantive changes to current District law.

First, the revised statute requires that the actor "knowingly" takes, conceals, or detains the complainant. The current parental kidnapping statute does not specify a culpable mental state. The current parental kidnapping statute references acting "with the intent to prevent a lawful custodian from exercising rights to custody," "with intent to harbor, secrete, detain, or conceal the child" or "with intent to deprive the other person of the right of limited custody or visitation,"[9] but it is not clear whether these culpable mental states apply to other elements of the offense, and the phrases "with intent" and "with the intent" are not defined in the statute. There is no case law on point. Resolving this ambiguity, the revised parental kidnapping statute specifies that a "knowingly" culpable mental state applies to the element of taking, concealing, or detaining the complainant. Applying a knowledge requirement to statutory elements that distinguish innocent from

[6] D.C. Code § 16-1021 (3).
[7] For example, children with their birth parents who have not been through court proceedings.
[8] D.C. Code § 16-1024.
[9] D.C. Code § 16-1022.

criminal behavior is a well-established practice in American jurisprudence.[10] Specifying a culpable mental state for the offense improves the clarity of the revised offense and is consistent with requirements for most other offenses.

Second, the revised statute does not explicitly include taking a child outside of the District for the purpose of depriving a lawful custodian of physical custody of the child after having been served with process in an action affecting the family but prior to the issuance of a temporary or final order determining custody rights. It is unclear whether this prong of parental kidnapping includes taking a child who does not yet have another lawful custodian, in expectation that another person *may* obtain custodial rights to the child, or whether this prong of the current statute requires that the child has another "lawful custodian" who already has custodial rights. There is no DCCA case law on point. Resolving this ambiguity, the revised parental kidnapping offense requires that the actor intended to interfere with a lawful custodian's pre-existing right to custody. This change improves the clarity of the revised offense.

Third, the revised statute specifies that the actor must take the child "to another location." The current statute merely states that the actor must "take" a child, but does not define the term, and there is no relevant DCCA case law. Resolving this ambiguity, the revised statute specifies that the child must be moved to a different location. Merely seizing a child without any movement is insufficient under the revised statute.[11] This change improves the clarity of the revised offense.

Fourth, the revised statute specifies that there is no culpable mental state as to the age of the complainant. The current statute requires that the complaining witness is a "child," which is defined as a "person under the age 16 years of age."[12] The current statute does not specify whether the actor must be aware that the complainant is under 16 years of age. There is no DCCA case law on point. Resolving this ambiguity, the revised statute specifies that there is no culpable mental state requirement as to the age of the complainant. This change improves the clarity of the revised offense.

Fifth, the offense requires that the actor is either a relative or a person who believes he or she is acting pursuant to directions of a relative. The current statute requires that the actor is either a relative of the complainant, or is acting pursuant to directions of a relative. However, the current statute does not specify whether the offense includes a person who incorrectly believes he or she is acting at the direction of a relative. There is no DCCA case law on point. Resolving this ambiguity, the revised statute requires that the actor believed he or she was acting at the direction of a relative. This change improves the clarity of the revised offense.

Sixth, the exclusion to liability under paragraph (e)(2) requires that the other parent gave effective consent to the conduct constituting the offense. Under current law, it is a

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[10] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)")

[11] Attempt liability may still apply in these cases, provided the requirements for attempt liability under RCC § 22E-301 are satisfied.

[12] D.C. Code § 16-1021 (1).

defense to prosecution that the action constituting the offense was "consented to by the other parent[.]"[13] The term "consent" is not defined in the statute, and there is no relevant DCCA case law. It is unclear if the defense would apply if the consent were induced by physical force, coercive threats, or deception. Resolving this ambiguity, the revised statute provides the defense only if the other parent gave "effective consent," as defined in RCC § 22E-701[14] to the conduct constituting the offense. This requires that the consent was not obtained by physical force, coercive threat, or deception. This change improves the clarity and proportionality of the revised statute.

Seventh, the jurisdiction provision in current D.C. Code § 16-1023 (h) is omitted. The current statute states that "Any violation of this subchapter is punishable in the District, whether the intent to commit the offense is formed within or without the District, if the child was a resident of the District, present in the District at the time of the taking, or is later found in the District." This language apparently is intended to ensure that District courts have jurisdiction over parental kidnappings that do not entirely occur within the District of Columbia. However, the DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[15] Consequently, although the DCCA has not applied this rule to parental kidnapping cases, it appears that even without any statutory language in the revised statute on jurisdiction District courts would have jurisdiction over any case in which a child was present in the District at the time of the taking, or was later found in the District. It is unclear, however, whether the current jurisdiction provision would extend jurisdiction to cases where the child is a District resident, but none of the acts constituting the offense occurs within the District. There is no relevant DCCA case law. Resolving this ambiguity, the revised statute applies jurisdictional principles the same as for other crimes, eliminating the offense-specific jurisdiction provision. This change improves the clarity and consistency of the revised offense.

Eighth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the parental kidnaping offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

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[13] D.C. Code § 16-1023 (a)(4).

[14] "Effective consent means consent other than consent induced by physical force, a coercive threat, or deception."

[15] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

Ninth, the revised statute does not specifically include liability for acting as an aider and abettor, conspirator, or accessory to any of the conduct proscribed by the offense. The current statute prohibits "Act[ing] as an aider and abettor, conspirator, or accessory to any of the actions forbidden by this section[.]"[16] There is no case law on point. By contrast, under the revised parental kidnapping statute, accessory and conspiracy liability for parental kidnapping is subject to the RCC's general accomplice liability[17] and conspiracy[18] statutes. The RCC's general accomplice and conspiracy statutes detail the culpable mental state and other requirements of accomplice and conspiracy liability in a manner consistent with other criminal offenses. To the extent that the RCC's general conspiracy and accomplice provisions differ from the law on conspiracy and accomplice liability as applied to the current parental kidnapping statute,[19] relying on the RCC's general provisions may constitute a change in current law.[20] This change improves the clarity and consistency of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised parental kidnapping statute specifically refers to an actor who "takes, conceals, or detains" a child, but does not specifically include "abducting," "harboring," or "secreting" a child. However, omitting these terms is not intended to change current District law. The term "taking," "detaining," and "concealing" cover all of the conduct covered by "abducting" or "secreting." Although "harboring" may be broader and include conduct that does not constituting "taking," "detaining," or "concealing," omitting this term does not change current District law. The current penalty provision for parental kidnapping determines penalties based on whether the actor "takes," "detains," or "conceals" a child inside or outside the District[21] and there is no penalty specified for merely "harboring" a child under the current statute. Omitting the word "harboring" does not change current District law, and improves the clarity of the revised offense.

Second, the revised statute omits several versions of the offense specified under current law.[22] Omitting these specific versions of parental kidnapping is not intended to

[16] D.C. Code § 16-1022 (b)(6).
[17] RCC § 22E-210.
[18] RCC § 22E-303.
[19] [The Commission plans to address liability for conduct constituting being an accessory after the fact with recommendations for reform to the District's obstruction of justice statutes.]
[20] For discussion on the RCC conspiracy statute's possible changes to current District law, see First Draft of Report #12, Definition of Criminal Conspiracy. For discussion on the RCC's accomplice liability statute's possible changes to current District law, see First Draft of Report #22, Accomplice Liability and Related Provisions.
[21] D.C. Code § 16-1024.
[22] The current statute specifically criminalizes: 1) abducting, taking, or carrying away a child from a person with whom the relative has joint custody pursuant to an order, judgment, or decree of any court, with the intent to prevent a lawful custodian from exercising rights to custody to the child; 2) having obtained physical control of a child for a limited period of time in the exercise of the right to visit with or to be visited by the child or the right of limited custody of the child, pursuant to an order, judgment, or decree of any court, which grants custody of the child to another or jointly with the relative, with intent to harbor, secrete, detain, or conceal the child or to deprive a lawful custodian of the physical custody of the child,

change current District law. Each of these versions of parental kidnapping still satisfies the elements of the offense specified in the revised statute. These versions of parental kidnapping all require taking, concealing, or detaining a child, with intent to interfere with a lawful custodian's rights to custody over the child. Omitting these versions of parental kidnapping improves the clarity of the revised statute.

keep the child for more than 48 hours after a lawful custodian demands that the child be returned or makes all reasonable efforts to communicate a demand for the child's return; 3) Having custody of a child pursuant to an order, judgment, or decree of any court, which grants another person limited rights to custody of the child or the right to visit with or to be visited by the child, conceal, harbor, secrete, or detain the child with intent to deprive the other person of the right of limited custody or visitation; 4) Concealing, harboring, secreting, or detaining the child knowing that physical custody of the child was obtained or retained by another in violation of this subsection with the intent to prevent a lawful custodian from exercising rights to custody to the child; and 5) After issuance of a temporary or final order specifying joint custody rights, taking or enticing a child from the other joint custodian in violation of the custody order.

RCC § 16-1023. Protective Custody and Return of Child.

Explanatory Note. *This section specifies when a law enforcement officer may take a child into protective custody, and establishes a duty to return a child to a lawful custodian or other entity authorized by law. This section replaces portions of D.C. Code § 16-1023 relating to law enforcement officers' authority to take a child into protective custody, and duty to return the child.*

Subsection (a) specifies that a law enforcement officer may take a child into protective custody when the officer reasonably believes that a person has committed an offense under this subchapter, and unlawfully will flee the District with the child.

Subsection (b) specifies that a law enforcement officer shall return a child who has been detained or conceals to the child's lawful custodian or place the child in custody with another entity authorized by law.

Subsection (c) cross references terms defined elsewhere in the RCC.

Relation to Current District Law. *This section does not change current District law. This statute is taken verbatim from current D.C. Code § 16-1023 (d) and (e).*

RCC § 16-1024. Expungement of Parental Kidnapping Conviction.

Explanatory Note. *This section specifies procedures for expunging record of convictions for parental kidnapping. This section replaces current D.C. Code § 16-1026.*

This section provides that a person convicted of parental kidnapping under D.C. Code § 16-1022 may have all records of the conviction expunged. A person who commits parental kidnapping with respect to his or her own child may apply for expungement when the person's youngest child reaches the age of 18, provided that the person has no more than one conviction for parental kidnapping. A person who commits parental kidnapping with respect to a person who is not his or her child may apply for expungement five years after the conviction, or after the child has reached 18 years of age, whichever occurs later, provided that the person has no more than one conviction for parental kidnapping.

Relation to Current District Law. *This section does not change current District law. This statute is taken verbatim from current D.C. Code § 16-1026.*

RCC § 23-586. Failure to Appear after Release on Citation or Bench Warrant Bond.

Explanatory Note. *This section establishes the failure to appear after release on citation or bench warrant bond offense for the Revised Criminal Code (RCC). The offense prohibits knowingly failing to appear for a hearing after being released on citation and ordered to appear under D.C. Code § 23-584. It replaces subsection (b) of D.C. Code § 23-585, failure to appear.*

Subsection (a) specifies the elements of first degree failure to appear after release on citation or bench warrant bond.

Paragraph (a)(1) requires that the person was required to appear before a judicial officer on a specified date and time for a felony offense. The term "judicial officer" is a defined term under D.C. Code § 23-501.[1] The term "appear" is not defined and should be construed broadly to include all types of appearances, including both in-person and virtual hearings. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they are required by a citation or by a bench warrant to appear at a specific date and time.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether a circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied here, knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and to avoid liability avoids confirming or fails to investigate whether they are required to appear at a specified date and time.[3] The term "in fact" indicates that the accused is strictly liable with respect to whether a citation was issued under D.C. Code § 23-584,[4] which authorizes law enforcement officers to release arrestees to appear before a judge at a later date (with or without conditions[5]), or a bond was posted pursuant to a Superior Court bench warrant. The term "in fact" also indicates that the accused is strictly liable with respect to whether the offense for which they were cited is a felony, as defined in RCC § 22E-701.[6]

Paragraph (a)(2) requires that the person fail to appear at the time specified in the court's order or to remain until excused by a judicial officer. The term "appear" has the same meaning as in paragraph (a)(1). Paragraph (a)(2) specifies that the person must act

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[1] D.C Code § 23-501(1) ("The term 'judicial officer' means a judge of the Superior Court of the District of Columbia or of the United States District Court for the District of Columbia, or a United States commissioner or magistrate for the District of Columbia.").

[2] Consider, for example, a person who is unable to read or understand the citation due to illiteracy or a language barrier. That person may not be practically certain that they were required to appear.

[3] Consider, for example, a person who is handed a citation to appear and angrily tears it up and throws it in the garbage before reading the date. Knowledge that they were required to appear on the specified date and time may be imputed even though they were not practically certain of it.

[4] RCC § 22E-207.

[5] Failure to abide by a condition of release is not a criminal offense but it does subject a person to being taken into custody and presented before a judicial officer. D.C Code § 23-585(a).

[6] The offense for which the person is cited may differ from the offense that is eventually charged by a prosecutor. First degree liability is dependent upon the offense the law enforcement officer indicated on the citation. It is not a defense that there was no probable cause for the felony offense.

knowingly, a term defined in RCC § 22E-206, which here means that the person must be practically certain that they failed to appear or remain as required.[7] Determining whether a failure to appear is knowing or inadvertent is a fact-sensitive inquiry.[8] Under RCC § 22E-203, the person's conduct must be voluntary.[9]

Subsection (b) specifies the elements of second degree failure to appear after release on citation or bench warrant bond. The elements are identical to the elements of first degree, except that first degree is limited to a felony offense and second degree applies more broadly to either a felony or misdemeanor.

Subsection (c) provides two defenses to liability. First, subsection (c)(1) provides a defense for when a person has the effective consent of a releasing official,[10] prosecutor,[11] or judicial officer[12] to miss the hearing or arrive at a later time. "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[13] "Consent" is also defined in RCC

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[7] Consider, for example, a person who misunderstands when and where they are to appear because the courthouse is closed due to inclement weather or because the hearing is moved to another courtroom. The evidence must show beyond a reasonable doubt that the person was practically certain or deliberately ignorant as to when and where they needed to appear. RCC §§ 22E-206; 22E-208(d). *See, e.g., Smith v. United States*, 583 A.2d 975, 979 (D.C. 1990); *Bolan v. United States*, 587 A.2d 458, 460 (D.C. App. 1991) (reversing a conviction on sufficiency grounds where a defendant was not notified of a courtroom change).

[8] *See Laniyan v. United States*, 226 A.3d 1146, 1150 (D.C. 2020) (D.C. May 14, 2020) (explaining that the factfinder must give sufficient consideration to the defendant's personal circumstances); *see also Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness.").

[9] A person does not commit failure to appear after release on citation if the absence was not subject to the person's control. For example, a person does not commit an offense if they are incarcerated, hospitalized, stranded, or unable to connect to a virtual hearing due a technological problem. *See, e.g., Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction under a similar statute where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."). Likewise a person does not commit an offense if they are detained by a court security officer while being searched, temporarily removed from the courthouse for a fire drill, or made to wait outside a courtroom until a non-public hearing concludes.

[10] The term "releasing official" is defined in subparagraph (e)(2)(B). Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells her that she is excused from appearing on the date specified. The arrestee has the effective consent of a releasing official to not appear.

[11] Consider, for example, a prosecutor who confers with defense counsel before the hearing date and notifies defense counsel that no charges will be filed (i.e. the case will be "no papered") and excuses the accused from appearing in court. The arrestee has the effective consent of a prosecutor to not appear.

[12] Consider, for example, a presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear.

[13] RCC § 22E-701.

§ 22E-701. The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[14] It is not a defense that the person mistakenly believed that they were excused when actually they were not excused.[15]

Subsection (c)(2) provides a defense when the actor, in fact, makes good faith, reasonable efforts to appear or remain for the hearing. The term "in fact" indicates that the accused is strictly liable with respect to whether their conduct constituted "good faith, reasonable efforts."[16]

Subsection (d) specifies the penalties for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 23 offense.

Relation to Current District Law. *The revised failure to appear after release on citation statute clearly changes current District law in three main ways.*

First, the revised statute imposes a single penalty class for all misdemeanor offenses. Current D.C. Code § 23-585(b)(1), concerning misdemeanors, imposes a maximum penalty of "not more than the maximum provided for the offense for which such citation was issued." In contrast, the revised code specifies a penalty class for every offense, including the failure to appear offenses. This change improves the consistency and proportionality of the revised statutes.

Second, the revised statute allows for higher fines for organizational defendants who violate the statute. Current D.C. Code § 23-585(b)(3) states that: "For the purposes of this section, section 101 of the Criminal Fine Proportionality Amendment Act of 2012, effective June 11, 2013 (D.C Law 19-317; D.C. Official Code § 22-357.01), shall not apply." While the main portion (subsection (b)) of section 101 of the Criminal Fine Proportionality Amendment Act of 2012 sets fines for certain classes of offenses, subsection (c) of Section 101 provides that organizational defendants are subject to heightened (double) fines. Consequently, D.C. Code § 23-585(b)(3) not only exempts the statute from the standard fine provisions applicable to most other current D.C. Code offenses, but also exempts organizational defendants from the heightened fine provisions otherwise applicable to most current D.C. Code offenses. In contrast, the revised code does not specifically exclude failure to appear violations from the higher fines applicable to organizational defendants under RCC § 22E-604(b). There is no clear rationale for treating organizational defendants differently for this particular offense. This change improves the consistency and proportionality of the revised statutes.

[14] RCC § 22E-207.
[15] Consider, for example, a person who mistakenly believes they may leave the courtroom temporarily to use the bathroom or to smoke a cigarette. Liability depends entirely on the judge's courtroom policy.
[16] RCC § 22E-207.

Third, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the revised offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, consistency, completeness, and proportionality of the revised offense.

Beyond these three changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code § 23-585(b) requires that the accused act willfully. Although the term "willfully" is not defined in the statute, the District of Columbia Court of Appeals ("DCCA") has explained that, in a closely related statute,[17] "willful" means "knowing, intentional, and deliberate, rather than inadvertent or accidental," but does not mean "done with a bad purpose," as it might in other statutes.[18] To resolve this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[19] and "in fact,"[20] applying the former to the actor's failure to appear as required and the latter to the nature of the citation. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and, to avoid liability, avoids confirming or fails to investigate whether they are required to appear at a specified date and time. Use of the culpable mental state of "knows" also is consistent with the defense in subsection (c)(2) for making good faith, reasonable efforts to appear. This change improves the clarity and consistency of the revised statutes.

Second, the revised statute includes a defense for when, in fact, the actor makes reasonable, good faith efforts to appear or remain at the hearing. Current D.C. Code § 23-585(b) is silent as to whether a person is "willful" or is otherwise free from liability when, despite their good faith, reasonable efforts to be present they do not do so. There is no case law on point. To resolve this ambiguity, the revised statute provides a defense for making good faith, reasonable efforts to appear or remain. Notably, this defense is unnecessary where the failure to appear or remain is simply involuntary.[21] This change is consistent

[17] D.C. Code § 23-1327, also proscribing failure to appear.
[18] *Trice v. United States*, 525 A.2d 176, 181 (D.C. 1987); *see also Patton v. U. S.*, 326 A.2d 818, 820 (D.C. App. 1974).
[19] RCC § 22E-206.
[20] RCC § 22E-207.
[21] RCC § 22E-203 ("No person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense…When a person's omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when: (A) The person has the physical

with the requirement of only knowledge, rather than purpose, in subsections (a)(2) and (b)(2) of the revised statute. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute includes a defense where the accused acts with the effective consent[22] of a releasing official, prosecutor, or judicial officer. Current D.C. Code § 23-585(b) is silent as to whether a person may be excused from appearing for a hearing with the consent of a releasing official,[23] prosecutor,[24] or judicial officer.[25] The revised statute makes clear that each of these actors is empowered to excuse the accused from appearing. This change improves the clarity and proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised statute is severed from D.C. Code § 23-585 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsection (a) of current D.C. Code § 23-585, which is not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

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capacity to perform the required legal duty; or (B) The failure to act is otherwise subject to the person's control.").

[22] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.

[23] Consider, for example, an officer who issues a citation and decides to withdraw it (e.g., to correct an erroneous date or to dismiss the accusation based on newly discovered evidence). The officer retrieves the citation from the accused and tells them that they are excused from appearing on the date specified. The arrestee has the effective consent of a releasing official to not appear.

[24] Consider, for example, a prosecutor who confers with defense counsel before the hearing date and notifies defense counsel that no charges will be filed (i.e. the case will be "no papered") and excuses the accused from appearing in court. The arrestee has the effective consent of a prosecutor to not appear.

[25] Consider, for example, the presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear.

RCC § 23-1327. Failure to Appear in Violation of a Court Order.

Explanatory Note. *This section establishes the failure to appear in violation of a court order offense for the Revised Criminal Code (RCC). The offense prohibits knowingly failing to appear for a hearing after being ordered to appear by a judge. It replaces D.C. Code § 23-1327, Penalties for failure to appear.*

Subsection (a) specifies the elements of first degree failure to appear in violation of a court order.

Paragraph (a)(1) requires that the person was required to appear for a hearing before a judicial officer on a specified date and time by a court order that is issued under D.C. Code § 23-584 for a felony. The term "judicial officer" is a defined term under D.C. Code § 23-1331.[1] The term "appear" is not defined and should be construed broadly to include in-person and virtual hearings. The term "court order" includes any judicial directive, oral or written. Common examples include a summons to appear signed by a judge, a pretrial release order that specifies a hearing date and requires the defendant's presence, a scheduling order, and oral directive to return after a recess. A single missed appearance constitutes a single offense, even if the underlying case involved multiple charges.[2] Paragraph (a)(1) also requires that the person knows they are subject to a court order to appear before a judicial officer. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they are required to appear at a specific date and time.[3] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether a circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied here, knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and to avoid liability avoids confirming or fails to investigate whether they are required to appear at a specified date and time.[4]

Subparagraphs (a)(1)(A) and (a)(1)(B) specify two types of hearings that will trigger first degree liability. Under (a)(1)(A), first degree liability attaches when the person is scheduled to appear as a defendant in a felony case. The term "felony" is defined in RCC § 22E-701. A conviction for the underlying offense is not required.[5] Under (a)(1)(B), first degree liability attaches when the person is scheduled to be sentenced. This does not include hearings in which sentencing is merely a possibility, e.g., a status hearing at which the parties expect to resolve a case short of trial by guilty plea and proceed to sentencing,

[1] D.C Code § 23-1331(1) ("The term 'judicial officer' means, unless otherwise indicated, any person or court in the District of Columbia authorized pursuant to section 3041 of Title 18, United States Code, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court.").
[2] *Lennon v. United States*, 736 A.2d 208, 210 (D.C. App. 1999).
[3] Consider, for example, a person who is unable to read or understand the citation due to illiteracy or a language barrier. That person may not be practically certain that they were required to appear.
[4] Consider, for example, a person who is handed a scheduling order and angrily tears it up and throws it in the garbage before reading the date. That person may be said to know that they were required to appear on the specified date even though they were not practically certain of it.
[5] *Williams v. U. S.*, 331 A.2d 341, 342 (D.C. App. 1975).

a trial date on which the parties expect to conclude quickly and proceed to sentencing (if applicable), a probation revocation hearing during which the court may resentence, a status hearing after an appellate court has remanded for resentencing. The term "in fact" indicates that the accused is strictly liable with respect to whether the hearing was one of those two types.

Paragraph (a)(2) requires that the person fail to appear[6] at the time specified in the court's order[7] or to remain until excused by a judicial officer.[8] The term "appear" has the same meaning as in paragraph (a)(1). Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206, which here means the person must be practically certain that they failed to appear or remain as required.[9] Determining whether a failure to appear is knowing or inadvertent is a fact-sensitive inquiry.[10] Under RCC § 22E-203, the person's conduct must be voluntary.[11]

Subsection (b) specifies the elements of second degree failure to appear in violation of a court order. The elements are identical to the elements of first degree, except for the type of hearing that will trigger liability. Subparagraphs (b)(1)(A) and (b)(1)(B) specify two types of hearings that will trigger second degree liability. Under (b)(1)(A), second degree liability attaches when the person is scheduled to appear as a defendant for either a

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[6] *See Macklin v. United States*, 733 A.2d 962, 964 (D.C. App. 1999) (reversing a conviction where there was no evidence presented that the defendant failed to appear).

[7] *See Wilkins v. United States*, 137 A.3d 975, 979 (D.C. App. 2016).

[8] *See Gilliam v. United States*, 46 A.3d 360, 371 (D.C. App. 2012) (affirming a conviction where the defendant was present but subsequently left the courtroom).

[9] Consider, for example, a person who misunderstands when and where they are to appear because the courthouse is closed due to inclement weather or because the hearing is moved to another courtroom. The evidence must show beyond a reasonable doubt that the person was practically certain or deliberately ignorant as to when and where they needed to appear. RCC §§ 22E-206; 22E-208(d). *See, e.g., Smith v. United States*, 583 A.2d 975, 979 (D.C. 1990); *Bolan v. United States*, 587 A.2d 458, 460 (D.C. App. 1991) (reversing a conviction on sufficiency grounds where a defendant was not notified of a courtroom change).

[10] *See Laniyan v. United States*, 226 A.3d 1146, 1150 (D.C. 2020) (D.C. May 14, 2020) (explaining that the factfinder must give sufficient consideration to the defendant's personal circumstances); *see also Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness.").

[11] A person does not commit failure to appear in violation of a court order if the absence was not subject to the person's control. For example, a person does not commit an offense if they are incarcerated, hospitalized, stranded, or unable to connect to a virtual hearing due a technological problem. *See Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."). Likewise, a person does not commit an offense if they are detained by a court security officer while being searched, temporarily removed from the courthouse for a fire drill, or made to wait outside a courtroom until a non-public hearing concludes.

felony or misdemeanor. Under (b)(1)(B), second degree liability attaches when the person is ordered[12] to appear as a material witness in a criminal case.

Subsection (c) provides two defenses to liability. First, paragraph (c)(1) provides a defense for when a person has the effective consent of a judicial officer[13] to miss the hearing or arrive at a later time. "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[14] "Consent" is also defined in RCC § 22E-701. The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[15] It is not a defense that the person mistakenly believed that they were excused when actually they were not excused.[16]

Second, paragraph (c)(2) provides a defense when the actor, in fact, makes good faith, reasonable efforts to appear or remain for the hearing. The term "in fact" indicates that the accused is strictly liable with respect to whether their conduct constituted "good faith, reasonable efforts."[17]

Paragraphs (d)(1) and (d)(2) specify the penalties for each gradation of the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] In some cases, the conduct criminalized under this section will also constitute criminal contempt for violation of a court order under RCC § 23-1329(c) or D.C. Code § 11-944 and, in that situation, convictions for both offenses merge under RCC § 22E-214(a)(4).[18]

Paragraph (d)(3) authorizes the court to order the forfeiture of any security which was given or pledged for the defendant's release, subject to the Federal Rules of Criminal Procedure.[19]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 23 offense.

Relation to Current District Law. *The revised failure to appear in violation of a court order statute clearly changes current District law in two main ways.*

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[12] A subpoena is insufficient.

[13] Consider, for example, a presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear. Consider also a judge who calls a case and is informed that the defendant did not due to a family emergency. If the judge excuses the person's absence and reschedules the hearing, the person does not commit an offense.

[14] RCC § 22E-701.

[15] RCC § 22E-207.

[16] Consider, for example, a person who mistakenly believes they may leave the courtroom temporarily to use the bathroom or to smoke a cigarette. Liability depends entirely on the judge's courtroom policy.

[17] RCC § 22E-207.

[18] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."

[19] *See United States v. Nell*, 515 F.2d 1351 (D.C. Cir. 1975).

First, the revised offense provides for two degrees of punishment. Current D.C. Code § 23-1327 effectively has three sentencing gradations: 1-5 years for missing a sentencing hearing or a hearing in a felony case, 90-180 days for missing a hearing in a misdemeanor case, and 0-180 days for failing to appear as a material witness. In contrast, because the RCC imposes only maximum penalties and no mandatory or statutory minimums for this offense,[20] the revised statute condenses the offense to two gradations. This change improves the consistency and proportionality of the revised offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the revised offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, consistency, completeness, and proportionality of the revised offense.

Beyond these two changes to current District law, six other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code § 23-1327 requires that the accused act "wilfully." Although the term "wilful" is not defined in the statute, the District of Columbia Court of Appeals ("DCCA") has explained that, in this statute, it means "knowing, intentional, and deliberate, rather than inadvertent or accidental," but does not mean "done with a bad purpose," as it might in other statutes.[21] On at least three occasions, the DCCA has remanded back to the trial court with a directive to more closely consider the impact of a defendant's personal and financial circumstances on their ability to understand, recall, and comply with an order to appear.[22] To resolve this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[23] and "in fact,"[24] applying the former to the actor's failure to appear as required and the latter to the nature and issuance of the citation. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are required to appear before a judicial officer on a specified date and time, and, to avoid liability, avoids confirming or fails to investigate whether they are required to appear at a specified date

[20] *See* CCRC Advisory Group Memorandum #32 (March 20, 2020) (available at https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-32-Supplemental-Materials-to-the-First-Draft-of-Report-52.pdf).
[21] *Trice v. United States*, 525 A.2d 176, 181 (D.C. 1987); *see also Patton v. U. S.*, 326 A.2d 818, 820 (D.C. App. 1974).
[22] *See Laniyan v. United States*, 226 A.3d 1146, 1151 (D.C. 2020) (citing *Evans v. United States*, 133 A.3d 988, 992 (D.C. 2016); *Foster v. United States*, 699 A.2d 1113 (D.C. 1997)).
[23] RCC § 22E-206.
[24] RCC § 22E-207.

and time. Use of the culpable mental state of "knows" also is consistent with the defense in subsection (c)(2) for making good faith, reasonable efforts to appear. This change improves the clarity and consistency of the revised statutes.

Second, the revised statute omits specific references to provision of notice. Current D.C. Code § 23-1327 discusses notice in three places, all of which appear to provide exceptions or qualifications to the offense's requirement that the person's failure to appear be "willful" (a term the D.C. Code does not define). First, subsection (b) states, "Any failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is wilful." Second, subsection (b) also specifies that notice of the potential penalties for failure to appear is not required but "shall be a factor" in determining whether such failure to appear is wilful.[25] It further states that, "such warning shall not be a prerequisite to conviction under this section." Third, subsection (c) provides that a factfinder "may convict under this section even if the defendant has not received actual notice of the appearance date if (1) reasonable efforts to notify the defendant have been made, and (2) the defendant, by his own actions, has frustrated the receipt of actual notice." Resolving these ambiguities about exceptions to the otherwise applicable requirement that conduct be "willful," the revised statute requires only that a person actually be required to appear, know that they are required to appear, and knowingly fail to appear. In the revised statute, the provision of notice may well be relevant to proving a defendant's culpable mental state about their duty to appear or failure to appear. However, more specific references to provision of notice are unnecessary because the RCC's general part defines all applicable mental states[26] and includes a deliberate ignorance provision[27] that clarify the culpable mental that must be proven. This change improves the clarity and consistency of the revised statutes.

Third, the revised offense includes a defense for when, in fact, the actor makes reasonable, good faith efforts to appear or remain at the hearing. The D.C. Code is silent as to a special circumstances defense. However, the DCCA has held that such a defense exists and, "if there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."[28] The court provides an

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[25] This provision appears to be superfluous. Unlike the preceding sentence which establishes a permissive inference by use of the phrase "shall be prima facie evidence," it is unclear what effect, if any, the phrase "shall be a factor" has on the statute. No reference to penalty warnings appears in any of the jury instructions the DCCA has reviewed for error or in the pattern jury instruction for the offense. *Trice v. U.S.*, 525 A.2d 176, 181–82 (D.C. 1987); *Robinson v. U.S.*, 322 A.2d 271 (D.C. 1974); *Raymond v. U.S.*, 396 A.2d 975 (D.C. 1979); *Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005); *Cooper v. U.S.*, 680 A.2d 1370, 1372 (D.C. 1996); Crim. Jury Inst. for DC 6.602 (2019).

[26] *See* RCC § 22E-206 and accompanying commentary.

[27] RCC § 22E-208(d).

[28] *Fearwell v. United States*, 886 A.2d 95, 101 (D.C. 2005) (internal citations omitted); *see also Laniyan v. United States*, 226 A.3d 1146, 1151 (D.C. 2020) ("Our cases hold that where, as here, a defendant presents special circumstances explaining his failure to appear as inadvertent, the judge (in a bench trial) must either discredit the defendant's evidence or credit some or all of it while pointing to other evidence overcoming it.

example in which a person is so ill that it is physically impossible to appear in court but does not further clarify what types of circumstances may qualify under the DCCA-recognized defense. To resolve this ambiguity, the revised statute provides a defense for making good faith, reasonable efforts to appear or remain. Notably, this defense is unnecessary where the failure to appear or remain is simply involuntary.[29] This change is consistent with the requirement of only knowledge, rather than purpose, in subsections (a)(2) and (b)(2) of the revised statute. This change improves the clarity and consistency of the revised statutes.

Fourth, the revised statute includes a defense where the accused acts with the effective consent[30] of a judicial officer. Current D.C. Code § 23-1327 is silent as to whether a person may be excused from appearing for a hearing with the consent of a judicial officer.[31] Resolving this ambiguity, the revised statute makes clear that the court is empowered to excuse the accused from appearing. This change improves the clarity and proportionality of the revised offense.

Fifth, the revised statute is limited to persons who are subject to a court order. Current D.C. Code § 23-1327 does not specify that it applies only to court orders (as opposed to releases on citation[32]). However, the statute's location in the District's release and pretrial detention chapter of an enacted title suggests that it may apply only to defendants who have been released under D.C. Code § 23-1321. In addition, District practice is consistent with this reading of the law.[33] To resolve this ambiguity, the revised statute is limited only to persons who are subject to a court order. This change clarifies the revised statute.

Sixth, the revised statute is limited to material witnesses who are required to appear in a criminal case. Current D.C. Code § 23-1327(a) does not specify that it applies only to criminal cases, however, the statute's location in the District's release and pretrial detention chapter of an enacted title suggests that it is specific to criminal matters. To resolve this ambiguity, the revised statute is limited to material witnesses in criminal cases. Criminal contempt remains available under D.C. Code § 11-944. This change clarifies the revised statute.

In other words, if a defendant puts forward a colorable defense to a finding of willfulness, and if the judge credits that defense, then the judge must discuss in sufficient detail the proffered reasons for failing to appear and what other evidence overcomes those reasons, in order to find the defendant's failure to appear willful. In those situations, the judge cannot simply rely on the statutory inference alone.").

[29] RCC § 22E-203 ("No person may be convicted of an offense unless the person voluntarily commits the conduct element required for that offense…When a person's omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when: (A) The person has the physical capacity to perform the required legal duty; or (B) The failure to act is otherwise subject to the person's control.").

[30] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.

[31] Consider, for example, a presiding criminal judge who reschedules all citation arrest hearings to accommodate social distancing during a global health emergency. The arrestee has the effective consent of a judicial officer to not appear.

[32] *See* RCC § 23-585.

[33] *See* Crim. Jury Inst. for DC 6.602 (2019) (including in the first element of the offense that the defendant was "released by a judicial officer").

RCC § 23-1329A. Criminal Contempt for Violation of a Release Condition.

Explanatory Note. *This section establishes the criminal contempt for violation of a release condition provision[1] for the Revised Criminal Code (RCC). The offense prohibits violating a condition of a pretrial release order issued under D.C. Code § 23-1321. It replaces subsections (a-1) and (c) of D.C. Code § 23-1329, Penalties for violation of conditions of release.*

Paragraph (a)(1) requires that the person knows that they are required to comply with conditions while on release. The term "knows" is defined in RCC § 22E-206 and here requires that the person is practically certain that they must comply with certain conditions.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether the circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists.[3]

Subparagraphs (a)(1)(A) – (a)(1)(D) require that the person is conditionally released under D.C. Code § 23-1321[4] and that the release order meet the criteria codified in D.C. Code § 23-1322(f).[5] The term "in fact" indicates that the accused is strictly liable[6] with respect to whether the conditional release order is issued under D.C. Code § 23-1321, is in writing, is sufficiently clear and specific to serve as a guide for the person's conduct, and advises the person of the consequences for violating the order. These consequences include immediate arrest or the issuance of a warrant for the person's arrest, criminal penalties under this section, the pretrial release penalty enhancements under RCC § 22E-

[1] "[A] criminal contempt proceeding is not a criminal prosecution, and consequently not all procedures required in a criminal trial are necessary in a hearing on a charge of contempt." *Smith v. United States*, 677 A.2d 1022, 1028 (D.C. App. 1996); *In re: Wiggins,* 359 A.2d 579, 580 (D.C.1976).

[2] Consider, for example, a person who is unable to read or understand the release order due to illiteracy or a language barrier. That person may not be practically certain of their release conditions.

[3] Consider, for example, a person who is handed a release order and angrily tears it up and throws it in the garbage before reading it. That person may be said to know that they were conditionally released, even though they were not practically certain of it.

[4] D.C. Code § 23-1321(b) requires that the court impose a condition "that the person not commit a local, state, or federal crime during the period of release." D.C. Code § 23-1321(c)(1)(B)(xiv) authorizes the court to impose "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." Disobedience of these and other court orders are also punished under D.C. Code §§ 11-741 and 11-944. *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991). The statute does not apply to a person who is detained. That is, a person cannot be subject to pretrial or presentencing conditions if they are detained in the same case. For example, no statutory or other authority exists under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness.

[5] *See, e.g., Vaas v. U.S.*, 852 A.2d 44, 46 (D.C. 2004) (defendant's conduct not willful where order failed to meet specificity standard of § 23-1322(f) in case where written order to stay away from "1 block radius" and oral order to stay away from "1 block area" created an ambiguity regarding area from which defendant was barred); *Smith v. U.S.*, 677 A.2d 1022 (D.C. 1996) (no contempt where written statement of conditions was not sufficiently clear and specific to serve as a guide to defendant's conduct where court could not conclude that defendant could reasonably infer from order to stay away from complainant that she was not to have contact with complainant's attorney).

[6] RCC § 22E-207.

607, and the criminal penalties for obstruction of justice under D.C. Code § 22-722. Invalidity of the order is not a defense.[7]

Paragraph (a)(2) requires that the person fail to comply with the release order. Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206, which here means the person must be practically certain that they failed to comply with one or more provisions in the order. Under RCC § 22E-203, the person's conduct must be voluntary.[8] For example, being arrested on probable cause is not a volitional act, however, committing a crime while on release is.[9] A person must be afforded a reasonable opportunity to comply with the condition.[10]

Subsection (b) codifies as a defense that the actor has the effective consent of a judicial officer to be excused from the condition of release that is the subject of the charged offense.[11] "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[12]

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[7] A person is not entitled to attack the validity of a court order in a contempt proceeding. *See, e.g., Shewarega v. Yegzaw*, 947 A.2d 47, 51 (D.C. 2008) (respondent not entitled to attack validity of a CPO in contempt proceeding; he was obligated to obey the court order unless and until it was reversed or vacated). "Compliance with court orders is required until they are reversed on appeal or are later modified." *Baker*, 891 A.2d at 212 (quoting *Kammerman v. Kammerman*, 543 A.2d 794, 798–99 (D.C. 1988)). *See also Thomas v. U.S.*, 934 A.2d 389, 391 (D.C. 2007).

[8] A person does not commit an offense if the act or omission was not subject to the person's control. For example, a person does not violate a condition to meet with their pretrial services officer if they are incarcerated, hospitalized, or stranded. *See, e.g., Evans v. United States*, 133 A.3d 988, 993 (D.C. App. 2016) (explaining, "The evidence of appellant's chronic or recurring memory problems also was evidence that, if credited by the trial judge, might be deemed relevant to the court's assessment of whether appellant's failure to appear was willful. As another example, appellant testified that he 'had so much stuff going on' while his underlying marijuana-possession case was pending, including financial difficulties and housing challenges—circumstances that the trial court, if it credits appellant's testimony, may also deem relevant on the issue of willfulness."); *Foster v. United States*, 699 A.2d 1113, 1115 (D.C. App. 1997) (reversing a conviction under a similar statute where the defendant's employer unexpectedly canceled his return trip to the District); *see also Fearwell v. U.S.*, 886 A.2d 95, 101 (D.C. 2005) (holding "[I]f there is evidence—however weak—to support it, a defendant is entitled to a requested instruction that he has presented evidence of special circumstances which prevented him from appearing in court on the scheduled date and time, and that if the jury credits that evidence, this may create a reasonable doubt concerning whether the government has proven willfulness beyond a reasonable doubt."); *but see Grant v. U.S.*, 734 A.2d 174, 177 (D.C. 1999) (holding that "[a]ddiction to heroin [does] not constitute a defense to the charge of contempt based upon violating a condition of pretrial release not to use drugs.").

[9] *Parker v. U. S.*, 373 A.2d 906, 907 (D.C. App. 1977).

[10] For example, a person does not violate a condition to stay away from a complainant where the complainant is physically chasing after the person and the person makes reasonable efforts to distance themselves. *See* RCC § 22E-203 (requiring physical capacity to perform a required legal duty); *Conley v. United States*, 79 A.3d 270, 292-293 (D.C. 2013) (explaining voluntariness requires a reasonable opportunity to comply with a legal duty); *Lambert v. People of the State of California*, 355 U.S. 225, 229 (1957) (reversing a conviction where, on first becoming aware of her duty, the appellant had no opportunity to comply with the law and avoid its penalty).

[11] Consider, for example, a judge in one case orders a person to complete a domestic violence intervention program and a judge in another case orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.

[12] RCC § 22E-701.

"Consent" is also defined in RCC § 22E-701. The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[13]

Subsection (c) authorizes the court to initiate contempt proceedings *sua sponte*.[14]

Subsection (d) specifies that contempt proceedings must be tried to the court.[15]

Subsection (e) specifies the penalties for the revised offense.[16] [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] In some cases, the conduct criminalized under this section will also constitute criminal contempt under D.C. Code §§ 11-741 or 11-944,[17] failure to appear in violation of a court order under RCC § 23-1327,[18] or tampering with a detection device under RCC § 22E-3402 and convictions for the offenses must merge under RCC § 22E-214(a)(4).[19] Additionally, where the violation of release conditions is committing a new offense,[20] the contempt conviction must merge with or bar any conviction for the new offense.[21]

Subsection (f) cross-references applicable definitions in the RCC.

Subsection (g) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 23 offense.

Relation to Current District Law. *The revised criminal contempt for violation of a court order statute clearly changes current District law in one main way.*

The revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the revised offense may change District law in numerous ways. For more in-depth

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[13] RCC § 22E-207.

[14] *See* D.C. Code § 23-1329(c). "[A] criminal contempt proceeding is not a criminal prosecution, and consequently not all procedures required in a criminal trial are necessary in a hearing on a charge of contempt." *Smith v. United States*, 677 A.2d 1022, 1028 (D.C. App. 1996); *In re: Wiggins,* 359 A.2d 579, 580 (D.C.1976).

[15] *See* D.C. Code § 23-1329(c). "[A] criminal contempt proceeding is not a criminal prosecution, and consequently not all procedures required in a criminal trial are necessary in a hearing on a charge of contempt." *Smith v. United States*, 677 A.2d 1022, 1028 (D.C. App. 1996); *In re: Wiggins,* 359 A.2d 579, 580 (D.C.1976).

[16] This section operates independently of and in addition to statute eliminating limitation on length of sentence for criminal contempt, thus the sentencing limit effectively does not apply. *Caldwell v. U.S.*, 1991, 595 A.2d 961 (D.C. 1991).

[17] *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991); *Vest v. United States*, 834 A.2d 908 (D.C. App. 2003).

[18] *See, e.g., Swisher v. U.S.*, 572 A.2d 85, 89 (D.C. 1990).

[19] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."

[20] D.C. Code § 23-1321(b) requires that the court impose a condition "that the person not commit a local, state, or federal crime during the period of release."

[21] *See Haye v. United States*, 67 A.3d 1025, 1031 (D.C. App. 2013); *United States v. Dixon*, 509 U.S. 688, 698 (1993).

discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, consistency, completeness, and proportionality of the revised offense.

Beyond this change to current District law, four other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. Current D.C. Code § 23-1329(c) requires that the accused "intentionally violated a condition of his release." The term "intentionally" is not defined in the statute. There is limited DCCA case law on point that does not clearly distinguish between voluntariness and culpable mental states, but suggests that proof of knowledge or awareness of the violation is sufficient, and not a conscious desire to commit the violation.[22] To resolve this ambiguity, the revised statute uses the RCC's general provisions that define "knowingly"[23] and "in fact,"[24] applying the former to the actor's failure to comply with the order and the latter to the nature and issuance of the order. In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they are subject to a conditional release order, and, to avoid liability, avoids confirming or fails to investigate whether they are subject to a conditional release order. These changes clarify and improve the consistency of District statutes.

Second, the revised statute includes a defense where the accused acts with the effective consent[25] of a judicial officer. Current D.C. Code § 23-1327 is silent as to whether a person may be excused from appearing for a hearing with the consent of a judicial officer.[26] Resolving this ambiguity, the revised statute makes clear that the court is

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[22] *Grant v. United States*, 734 A.2d 174, 177 n. 6 (D.C. 1999) ("Proof of the intent element of criminal contempt only requires proof that the appellant intended to commit the actions constituting contempt. *See, e.g., Jones v. Harkness*, 709 A.2d 722, 723–24 (D.C.1998) (no defense to contempt that appellant's violations of civil protection order were due to his psychological condition and not motivated by disrespect to court)."); *Jones v. Harkness*, 709 A.2d 722, 723–24 (D.C. 1998) ("Appellant admitted that, knowing the CPO was in place, he contacted Ms. Harkness in violation of the court order on numerous occasions. As the court noted, appellant deliberately engaged in continuing behavior that violated the court order. From appellant's actions, the court properly inferred wrongful intent. *See Swisher, supra*, 572 A.2d at 89 n. 9 (explaining that willfulness could be inferred from the defendant's failure to appear for trial after having been warned that his attendance was required); *see also Hager v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 475 A.2d 367, 368 (D.C.1984) ("Generally, [willful] means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.' ") (quoting *Townsend v. United States*, 68 App. D.C. 223, 229, 95 F.2d 352, 358, cert. denied, 303 U.S. 664, 58 S.Ct. 830, 82 L.Ed. 1121 (1938)).").

[23] RCC § 22E-206.

[24] RCC § 22E-207.

[25] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.

[26] Consider, for example, a judge in one case orders a person to complete a domestic violence intervention program and a judge in another case orders the person to complete an inpatient drug rehabilitation program. Consider also a judge who – temporarily or permanently – loosens the requirements of a written order by making an oral pronouncement.

empowered to excuse the accused from appearing. This change improves the clarity and proportionality of the revised offense.

Third, the revised statute requires that the release order comply with the requirements of D.C. Code § 23-1322(f). Current D.C. Code § 23-1329 is silent as to whether or how a person's conditions of release be specified in an order. District case law has held that evidence of contempt is insufficient where conditions of release are not in writing and sufficiently clear and specific to serve as a guide to defendant's conduct.[27] However, case law has not addressed whether other criteria specified in the detention statute, such as notice of the potential penalties for failure to comply, must also be satisfied. To resolve this ambiguity, the revised statute codifies this point and clarifies that the written order must meet all requirements of D.C. Code § 23-1322(f). This change clarifies and improves the consistency of District statutes.

Fourth, the revised statute does not specify that contempt proceedings must be "expedited." Current D.C. Code § 23-1329(c) states, "contempt proceedings shall be expedited." The term "expedited" is undefined and District case law has not interpreted its meaning. In contrast, the RCC does not include a rule of criminal procedure in the statutory language. This change improves the consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised statute is severed from D.C. Code § 23-1329 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsections (a), (b), (d), (d-1), (e), and (f) of current D.C. Code § 23-1329, which are not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

[27] *Smith v. U.S.*, 677 A.2d 1022 (D.C. 1996); *Vaas v. U.S.*, 852 A.2d 44, 46 (D.C. 2004).

RCC § 24-241.05A. Violation of Work Release.

Explanatory Note. *This section establishes the violation of work release offense for the Revised Criminal Code (RCC). The offense prohibits knowingly violating a work release privilege. It replaces subsection (b) of D.C. Code § 24-241.05, violations of a work release plan.*

Paragraph (a)(1) requires that the person is subject to a work release privilege. The term "in fact" indicates that the accused is strictly liable with respect to whether they were on work release at the time the elements of the offense were completed.[1]

Paragraph (a)(2) requires that the person fail to return to the place of confinement designated in their work release plan. Paragraph (a)(2) specifies that the person must act knowingly, a term defined in RCC § 22E-206. Applied here, it means the person must be practically certain that they failed to return as required.[2] Under RCC § 22E-208(d), knowledge may be imputed if the person is reckless as to whether a circumstance exists and, with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied here, knowledge may be imputed when a person consciously disregards a substantial risk that that they have been granted a work release privilege, and to avoid liability avoids confirming or fails to investigate whether they have been granted a work release privilege.[3] Under RCC § 22E-203, the person's conduct must be voluntary.[4]

Subsection (b) specifies that a person does not commit an offense when they have the effective consent of a judicial officer,[5] the Director of the Department of Corrections, or the Chairman of the United States Parole Commission,[6] to be absent from their designated place of confinement. "Effective consent" is a defined term and excludes consent that was obtained by the application of physical force, an explicit or implicit coercive threat, or deception.[7] "Consent" is also defined in RCC § 22E-701. The term "in fact" indicates that the accused is strictly liable with respect to whether effective consent was given.[8] It is not a defense that the person mistakenly believed that they were excused when actually they were not excused.

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[1] RCC § 22E-207.

[2] Consider, for example, a person who is unable to read or understand their work release plan due to illiteracy or a language barrier. That person may not be practically certain that they failed to return as required.

[3] Consider, for example, a person who is handed a work release plan and angrily tears it up and throws it in the garbage before reading the designated place of confinement. That person may be said to know that they failed to return even though they were not practically certain that they did.

[4] A person does not commit violation of work release if the absence was not subject to the person's control. For example, a person does not commit an offense if they are incarcerated, hospitalized, or stranded.

[5] Paragraph (e)(2) specifies that the term "judicial officer" has the meaning specified in D.C. Code § 23-1331.

[6] The D.C. Board of Parole, referenced in D.C. Code § 24-241.02 no longer exists and its responsibilities are now handled by the United States Parole Commission. D.C. Code § 24-404.

[7] RCC § 22E-701.

[8] RCC § 22E-207.

Subsection (c) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (d) specifies the penalties for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] In some cases, the conduct criminalized under this section will also constitute third degree escape under RCC § 22E-3401(c) and convictions for both offenses must merge under RCC § 22E-214(a)(4).[9]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 24 offense.

Relation to Current District Law. *The revised violation of work release statute clearly changes current District law in two main ways.*

First, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the revised offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, consistency, completeness, and proportionality of the revised offense.

Second, the revised statute eliminates the mandatory consecutive sentencing provision. Current D.C. Code § 23-241.05(b) states, "such sentence of imprisonment [shall] run consecutively with the remainder of previously imposed sentences." In contrast, the RCC imposes only maximum penalties and no mandatory or statutory minimums for this offense, recognizing that sentencing guidelines, rather than statutory mandates are a more appropriate way to guide judicial decision making.[10] This change improves the consistency and proportionality of the revised offenses.

Beyond these two changes to current District law, two other aspects of the revised statute may constitute substantive changes to current District law.

First, the revised statute applies standardized definitions for the culpable mental states required for criminal liability. The current violation of a work release plan statute[11] punishes "Any prisoner who willfully fails to return at the time and to the place of

[9] "Multiple convictions for 2 or more offenses arising from the same course of conduct merge when…[o]ne offense reasonably accounts for the other offense, given the harm or wrong, culpability, and penalty proscribed by each."
[10] *See* CCRC Advisory Group Memorandum #32 (March 20, 2020) (available at https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Advisory-Group-Memo-32-Supplemental-Materials-to-the-First-Draft-of-Report-52.pdf).
[11] D.C. Code § 24-241.05.

confinement designated in his work release plan." However, the term "willfully" is not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "knowingly"[12] and "in fact"[13] and specifies that culpable mental states apply until the occurrence of a new culpable mental state or strict liability in the offense.[14] . In addition, under RCC § 22E-208(d), knowledge may be imputed when a person consciously disregards a substantial risk that that they have been granted a work release privilege, and, to avoid liability, avoids confirming or fails to investigate whether they have been granted a work release privilege. These changes clarify and improve the consistency of District statutes.

Second, the revised statute includes a defense where the accused acts with the effective consent[15] of a judicial officer, the Director of the Department of Corrections, or the Chairman of the United States Parole Commission. Current D.C. Code § 24-241.05(b) is silent as to whether a person may be excused from returning to the place designated on their work release plan with the consent of a judicial officer,[16] the Department of Corrections,[17] or the United States Parole Commission.[18] Resolving this ambiguity, revised statute makes clear that each of these actors is empowered to excuse the accused from returning. This change improves the revised offenses by describing all elements that must be proven and applying consistent definitions throughout the revised code.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised statute is severed from D.C. Code § 24-241.05 and given its own section in the revised code. This change clarifies that the defense, penalties, and definitions do not apply to subsection (a) of current D.C. Code § 24-241.05, which is not being revised at this time. This change improves the clarity and logical organization of the revised statutes.

[12] RCC § 22E-206.
[13] RCC § 22E-207.
[14] RCC § 22E-207(a).
[15] "Effective consent" is defined in RCC § 22E-701 to exclude consent obtained by means other than the application of physical force, an explicit or implicit coercive threat, or deception.
[16] Consider, for example, a judge who orders a person to remain in court for a hearing instead of returning to their residence at the time specified on their work plan. That person does not commit an offense by abiding by the court's order.
[17] Consider, for example, a halfway house which directs a person to return at 8:00 p.m. and not 7:00 p.m. as specified in the work release plan, to avoid conflict with another resident. That person does not commit an offense by adhering to the safety rules of the confining institution.
[18] Consider, for example, a parole officer who directs a supervisee by text message to report to another placement for the night, due to overcrowding or an emergency evacuation. That person does not commit an offense by following their parole officer's amended work release plan.

RCC § 24-403.01. Sentencing, supervised release, and good time credit for felonies committed on or after August 5, 2000.

Explanatory Note. The RCC amendments to the statute affect a limited number of penalty-related provisions and do not contravene Congressional language in the criminal justice provisions of the Revitalization Act.[1]

Paragraph (b)(2) makes the length of supervised release imposed at sentencing a matter of judicial discretion, although the court must impose a term of supervised release. The maximum length of supervised release that may be imposed varies by the severity of the underlying offense (measured by maximum authorized sentence length). A court may impose a maximum of five years supervised release if the term of imprisonment authorized for the offense is 24 years or more, three years if the term of imprisonment authorized for the offense is eight years or more but less than 24 years, or 1 year if the term of imprisonment authorized for the offense is more than one year but less than 8 years. The paragraph only applies to sentencing for felony offenses.

Paragraph (b)(7) sets the maximum term of imprisonment that may be imposed following revocation of supervised release. Sub-paragraph (b)(7)(A) provides for a maximum of 5 years imprisonment following revocation when the offense carries a maximum of 40 years or more. Sub-paragraph (b)(7)(B) provides for a maximum of 3 years imprisonment following revocation when the offense carries at least 24 years or more but less than 40 years imprisonment. Sub-paragraph (b)(7)(C) provides for a maximum of 2 years imprisonment following revocation when the offense carries at least 8 years or more but less than 24 years imprisonment. Sub-paragraph (b)(7)(D) provides for a maximum of 1 year imprisonment following revocation when the offense carries less than 8 years imprisonment.

Subsection (b-1) clarifies that, for any offense, the maximum term of imprisonment authorized upon revocation of supervised release under subsection (b)(7) shall not be deducted from the maximum term of imprisonment or commitment authorized for such offense.

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[1] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997) §§ 11201-11282. Notably, section 11214 of the Revitalization Act required the District to "enact in whole the recommendations of the [Truth in Sentencing] Commission," and the recommendations of the Commission included language specifying statutory minimums and maximums for various offenses currently codified in D.C. Code § 24-403.01(e) and (f) that are eliminated by the RCC changes to the statute. However, the Commission's inclusion of those statutory minimums and maximums was not required by the Revitalization Act and the Commission itself stated that its intent in inclusion of those minimums and maximums was to: "preserve[] existing maxima and minima, *subject to any future changes that may be made to the District of Columbia Code*" (emphasis added). *See* D.C. Truth in Sentencing Commission, *Formal Recommendations* (January 31, 1998) at 8. Consequently, elimination of current D.C. Code § 24-403.01(e) and (f) does not contravene the requirements of the Revitalization Act. Other provisions of D.C. Code § 24-403.01 revised by the RCC are statutory provisions enacted by the D.C. Council on its own authority, not pursuant to the Revitalization Act.

Relation to Current District Law. *The revised § 24-403.01 statute clearly changes current District law in five main ways.*

First, the revised statute provides the court discretion, up to the specified maximum, regarding how much supervisory release to require. Current D.C. Code § 24-403.01(b)(2) provides that, when the court imposes a sentence of more than one year, the court must impose either 5 or 3 years supervised release depending on whether the offense at issue carries an authorized penalty of 25 years or more imprisonment or is a less serious felony. Current D.C. Code § 24-403.01(b)(3) authorizes the same periods of supervised release based on the same threshold of 25 years, however subparagraph (b)(3) applies only when the court imposes a sentence of one year or less and the period of supervised release is discretionary. In contrast, the RCC statute provides the court the ability to determine the length of supervised release for all felony sentences, whether or not the imprisonment sentence is more than 1 year. This approach allows judges to better tailor the need for supervised release to each particular person and is consistent with the broader approach in the RCC to provide greater judicial discretion to impose lesser sanctions when doing so is sufficient to serve the purposes of supervision. As in the current D.C. Code §§ 24-403.01(b)(2) and (b)(3), some period of supervised release must still be imposed under the revised language, but the period can be any amount up to the specified maximum. This approach follows the recent updates to the Model Penal Code[2] and is generally consistent with federal law.[3] With the elimination of mandatory terms of supervised release, there remains no relevant distinction between D.C. Code §§ 24-403.01(b)(2) and (b)(3), and the latter is eliminated as duplicative. This change improves the clarity, consistency, and proportionality of the revised statutes.

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[2] *See, e.g., Model Penal Code: Sentencing* (Am. Law Inst., 2017) § 6.09, Postrelease Supervision ("(1) When the court sentences an offender to prison, the court may also impose a term of postrelease supervision. (2) The purposes of postrelease supervision are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, reduce the risks that they will commit new offenses, and address their needs for housing, employment, family support, medical care, and mental-health care during their transition from prison to the community. (3) The court shall not impose postrelease supervision unless necessary to further one or more of the purposes in subsection (2). (4) When deciding whether to impose postrelease supervision, the length of a supervision term, and what conditions of supervision to impose, the court should consult reliable risk-and-needs-assessment instruments, when available, and shall apply any relevant sentencing guidelines.").

[3] 18 U.S.C. § 3583 (a), (c) ("(a) In General.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b)."; "(c)Factors To Be Considered in Including a Term of Supervised Release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).").

Second, the revised statute provides a third, lower maximum term of supervised release for when the court imposes a sentence for a low felony crime. Current D.C. Code §§ 24-403.01(b)(2) and (b)(3) mandate or authorize imposition of up to either 5 or 3 years supervised release depending on whether the offense at issue carries an authorized penalty of 25 years or more imprisonment or is a less serious felony. In contrast, the RCC statute distinguishes three levels of severity in underlying offenses instead of two, and authorizes a 1 year maximum term of supervised release for low felonies. It is unclear why the current D.C. Code does not distinguish low felonies from the much more serious conduct involved in crimes of ten years or more. The RCC is generally consistent with federal law in providing a three-level distinction in felonies meriting supervised release.[4] This change improves the proportionality of the revised statutes.

Third, the revised statute updates the thresholds for the severity of offenses (measured in years) that trigger different terms of supervised release or, upon revocation of supervised release, imprisonment. Under current D.C. Code §§ 24-403.01(b)(2) and (b)(3) the thresholds for different terms of supervised release turn on whether the offense of conviction carries an authorized a penalty of 25 years or more imprisonment. Under current D.C. Code § 24-403.01(b)(7) the different terms of supervised release turn on whether the offense of conviction meets one of three thresholds: it is a designated "Class A felony"[5] or carries up to a life sentence; it carries an authorized penalty of 25 years or more; or it carries an authorized penalty of 5 years or more imprisonment. In contrast, the RCC statute adjusts the statutory maximums for these thresholds to better follow the RCC Class maximums. Under the RCC there still are four offense penalty ranges that determine imprisonment at revocation, and the new penalties (under 8 years, 8 to under 24 years, 24 to under 40 years, and 40 years or over) closely track the current D.C. Code ranges (under 5 years, 5 to under 25 years, 25 to Class A or life, and Class A or life). The three lower ranges are also used to determine the maximum term of supervised release under the revised paragraph (b)(2). The revised statute's thresholds reflect the RCC's more graduated approach to penalty severity[6] and better accommodate the penalty classes in the

[4] 18 U.S.C. § 3583 (b) ("Authorized Terms of Supervised Release.—Except as otherwise provided, the authorized terms of supervised release are—(1) for a Class A or Class B felony, not more than five years; (2) for a Class C or Class D felony, not more than three years; and (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.").

[5] Current D.C. Code statutes designating "Class A" felonies for purposes of imprisonment following revocation of release are: § 22-722 (obstruction of justice); § 22-1804a (penalty for felony after at least 2 prior felony convictions); § 22-2001 (kidnapping); § 22-2102 (first degree murder, railroads); § 22-2104 (penalty for murder in first and second degrees); § 22-2803 (carjacking); § 22-3002 (first degree sexual abuse); § 22-3008 (first degree child sexual abuse); § 22-4502 (additional penalty for committing crime when armed); § 22-4515a (manufacture, transfer, use, possession, or transportation of molotov cocktails, or other explosives for unlawful purposes).

[6] E.g., the current D.C. Code's treatment of all forms of kidnapping (D.C. Code § 22–2001) or all offenses with a while-armed enhancement (D.C. Code § 22–4502(a)(4)) as Class A offenses treats widely variable kinds of behavior as equivalent. In contrast, the RCC grades offenses (and enhancements) previously designated as "Class A" felonies to better distinguish relatively minor from more severe conduct.

RCC.[7] The RCC thresholds are also generally consistent with federal law distinctions in felonies meriting different amounts of time after revocation.[8] This change improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised statute eliminates the requirement that the maximum term of imprisonment for most offenses be reduced by the maximum term of imprisonment authorized on revocation of supervised release. Under current D.C. Code § 24-403.01(b-1), the maximum imprisonment term that the court can impose is equal to the statutory maximum stated in the offense only for offenses carrying a life sentence or designated as a "Class A" felony. For all other D.C. Code offenses, D.C. Code § 24-403.01(b-1) requires that the court subtract from the otherwise stated statutory maximum the maximum amount of imprisonment time authorized upon revocation of supervised release under subsection (b)(7)—a reduction of 3 years for offenses with a statutory maximum of 25 years or more, 2 years for offenses with a maximum of 5 years up to 25 years, and a reduction of 1 year for felony offenses with a maximum up to 5 years. In contrast, the revised statute does not limit the otherwise stated maximum term of imprisonment that can be imposed for an offense by the amount of backup time in D.C. Code § 24-403.01(b)(7).[9] In conjunction with this change, the RCC penalty classes provide somewhat lower penalties than are common in the current D.C. Code.[10] The net effect is that the RCC authorized penalty classes provide a more transparent statement of what imprisonment the court is allowed to impose, and largely accord with the maximum statutory penalties that are actually available in current D.C. practice once backup time is accounted for.[11] This change improves the clarity, consistency, and proportionality of the revised statutes.

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[7] The RCC penalty classes differentiate offense maximum penalties at 8 years (Class 7), 24 years (Class 4), and 40 years (Class 2). Notably, Classes 1 and 2 are the functional equivalents of life sentences (see commentary to RCC § 22E-603). Also, by setting the lowest threshold at "under 8 years," the lowest term of supervised release and imprisonment time after revocation for RCC Class 8 and 9 offenses, which have a maximum of 4 and 2 years respectively, still carry the same overall imprisonment exposure (3 years and 5 years) as current D.C. Code penalties carrying 3 and 5 year imprisonment terms from which revocation time must be subtracted at sentencing per D.C. Code § 24-403.01(b-1).

[8] *See* 18 U.S.C. § 3583 (e)(3) ("[A] defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;"); 18 U.S.C. § 3559 ("Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is— (1) life imprisonment, or if the maximum penalty is death, as a Class A felony; (2) twenty-five years or more, as a Class B felony; (3) less than twenty-five years but ten or more years, as a Class C felony; (4) less than ten years but five or more years, as a Class D felony; (5) less than five years but more than one year, as a Class E felony;").

[9] Under the revised statute, the total term of imprisonment imposed for revocation of supervised release in addition to the initial sentence imposed may exceed the statutory maximum sentence authorized for any given offense.

[10] RCC § 22E-603, Authorized Terms of Imprisonment.

[11] Compare the most common D.C. Code offense penalties, first line, with RCC § 22E-603, second line:
Life, 60Y, 40Y, 30Y, 20Y, 15Y, 10Y, 5Y, 3Y, 1Y, 180 days, 90 days, 30 days
45Y, 40Y, 30Y, 24Y, 18Y, 12Y, 8Y, 4Y, 2Y, 1Y, 180 days, 60 days, 10 days.

Fifth, the revised statute eliminates provisions providing various minimum and maximum sentences for certain offenses and aggravated versions of specified offenses. Current D.C. Code § 24-403.01(b-2) describes aggravating circumstances and procedures for alleging aggravating circumstances that, if proven, allow for higher sentences for various murder, carjacking, and sex offenses. Current D.C. Code §§ 24-403.01(e) and (f) provide statutory minimum sentences for various assault, sex, and weapon offenses when the actor has prior convictions of a specified type. Current D.C. Code § 24-403.01(g) clarifies that fines are available in addition to the imprisonment penalties described in the section. All offenses with penalties or aggravated penalties described in D.C. Code § 24-403.01 also have statutory penalties and are subject to enhancements for aggravating facts described elsewhere in the D.C. Code.[12] In contrast, the revised statute eliminates all minimum, maximum, and enhanced penalties specified in D.C. Code § 24-403.01 and instead specifies the relevant penalties and enhancements either in RCC Chapter 6 (Offense Classes, Penalties, & Enhancements) or the specific offense itself. There is no clear basis for specifying statutory minimums, maximums, and enhancements for in D.C. Code § 24-403.01, or treating these particular offenses differently than other similarly serious offenses. The revised statute specifies the penalties for all offenses in the same manner as for all other RCC offenses, using standardized penalty classes.[13] This change improves the clarity, consistency, organization, and proportionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The revised statute adds the word "adequate" to paragraph (b)(1) so it states: "If a person found guilty is sentenced to imprisonment, or to commitment pursuant to § 24-903, under this section, the court shall impose an adequate period of supervision ("supervised release") to follow release from the imprisonment or commitment." This language mirrors the Congressional language in the Revitalization Act[14] and clarifies the revised statutes.

The maximum statutory penalties common in the D.C. Code are generally 1 or 2 years higher for low and mid-felonies than the corresponding RCC classes, but in practice they are nearly equivalent because these D.C. Code maximums must be reduced by 1 or 2 years for backup time under D.C. Code § 24-403.01(b)(7).

[12] *Compare, e.g.,* penalty provisions in § 22–3008 (First degree child sexual abuse), D.C. Code § 22–3020 (Aggravating circumstances [sex offenses]), and enhancements such as D.C. Code § 22–3611 (Enhanced penalty for committing crime of violence against minors) *with* additional penalty provisions regarding first degree child sex abuse in D.C. Code § 24-403.01(b-2)(1), (b-2)(2), (b-2)(3), (e), and (f).

[13] For further description of the penalties for RCC offenses corresponding to the D.C. Code offenses cited in D.C. Code § 24-403.01, see the commentary to RCC Chapter 6 (Offense Classes, Penalties, & Enhancements) and the particular offense. Tables showing the correspondence between RCC and D.C. Code offenses are provided in Appendices A and G.

[14] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997) Sec. 11212(b)(2)(C).

D.C. Code § 24-403.03. Modification of an imposed term of imprisonment.

Explanatory Note & Relation to Current District Law. *This section establishes, for the Revised Criminal Code (RCC) and other D.C. Code provisions, authority and procedures for the court to modify a defendant's terms of imprisonment after serving at least 15 years' imprisonment. The revised statute replaces current D.C. Code § 24-403.03, Modification of an imposed term of imprisonment.*

The only changes in the revised statute as compared to the current D.C. Code provision are to: 1) elimination of the age reference from the section title; 2) replacement of the phrases "offense committed before the defendant's 25th birthday" with "offense" in subsection (a) prefatory language and paragraph (b)(1) of the statute; and deletion of the clause in subparagraph (b)(3)(B) stating "but before the defendant's 25th birthday".[15] For there to be a sentence modification under the revised statute a person must have served at least 15 years of their sentence and there must be judicial findings, after consideration of victim statements and other procedural requirements, that the person is not a danger to the safety of any person or the community, and that the interests of justice warrant such a sentence modification. When these stringent requirements are met, continued incarceration may be unjustifiable regardless of a defendant's age when he or she committed a crime.

The revised statute does not diminish the fact that the age when a person commits a crime remains a special factor in sentencing. For over a decade it has been well-established that adolescents are less able to understand the long term consequences of their actions and conform their behavior accordingly.[16] Moreover, the underlying brain and social development that marks adolescent criminal behavior is also common to individuals through age 24.[17] Yet, while these considerations suggest youth offenders may be less blameworthy for their conduct, there is also extensive research indicating that criminal behavior peaks in late teen years and declines from the early 20s onward.[18] Older individuals are less likely to recidivate after release than younger offenders with similar

[15] Apart from these changes, the RCC text is identical to the statute as amended by the Omnibus Public Safety and Justice Amendment Act of 2020, Act A23-0568 (Projected Law Date of May 18, 2021).
[16] *See* Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016", (Oct. 5, 2016), available at: http://lims.dccouncil.us/Download/35539/B21-0683-CommitteeReport1.pdf ("citing Laurence Steinberg, Adolescent Development and Juvenile Justice, Ann. Rev. Clin, Psychol. 2009 5:47-73).
[17] *See, e.g., U.S. Department of Justice, National Institute of Justice, "From Juvenile Delinquency to Young Adult Offending," (March 10, 2014) (available at* https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending) ("[R]esearchers concluded that young adult offenders ages 18-24 are more similar to juveniles than to adults with respect to their offending, maturation and life circumstances. Changes in legislation to deal with large numbers of juvenile offenders becoming adult criminals should be considered. One possibility is to raise the minimum age for referral to the adult court to 21 or 24, so that fewer offenders would be dealt with in the adult system.").
[18] *See, e.g.,* U.S. Department of Justice, National Institute of Justice, *From Juvenile Delinquency to Young Adult Offending, (March 10, 2014) (available at* https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending) ("The prevalence of offending tends to increase from late childhood, peak in the teenage years (from 15 to 19) and then decline in the early 20s.")

sentences.[19] These considerations undermine arguments for lengthy incarceration as being generally necessary for public safety.

More fundamentally, however, the revised statute recognizes the need for the District's criminal justice system to have a procedural mechanism to review in particular cases whether further incarceration continues to benefit public safety and serve the interests of justice after the person has served at least 15 years. This procedure helps ensure that criminal punishment decisions remain grounded in evidence and contemporary norms. As the American Law Institute (ALI)[20] recently stated in its recent recommendation for a judicial second look procedure after 15 years of time served,[21] such a policy: "is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."[22] Finality is a key component of criminal justice system decisions. However, no sentencing regime in the United States is entirely determinate and determinate sentences "are least justifiable as they extend in length from months and years to decades."[23]

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[19] *See, e.g.,* U.S. Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders* (December 2017).

[20] The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations on second look procedures and other matters.

[21] Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.

[22] Model Penal Code: Sentencing §305.6 cmt. a (Am. Law Inst., Proposed Final Draft 2017).

[23] Model Penal Code: Sentencing §305.6 cmt. b (Am. Law Inst., Proposed Final Draft 2017). *See, also, id.* ("The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. Looking more deeply into the American past, witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves were all at one time thought to be serious offenses. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values. The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue. On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived. An optimist would expect this to be so. For example, research into assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change. Proven and credible rehabilitative programming may become a pillar of deincarceration policy in the United States, as some contemporary advocates of "evidence-based sentencing" now expound. Twenty

Uniquely, federal law blocks other potential mechanisms the District might use to evaluate the continued benefits to public safety and justice of incarceration after 15 years. Federal law has eliminated the District's Parole Board,[24] limits Bureau of Prisons (BOP) reductions in incarceration for good behavior to a maximum of 15%,[25] and deprives the Mayor of commutation and exoneration powers ordinarily available to the head of the Executive Branch.[26] Other jurisdictions do not confront these barriers, yet several have still implemented second look provisions in addition to other mechanisms for sentence review.[27] The revised statute bypasses these obstacles by expanding current law to provide a second look for all incarcerated persons who have served at least 15 years of their sentence.

District judges are trusted to decide initial sentences of incarceration, but they are not infallible and cannot see into the future. They must work with imperfect information about potential threats to public safety, the likelihood of rehabilitation, and ever-evolving public norms about the seriousness of criminal behavior.[28] The revised statute provides judges with an opportunity to reassess the continued justification for incarceration of an individual after 15 years of time served. This procedural mechanism helps ensure the ongoing proportionality of punishments in the District's criminal justice system.

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years or more in the future, with sturdier empirical foundations, the perceived collapse of rehabilitation theory could be substantially reversed."

[24] National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997) ("D.C. Revitalization Act"). The District of Columbia is one of only 16 American jurisdictions without a local parole opportunity of any kind. Other jurisdictions include: Arizona, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. In addition, California has a parole system that is limited to life indeterminate life sentences. *See* Prison Policy Initiative, *Failure should not be an option: Grading the parole systems of all 50 states*, Appendix A, (2019), available at https://www.prisonpolicy.org/reports/parole_grades_table.html

[25] 18 U.S.C. 3624(b).

[26] The District's Mayor does have a limited power to pardon certain "offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District." D.C. Code Ann. § 1-301.76. However, the extent of Mayoral power to pardon does not reach the overwhelming majority of District crimes. See *United States v. Cella*, 37 App. D.C. 433, 435 (1911) ("crimes committed [in the District of Columbia] are crimes against the United States"); U.S. Const. art. II, § 2, cl. 1 ("…he shall have Power to grant Reprieves and Pardons for Offenses against the United States").

[27] For further background information, *see* Advisory Group Memorandum #25–"Second Look" and Related Provisions in Other Jurisdictions.

[28] *See also* Michael Serota, *Second Looks & Criminal Legislation,* 17 Ohio St. J. Crim. L. 495, 519–22 (2020) (arguments in favor of second look procedural mechanisms from a retributive perspective).

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

Explanatory Note. *This section establishes the possession of an open container or consumption of alcohol in a motor vehicle offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces D.C. Code § 25-1001 (Drinking of alcoholic beverage in public place prohibited; intoxication prohibited).*

Paragraph (a)(1) specifies that a person must act at least knowingly. "Knowingly" is a defined term[1] and applied here means that the person must be practically certain that they are consuming or possessing an alcoholic beverage. The term "alcoholic beverage" is defined[2] and means a liquid or solid containing alcohol capable of being consumed by a human being. It does not include a liquid or solid containing less than one-half of 1% of alcohol by volume.[3]

Subparagraph (a)(2)(A) specifies that the first way of committing the offense is by consuming an alcoholic beverage. Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—they are consuming an alcoholic beverage.[4]

Subparagraph (a)(2)(B) specifies that the second way of committing the offense is by possessing an alcoholic beverage in an open container.[5] "Possesses" is a defined term and includes both actual and constructive possession.[6] Constructive possession requires intent to exercise dominion and control over an object and to guide its destiny.[7] The term "open container" is defined and means "a bottle, can, or other container that is open or from which the top, cap, cork, seal, or tab seal has at some time been removed."[8] Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that the container contains an alcoholic beverage[9] and that the container is unsealed.[10]

Paragraph (a)(2) specifies that the possession or consumption of alcohol must occur in the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway. The term "passenger area" is undefined but is intended to have a meaning that

[1] "Knowingly" is defined in RCC § 22E-206.
[2] RCC § 22E-701.
[3] RCC § 22E-701; D.C. Code § 25-101(5); *Reid v. District of Columbia*, 980 A.2d 1131, 1133 (2009).
[4] For example, if a passenger surreptitiously spikes a driver's drink, the unknowing driver does not commit an offense.
[5] Possessing one or more open beverages on a single occasion constitutes a single offense.
[6] RCC § 22E-701.
[7] *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995).
[8] D.C. Code § 25-101(35); *see also Bean v. United States*, 17 A.3d 635, 637 (D.C. 2011) (holding the definition is not unconstitutionally vague); *but see* D.C. Code § 25-113(b)(5) (permitting a licensed restaurant to reseal one bottle of wine per patron in a manner that it is visibly apparent if the container has been subsequently opened).
[9] There must be evidence that the alcohol bottle contains some liquid. *See Workman v. United States*, 96 A.3d 678, 681-82 (2014).
[10] *See Robinson v. Gov't of the Dist. of Columbia*, 234 F. Supp. 3d 14, 26 (D.D.C. 2017).

is consistent with federal regulations.[11] The term "motor vehicle" is defined in RCC § 22E-701 and the term "highway" is defined in 23 U.S.C. § 101(a). Per the rules of interpretation in RCC § 22E-207, a person must know—that is be practically certain—that the beverage is in the passenger area of the vehicle and that they are in the prohibited location.

Subsection (b) excludes liability for passengers in motor vehicles designed for commercial transportation of many passengers, such as a limousine, or a recreational vehicle.[12] This exclusion does not apply to passengers in other vehicles or to drivers. Subsection (b) specifies "in fact," a defined term in RCC § 22E-207 that indicates there is no culpable mental state requirement for a given element, here the requirements in subsection (b).

Subsection (c) specifies that attempted possession of an open container or consumption of alcohol in a motor vehicle is not an offense.

Subsection (d) provides the penalty for the revised offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions in the RCC and the D.C. Code.

Subsection (f) specifies that Chapters 1 – 6 the RCC's General Part apply to this Title 7 offense.

Relation to Current District Law. *The revised possession of an open container or consumption of alcohol in a motor vehicle offense clearly changes current District law in four main ways.*

First, the revised statute does not criminalize possession of an open container outside of a motor vehicle. Current D.C. Code § 25-1001(4) makes it unlawful to possess an open container of alcohol in "[a]ny place to which the public is invited and for which a license to sell alcoholic beverages has not been issued…" The current statute provides exceptions for private residences and special events.[13] In *Robinson v. Gov't of the Dist. of Columbia*,[14] the court explained that the statute furthers a legitimate interest in proscribing public consumption of alcohol and public intoxication. However, the scope of the statutory language is not limited to possessing an open container with intent to consume its contents in public or with intent to become intoxicated in public. Rather, the language more broadly criminalizes any possession of an open container, including some conduct not commonly

[11] *See* 23 U.S.C. § 154(a)(4). Under the Transportation Equity Act for the 21st Century (TEA-21), "Passenger area" is currently defined as the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment. Vehicles without trunks may have an open alcoholic beverage container behind the last upright seat or in an area not normally occupied by the driver or passengers. A law that permits the possession of open alcoholic beverage containers in an unlocked glove compartment, however, will not conform to the requirements. An unlocked glove compartment is within the scope of the revised statute.

[12] *See* 23 U.S.C. § 154(b)(2).

[13] D.C. Code § 25-1001(b).

[14] 234 F. Supp. 3d 14, 26 (D.D.C. 2017).

considered criminal.[15] In contrast, the revised statute offense is limited to motor vehicles, where the danger of intoxication is so grave that mere access to alcohol warrants criminal punishment. Civil penalties may be warranted for individuals who possess an open container of alcohol in other locations.[16] Businesses that provide alcohol in open containers to a customer risk losing their license to sell or serve alcohol.[17] This change improves the proportionality[18] of the revised offenses.

Second, the revised code does not criminalize public intoxication.[19] Current D.C. Code § 25-1001(c) provides: "No person, whether in or on public or private property, shall be intoxicated and endanger the safety of himself, herself, or any other person or property." The term "intoxicated" is undefined in the current statute and District case law has not interpreted its meaning.[20] District case law has held that chronic alcoholism is a defense to public intoxication,[21] but has not defined the meaning of the phrase "chronic alcoholic."

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[15] For example, carrying a bag full of half empty beers to a recycling bin in an alleyway or carrying a bottle of homemade sangria to a gathering at a friend's home. In contrast, the District does not arrest for public smoking of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, WASHINGTON POST (September 21, 2018).

[16] In contrast to cities that have fully legalized public drinking (e.g., Las Vegas, NV; New Orleans, LA; Sonoma, CA; Fort Worth, TX; Savannah, GA; Indianapolis, IN; Erie, PA; Butte, MT; Hood River, OR; Gulfport, MS), the revised code decriminalizes public possession of an open container of alcohol and intoxication without making any recommendation as to whether and what civil remedies should be promulgated and enforced.

[17] D.C. Code § 25-741.

[18] Drinking in a public place is a public order crime that carries significant collateral consequences and may disproportionately impact persons of color. An arrest for POCA, similar to the effects of possession of marijuana, may lead to discrimination in employment, housing, and education. *See* Report on Bill 20-409, the "Marijuana Possession Decriminalization Amendment Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (January 15, 2014) at Page 5. It also may divert police resources away from investigating serious crime. *Id*. at Page 7. The direct and collateral consequences disproportionately impact low-income people and people of color. *Racial Disparities in D.C. Policing: Descriptive Evidence From 2013-2017*, American Civil Liberties Union of the District of Columbia (May 13, 2019) ("Because people in poverty are less likely to own property than wealthier individuals, they have fewer private places to congregate with friends. That makes members of low-income communities more likely to gather in public—and commit open container violations if they drink alcohol while doing so."); *see also* Joseph Goldstein, *Sniff Test Does Not Prove Public Drinking, a Judge Rules*, NEW YORK TIMES (June 14, 2012) (noting one study determined 85% of open-container charges were given to Black and Latino people and 4% given to White people in Brooklyn, NY). By comparison, 87% of POCA charges in D.C. Superior Court adult charges for POCA from 2009-2019 were for Black and 5% to white people. CCRC Advisory Group Memorandum #28, Statistics on District Adult Criminal Charges and Convictions, Appendix D (10-21-19).

[19] *But see* RCC § 22E-4201 (Disorderly Conduct), which punishes recklessly causing another person to reasonably believe that he or she is likely to suffer bodily injury, taking of property, or damage to property in a public place. The revised disorderly conduct statute does not reach conduct that occurs in private or behavior that only endangers a person's own bodily integrity or property. *See also* 36 CFR § 2.35(c) (prohibiting presence in a federal park area when under the influence of alcohol or a controlled substance to a degree that may endanger oneself or another person, or damage property or park resources).

[20] Title 50, Chapter 22 of the D.C. Code, concerning impaired operating or driving defines "intoxicated" to mean a specific blood alcohol content for persons over 21 years of age and any measurable blood alcohol content for persons under 21 years of age. *See* D.C. Code § 50-2206.01.

[21] *Easter v. Dist. of Columbia*, 361 F.2d 50, 53-55 (D.C. Cir. 1966) (explaining, "One who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public…[A] chronic alcoholic is in fact a sick person who has lost control over his use of alcoholic beverages…[T]o convict such a person of that crime would also offend the Eighth Amendment."); *see also*

In contrast, the revised statute eliminates criminal liability for any form of public intoxication, whether or not a person is a "chronic alcoholic." The District has long recognized the need of addressing public health issues through means other than criminalization.[22] Separate from D.C. Code § 25-1001(c), D.C. Code § 24-604 already provides that any person who is intoxicated in public may be (1) taken or sent to his home or to a public or private health facility; or (2) taken to a detoxification center.[23] Moreover, under D.C. Code § 25-781, a business that sells to an intoxicated person or a person who appears to be intoxicated, risks losing its license to sell or serve alcohol. This change improves the proportionality of the revised offenses.

Third, the revised statute provides specific exclusions from liability for passengers in commercial and certain other recreational and mass transit vehicles. D.C. Code § 25-1001(a)(2) prohibits possession of an open container in a "vehicle in or upon any street, alley, park, or parking area," without exception. Under current District law, a person who commissions a limousine or an event bus faces the same penalty for possession of an open container in that vehicle as a person who drives their own vehicle while drinking. In contrast, the revised offense does not punish drinking as a passenger in a commercial, recreational, or mass transit vehicle. This change allows persons with an open container of alcohol to hire a driver potentially providing a safe alternative to driving under the influence of alcohol.[24] This change improves the proportionality of the revised offenses.

Fourth, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22E of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly

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Anne E. Marimow, *Court Strikes Down Virginia Law 'Criminalizing an Illness' In Targeting Homeless Alcoholics*, THE WASHINGTON POST (July 17, 2019); *compare Robinson v. California*, 370 U.S. 660, 660 (1962) (holding that criminalizing the status of narcotics *addiction* as cruel and unusual punishment) *with Powell v. State of Tex.*, 392 U.S. 514 (1968) (upholding a conviction for *public* drunkenness); *Hicks v. Dist. of Columbia*, 383 U.S. 252, 252 (1966) (J. Douglas, dissenting) (stating the District's vagrancy statute violates due process).

[22] *See, e.g.,* D.C. Code § 24-601 ("all public officials in the District of Columbia shall take cognizance of the fact that public intoxication shall be handled as a public health problem rather than as a criminal offense, and that a chronic alcoholic is a sick person who needs, is entitled to, and shall be provided appropriate medical, psychiatric, institutional, advisory, and rehabilitative treatment services of the highest caliber for his illness."); Report on Bill 21-360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," Council of the District of Columbia Committee on the Judiciary (January 28, 2016) at Page 4 ("There has been a growing consensus in recent years that violence is a public health problem that can be best prevented by identifying and addressing its root causes and by improving access to social services and supports."). In *Easter v. Dist. of Columbia*, the D.C. Circuit cited legislative history in which the Council noted, "[A]nything more futile than this process of getting drunk, being arrested, receiving 10, 15, or 30-day sentences, going to the Jail and to the Workhouse serving time, going out and getting drunk again, can scarcely be imagined." 361 F.2d 50, App. B (D.C. Cir. 1966) (noting "[T]he average person arrested for intoxication during that test period had a record of 12 prior arrests for the same offense…the best evidence that existing procedures are failing to rehabilitate the alcoholic.").

[23] D.C. Code § 25-1001(d) includes a cross-reference to this provision.

[24] Notably, nonprofit organization Mothers Against Drunk Driving has not actively supported public consumption laws, adding "We're concerned about [open-container laws] for vehicles." Emile Shire, Drunk on Power: It's Time to Ditch America's Idiotic Open-Container Laws, THE DAILY BEAST (April 14, 2017).

applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of an open container or consumption of alcohol in a motor vehicle offense may change District law in numerous ways. For more in-depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Beyond these four changes to current District law, one other aspect of the revised statute may constitute a substantive change to current District law.

The revised statute applies a standardized definition for the "knowingly" culpable mental state required for possession of an open container or consumption of alcohol in a motor vehicle liability. The current statute does not specify a requisite mental state,[25] however, the United States District Court for the District of Columbia has construed the law to require knowledge implicitly.[26] Furthermore, District case law generally requires knowledge for actual or constructive possession of any item.[27] The revised statute uses the RCC's general provisions that define "knowingly" and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[28] These changes clarify and improve the consistency of District statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

The revised code defines "possession" in its general part.[29] The D.C. Code does not codify a definition of possession, although it is an element of several property, drug, and weapon offenses. Instead, parties rely on District case law concerning what evidence is or is not sufficient to establish that the accused actually or constructively or jointly possessed an unlawful item.[30] The RCC definition of "possession,"[31] with the requirement in the offense that the possession be "knowing,"[32] matches the meaning of possession in current DCCA case law.[33] The RCC definition of possession improves the consistency of possessory elements throughout revised statutes.

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[25] D.C. Code § 25-1001.
[26] *Robinson v. Gov't of the Dist. of Columbia*, 234 F. Supp. 3d 14, 26 (D.D.C. 2017) (explaining the individual must know the container he possesses contains an alcoholic beverage, know the container is unsealed, and know he is standing in a public space while in possession of that container).
[27] *See, e.g., Campos v. United States*, 617 A.2d 185, 187-88 (D.C. 1992); *United States v. Joseph*, 892 F.2d 118, 125 (D.C. Cir. 1989); *Thompson v. United States*, 567 A.2d 907, 908 (D.C. 1989); *Easley v. United States*, 482 A.2d 779, 781 (D.C. 1984).
[28] RCC § 22E-207.
[29] RCC § 22E-202.
[30] *See* Criminal Jury Instructions for the District of Columbia Instruction 3.104 (2018).
[31] RCC § 22E-701.
[32] RCC § 22E-206.
[33] *See United States v. Hubbard,* 429 A.2d 1334, 1338 (D.C. 1981) ("Actual possession has been defined as the ability of a person to knowingly exercise direct physical custody or control over the property in question. *See United States v. Spears,* 145 U.S.App.D.C. 284, 293, 449 F.2d 946, 955 (1971); *Spencer v.*

United States, 73 U.S.App.D.C. 98, 99, 116 F.2d 801, 802 (1940)."); *see also Rivas v. United States*, 783 A.2d 125, 128 (D.C. 2001) (en banc) ("[I]n…constructive possession cases, there must be something more in the totality of the circumstances–a word or deed, a relationship or other probative factor–that, considered in conjunction with the evidence of proximity and knowledge, proves beyond a reasonable doubt that the passenger *intended* to exercise dominion or control over the drugs, and was not a mere bystander." (Emphasis in original.)); *Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) ("To obtain a conviction based on a theory of constructive possession, the government must prove that the defendant knew of the location of the contraband, that he had the ability to exercise dominion and control over it, and that he 'intended to guide [its] destiny.' *Speight v. United States*, 599 A.2d 794, 796 (D.C.1991); *In re T.M.*, 577 A.2d 1149, 1151–1152 n. 5 (D.C.1990); *Bernard v. United States*, 575 A.2d 1191, 1195-1196 (D.C.1990).").

RCC § 48-904.01a. Possession of a Controlled Substance.

Explanatory Note. *This section establishes the possession of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing a controlled substance. The offense is divided into two penalty gradations which are based on the type of controlled substance possessed by the actor. The revised possession of a controlled substance statute replaces D.C. Code § 48-904.01(d), the applicable language of the attempt and conspiracy penalty provision,[1] and the applicable language of the repeat offender penalty enhancement statute.[2]*

Subsection (a) specifies the elements of first degree possession of a controlled substance. Paragraph (a)(1) specifies that the person must knowingly possess a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[3] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed a controlled substance. It is not required that the accused knew which specific controlled substance he or she possessed. This element may be satisfied by showing that the accused was practically certain that he or she possessed any controlled substance.

Paragraph (a)(2) requires that the controlled substance that the accused possessed was, in fact, one of the eight substances referenced in subparagraphs (a)(2)(A)-(H). Subparagraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state as to whether the substance was one of the substances referenced in (a)(2)(A)-(H).

Subsection (b) specifies the elements of second degree possession of a controlled substance. The elements of second degree possession of a controlled substance are identical to those for first degree possession of a controlled substance, except that it is not required that the person possessed one of the eight substances listed in subparagraphs (a)(2)(A)-(H). Second degree possession of a controlled substance only requires that the person knowingly possessed any controlled substance.

Subsection (c) provides two exclusions from liability under subsections (a) and (b). Paragraph (c)(1) specifies it is an exclusion to liability if a person possesses a controlled substance that was obtained directly from, or pursuant to, a valid prescription or order of a practitioner, or if the possession is otherwise authorized by Chapter 9 of Title 48 or Chapter 16B of Title 7. Paragraph (c)(2) specifies that it is an exclusion to liability that the actor satisfied the requirements under D.C. Code § 7-403.

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[1] D.C. Code § 48-904.09.
[2] D.C. Code § 48-904.08.
[3] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

Subsection (d) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (f) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Subsection (g) specifies procedures by which a judge may dismiss or defer proceedings. Paragraph (g)(1) provides that when a person is convicted of possession of a controlled substance, "the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe." Under paragraph (g)(1), if the person violates a condition of probation, the court "may enter an adjudication of guilt and proceed as otherwise provided." If the person does not violate probation, paragraph (g)(1) provides for dismissal of the proceedings, and once the period of probation expires, paragraph (g)(1) states that "the court shall discharge such person and dismiss the proceedings against the person." Under paragraph (g)(1), such a dismissal "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime," including recidivist penalties such as under D.C. Code § 48-904.08. Under paragraph (g)(1), a judge may defer and dismiss proceedings, even if the defendant has previously had a case dismissed, or has been convicted of any other offense under this chapter, or of any offense under the laws of the United States or any state relating to narcotic or abusive drugs or depressant or stimulant substances.

Paragraph (g)(2) states that upon discharge of the proceedings under paragraph (g)(1), the person may apply to the court for an order to expunge "from all official records all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection." If the court determines, the person or her discharged, paragraph (g)(2) provides that "it shall enter such order." Further, under paragraph (g)(2), "No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of the person for any purpose."

Relation to Current District Law. *The revised possession of a controlled substance offense changes current District law in four main ways.*

First, the revised possession of a controlled substance offense changes current District law by dividing the offense into two penalty grades based on whether the controlled substance is an abusive or narcotic drug. The current D.C. Code possession of controlled substance offense is divided into two penalty grades based on whether the controlled substance is phencyclidine (commonly known as "PCP") in liquid form[4] as compared to any other drug. In contrast, in the revised offense, first degree possession of a controlled

[4] D.C. Code § 48-904.01(d)(2).

substance requires possession of one of the substances enumerated in subparagraphs (a)(2)(A)-(H), and second degree possession of a controlled substance requires possession of any controlled substance. In the revised offense first degree possession of a controlled substance includes possession of phencyclidine, but does not provide any heightened penalty for possession of phencyclidine in liquid form. Grading possession based on whether the controlled substance is an abusive or narcotic drug uses the same standards (based on the potential harm of the drug) as in the current and RCC offenses of distribution and possession with intent to distribute. There is no clear rationale for why, at present, the *possession* of any quantity of liquid phencyclidine, alone, merits categorically more severe penalties[5] than all other controlled substances.[6] This change improves the proportionality and consistency of revised statutes.

Second, the RCC possession of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[7] In contrast, under the RCC attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[8] and conspiracy[9] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statutes.

Third, the RCC possession of a controlled substance offense eliminates repeat offender penalty enhancements consistent with other nonviolent revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state,

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[5] Under current District law, possession of any quantity of liquid phencyclidine is subject to a 3 year imprisonment penalty as compared to a maximum of 180 days for all other controlled substances—a penalty six times as severe. D.C. Code § 48-904.01(d).

[6] The legislative history to the "Liquid PCP Possession Amendment Act" provides two rationales for the increased penalty for possession of phencyclidine in liquid form: 1) the Committee report says that PCP "more frequently engenders violent and bizarre behavior, combined with a sense of invulnerability, than happens with other drugs"; and 2) PCP in liquid form is the typical medium for distribution, even in small quantities. The report says that illegal drugs are usually distributed and consumed in similar form, but that is not the case with PCP which typically is distributed is a liquid but is not consumed in that form. The legislative history makes clear that the bill "should not be viewed as a bill to punish *users*" and that the enhanced penalty is that the enhanced penalty is intended to "address the fight against PCP . . . *by going after distributors.*" Committee on Public Safety and the Judiciary Report on the Liquid PCP Possession Amendment Act, April 13, 2010, at 5-6. However, to the extent that the intent of the bill was to punish distributors, and PCP is typically distributed, but not consumed, in liquid form, it is unclear why penalties for *possession* of liquid PCP should be increased. If PCP in liquid form is highly probative of intent to distribute, then the RCC trafficking of a controlled substance should adequately provide for heightened penalties above those applicable for simple possession.

[7] D.C. Code § 48-904.09.

[8] RCC § 22E-301.

[9] RCC 22E-303.

upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[10] In contrast, the revised code eliminates a drug offense-specific repeat offender provision. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised criminal code.

Fourth, subsection (g), which provides for a deferral or dismissal, gives the court discretion to defer sentencing regardless of whether the defendant has a prior conviction for a drug offense. Under current law, a judge may not defer or dismiss proceedings if the defendant previously had a case dismissed under § 48-904 (e)(1), or if the defendant has ever been convicted of an offense under Chapter 9 or Title 48, or of any offense under the law of the United States or any other state relating to narcotic or abusive drugs, or depressant or stimulant substances. By contrast, under RCC subsection (g), a judge may still defer and dismiss proceedings, even if the defendant has previously had a case dismissed, or if the defendant has prior convictions for controlled substance offenses in another jurisdiction. Due to the addictive nature of many controlled substances, persons may repeatedly be charged and convicted of possession of a controlled substance. This change will provide trial judges with broader discretion to dismiss proceedings when appropriate, even if the defendant has prior convictions, or has had other cases dismissed. This change improves the proportionality of the revised criminal code.

Beyond these four substantive changes to current District law, one other aspect of the revised possession of a controlled substance statute may be constitute a substantive change to current District law.

The revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute requires that the accused possess a "measurable amount" of a controlled substance. Although the current statute does not specify that the accused must possess a measurable amount, the D.C. Court of Appeals (DCCA) has held that the

[10] D.C. Code § 48-904.08.

offense requires possession of a "measurable amount" of a controlled substance.[11] This language is intended to codify current DCCA case law which requires that the accused possesses a measurable amount of a controlled substance.

Second, the exclusion to liability under subsection (c) does not reference D.C. Code § 48-1201. The current statutory provision criminalizing possession of a controlled substance refers to § 48-1201. However, omitting this reference is not intended to change current District law, or in any way change the applicability of § 48-1201.

[11] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

RCC § 48-904.01b. Trafficking of a Controlled Substance.

Explanatory Note. *This section establishes the trafficking of a controlled substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, manufacturing, or possessing with intent to distribute or manufacture a controlled substance. The offense is divided into five penalty gradations based on the type and quantity of controlled substance involved in the offense. The revised trafficking of a controlled substance statute replaces portions of the District's current controlled substance prohibited acts statute,[1] the distribution to minors statute,[2] enlistment of minors statute,[3] the drug free zones statute,[4] the attempt and conspiracy penalty provision,[5] the repeat offender penalty enhancement statute,[6] part of the statute criminalizing possession of a firearm or imitation firearm during a dangerous crime,[7] and the additional penalty for committing crime when armed statute.[8]*

Subsection (a) specifies the elements of first degree trafficking of a controlled substance. Paragraph (a)(1) requires that the person knowingly distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a controlled substance. A measurable quantity is a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[9] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.01, and means "the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship."[10] The term "manufacture" is defined in D.C. Code § 48-901.02, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.01, and includes a broad array of substances organized into five different schedules.

Paragraph (a)(1) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 to mean that the accused was practically certain that he or she would distribute or manufacture a controlled substance. It is not required that the accused knew which specific controlled substance he or she would distribute or manufacture. This

[1] D.C. Code § 48-904.01(a)(1).
[2] D.C. Code § 48-904.06.
[3] D.C. Code § 48-904.07.
[4] D.C. Code § 48-904.07a.
[5] D.C. Code § 48-904.09.
[6] D.C. Code § 48-904.08.
[7] D.C. Code § 22-4504 (b).
[8] D.C. Code § 22-4502.
[9] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).
[10] The terms "administering" and "dispensing" are also defined in D.C. Code § 48-901.02.

element may be satisfied by showing that the accused was practically certain that he or she distributed or manufactured any controlled substance. Alternatively, a person commits trafficking in a controlled substance if he or she knowingly possesses a controlled substance with intent to distribute or manufacture a controlled substance. Again, it is not required that the accused knew which specific controlled substance he or she possessed with intent to distribute or manufacture. The term "intent" is defined in RCC § 22E-206, which here requires that the person was practically certain that he or she would distribute or manufacture a controlled substance. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the person's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually distributed or manufactured a controlled substance, only that the actor believed to a practical certainty that he or she would distribute or manufacture a controlled substance.

Paragraph (a)(2) requires that the controlled substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[11] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

Subsection (b) specifies the elements of second degree trafficking in a controlled substance. The elements of second degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the minimum required quantity for each specified controlled substance in subparagraphs (b)(2)(A)-(H) are lower than those required for first degree trafficking.

Subsection (c) specifies the elements of third degree trafficking in a controlled substance. The elements of third degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that there is no minimum quantity required for each specified controlled substance in subparagraphs (c)(2)(A)-(H). Third degree trafficking only requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture, a measurable quantity of a compound or mixture containing of the substances listed in subparagraphs (c)(2)(A)-(H).

Subsection (d) specifies the elements of fourth degree trafficking in a controlled substance. The elements of fourth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture any controlled substance that is, in fact, under schedule I, II, or III, as defined in Subchapter II of this Chapter 9 of Title 48. "In fact," a defined term in RCC § 22E-207,

[11] For example, under subparagraph (a)(2)(D), it is not required that the person distribute, manufacture, or possess X grams of pure cocaine. This element is satisfied if the defendant distributed cocaine mixed with an adulterant, if the entire mixture weighs more than X grams.

is used to indicate that there is no culpable mental state requirement as to whether the controlled substance is included in schedules I, II, or III.

Subsection (e) specifies the elements of fifth degree trafficking in a controlled substance. The elements of fifth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, manufactures, or possesses with intent to distribute or manufacture any controlled substance.

Subsection (f) allows for the aggregation of quantities for the purposes of offense grading when a single scheme or systematic course of conduct could give rise to multiple trafficking of a controlled substance charges. The aggregation provision only applies when the multiple charges could arise from trafficking the same type of controlled substance. The government may not aggregate quantities of two different controlled substances to determine the grade of the offense.

Subsection (g) specifies rules for edible products and non-consumable containers in determining the weight of compounds or mixtures containing controlled substances. Paragraph (g)(1) specifies that when a controlled substance is contained within an edible product, the weight of the inert edible mixture will not be included in determining the weight of the compound or mixture containing a controlled substance. Paragraph (g)(2) specifies that the weight of non-consumable containers in which a substance is stores shall not be included in the weight of the compound or mixture containing the controlled substance.[12]

Subsection (h) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.] Paragraph (g)(6) provides for enhanced penalties for each grade of the offense. If the government proves at least one of the elements listed under subparagraphs (h)(6)(A)-(C), the penalty classification for each offense may be increased in severity by one penalty class. This penalty enhancement may be applied in addition to any penalty enhancements authorized by RCC Chapter 6.

Subparagraph (h)(6)(A) codifies a penalty enhancement if the actor was, in fact, over the age of 21, and distributed a controlled substance to a person with recklessness as to the fact that the person is under the age of 18. This enhancement requires that the actor was aware of a substantial risk that the controlled substance would be distributed to a person under the age of 18. This enhancement does not apply if an actor distributes a controlled substance to an adult who subsequently distributes the substance to a person under the age of 18, unless the actor knew that the adult was going to transfer the substance to the other person, and the actor was at least reckless as to the fact that other person was under the age of 18.

Subparagraph (h)(6)(B) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a controlled substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation

[12] For example, if a cigarette is dipped in liquid PCP, the weight of the tobacco containing the liquid PCP may be included in the weight of the compound or mixture. However, if some of the liquid PCP also soaks into the cigarette box, the weight of the box would *not* be included in the weight.

firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is in "close proximity or easily accessible during the commission of the offense."[13] The term "firearm" is defined in RCC § 22E-701 to have the same meaning as under D.C. Code § 7-2501.01.[14] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Subparagraph (g)(6)(B) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in furtherance of a drug trafficking offense.[15] It is not required that the actor actually displayed or used the firearm, imitation firearm, or dangerous weapon, but the imitation firearm or weapon must at least facilitate commission of the offense in some manner.[16]

Subparagraph (h)(6)(C) codifies as a penalty enhancement that the actor was, in fact, 21 years of age or older, and engages in the conduct constituting the offense by enlisting, hiring, contracting, or encouraging any person to sell or distribute any controlled substance for the profit or benefit of the actor, reckless as to the person being under the age of 18. This enhancement requires that the actor was aware of a substantial risk that the person enlisted, hired, contracted, or encouraged to sell or distribute a controlled substance is under the age of 18. A person may be liable for committing an offense under this section based on the conduct of another if the actor satisfies either the requirements for accomplice

[13] *Clyburn v. United States*, 48 A.3d 147, 153–54 (D.C. 2012) (interpreting the meaning of the term "readily available" as used in D.C. Code § 22-4502 (a)).

[14] However, the term "firearm" as used in the RCC "shall not include a firearm frame or receiver; [s]hall not include a firearm muffler or silencer; and [s]hall include operable antique pistols."

[15] 18 U.S.C. § 924 (c)(1)(A). *See,* Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018, at 8 (discussing the "in furtherance" requirement under 18 U.S.C. § 94, and federal courts' holdings regarding factors that are relevant in determining whether possession of firearm was in furtherance of predicate drug offense).

[16] For example, if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm.

liability[17], or liability for causing crime by an innocent or irresponsible party.[18] If an actor commits trafficking of a controlled substance under either of these theories of liability, reckless that the person enlisted, hired, etc. is under the age of 18, this penalty enhancement applies.

Subparagraph (h)(6)(D) codifies a penalty enhancement if the person commits the offense in a location that is, in fact, within 300 feet of a school, college, university, public swimming pool, public playground, public recreation center, public library, or children's day care center, that displays clear and conspicuous signage which indicates controlled substances are prohibited or the location is a drug free zone. This enhancement applies if the offense occurs within 300 feet of the building or grounds, or within the building or grounds. The term "in fact" specifies that there is no culpable mental state as to whether the person committed the offense while in the specified location.

Subsection (i) specifies two defenses to prosecution under this section. Under paragraph (i)(1), it is a defense that the person distributes or possesses with intent to distribute a controlled substance, but such distribution or possession with intent to distribute is not in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. In addition, paragraph (i)(1) requires that either the quantity of the substance distributed does not exceed the amount for a single use by the recipient, or the recipient plans to immediately use the controlled substance. This defense generally applies to sharing or giving away controlled substances for free,[19] rather than substances distributed in exchange for anything of value, which includes services, satisfaction of debt, or promises of future payment or services. However, even when sharing or giving away controlled substances for free, the defense is not available if such action was taken with future expectation of financial gain from distribution of a controlled substance.[20] Paragraph (i)(1) uses the term "in fact" to specify that there is no culpable mental state required as to the elements of the defense.

Under paragraph (i)(2), it is a defense to that the person manufactured, or possessed with intent to manufacture, a controlled substance by packaging, repackaging, labeling, or relabeling a controlled substance for his or her own personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or re-label the substance for one of the purposes specified in paragraph (h)(2). Under this defense, packaging, repackaging, labeling, or relabeling a controlled substance for personal use, or possessing

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[17] RCC § 22E-210.

[18] RCC § 22E-211. Although this enhancement does not require any culpable mental state as to enlisting, hiring, contracting, or encouraging any person to sell or distribute a controlled substance, liability still requires that the actor satisfy the *mens rea* requirements for accomplice liability under RCC § 22E-210 or causing crime by an innocent or irresponsible party.

[19] For example, an actor who shares a controlled substance with his or her spouse or a friend, without receiving anything of value in return and having no future expectation of receiving something of value in return, may claim this defense. However, a person successfully raising this defense likely would still be liable for committing a lesser crime—possession of a controlled substance.

[20] For example, an actor would not be able to claim this defense who distributes free "samples" of a controlled substance for marketing purposes or to create addiction in a population, which is expected to end up yielding the actor some sort of financial gain from drug distribution.

a controlled substance with intent to package, repackage, label, or relabel it for personal use does not constitute a violation of this section.[21] Per the rules of interpretation in RCC § 22E-207, the term "in fact" also applies to this paragraph, and there is no culpable mental state required as to the elements of this defense.

Subsection (j) cross-references applicable definitions located elsewhere in the RCC.

Subsection (k) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The trafficking of a controlled substance statute changes current law in nine main ways.*

First, the revised offense grades, in part, based on the weight of the controlled substance involved in the offense. The current D.C. Code statute only provides for different penalties based on the *type* of controlled substance, but not the weight. The current statute provides for a maximum 30-year sentence if the offense involves a schedule I or II drug that is an "abusive" or "narcotic" drug, regardless of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, under subsection (f), when a single scheme or course of conduct could give rise to multiple charges of trafficking of a controlled substance, the government may bring one charge and aggregate the quantity of the controlled substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves controlled substances under Schedules IV or V. The current D.C. Code statute provides for different maximum penalties based on whether the actor committed the offense with respect to a controlled substance under Schedule IV or V.[22] In contrast, under the revised statute, fifth degree trafficking of a controlled substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor. This change improves the proportionality of the revised statute.

Third, the revised statute includes a defense if the person distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance. Under the current D.C. Code, a person commits distribution of a controlled substance regardless of whether the controlled substance was distributed in exchange for anything of value.[23] Consequently, non-commercial transfers of a controlled substance between two

[21] For example, a person who packages cocaine in a bag for his own use later in time has technically "manufactured" a controlled substance as the term is defined. Under this defense, this conduct would not constitute a violation of this section. However, a person successfully raising this defense likely would still be liable for committing a lesser crime—possession of a controlled substance.
[22] D.C. Code § 48-904.01 (a)(2)(C), (D).
[23] *Durham v. United States*, 743 A.2d 196, 201 (D.C. 1999) ("The prosecutor need not prove that a sale took place").

people such as gifting and sharing are subject to liability.[24] In contrast, the revised statute provides a defense if the actor distributed or possessed with intent to distribute a controlled substance, but did not do so in exchange for anything of value or future expectation of receiving something of value. However, both the person distributing and the recipient of such a transaction likely would still be liable for a lesser possessory offense.[25] This change improves the proportionality of the revised statute.

Fourth, the revised statute includes a defense if the person packages, repackages, labels or relabels a controlled substance for his or her own personal use, or possesses a controlled substance with intent to do so. Under the current D.C. Code, a person commits manufacturing of a controlled substance regardless of the purpose for packaging, repackaging, labeling, or relabeling of a controlled substance. Consequently, a person who packages a controlled substance for his or her own use is subject to liability. In contrast, the revised statute provides a defense if the actor packaged, repackaged, labeled, or relabeled a controlled substance for his or her personal use. It is also a defense to prosecution for possession with intent to manufacture that the person possessed a controlled substance with intent to package, repackage, label, or relabel a substance for one the purposes specified in paragraph (h)(2). However, the person would still be liable for a lesser possessory offense.[26] This change improves the proportionality of the revised statute.

Fifth, the RCC trafficking of a controlled substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[27] In contrast, under the RCC, penalties for attempt or conspiracy to commit a controlled substance offense will be determined by the general provisions relating to attempt[28] and conspiracy[29] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Sixth, the RCC trafficking of a controlled substance offense eliminates repeat offender penalty enhancements consistent with other nonviolent revised offenses. Under the current D.C. Code, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to

[24] See *Wright v. United States*, 588 A.2d 260, 262 (D.C. 1991) ("Appellant testified that he possessed drugs when arrested which he intended to share with his companion. Such evidence proves possession with intent to distribute.").
[25] RCC § 48-904.01a.
[26] RCC § 48-904.01a.
[27] D.C. Code § 48-904.09.
[28] RCC § 22E-301.
[29] RCC 22E-303.

twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[30] In contrast, the revised code omits a drug-offense specific repeat offender provision. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statute.

Seventh, the RCC limits the area around schools and other specified locations that are subject to a penalty enhancement, and eliminates public housing and "video arcade[s]" altogether as specified locations. Under the current D.C. Code, drug free zones extend to all areas within 1,000 feet of any designated location, including all day care centers (public or private), schools, playgrounds, libraries, public housing, and video arcades.[31] In contrast, the revised statute applies a penalty enhancement only if the offense occurs within 100 feet of a designated location, which does not categorically include public housing or video arcades. While heightened penalties are warranted for committing trafficking of a controlled substance on or near locations where youth gather, 1,000 feet appears to be an excessive distance. In an urban jurisdiction like the District, a 1,000 foot radius around every playground, school, etc. listed in the current drug free zone statute leaves almost no location in the District in an *unenhanced* location.[32] In addition to considerably expanding the zones where there are enhanced penalties, categorically raising penalties in areas of public housing (as opposed to private housing) raises concerns about equitable treatment under the law. This change improves the proportionality of the revised statute.

Eighth, the RCC includes a penalty enhancement only if the person commits an offense while possessing on one's person or having readily available, a firearm, imitation firearm, or other dangerous weapon, and such possession is in furtherance of the offense. The current D.C. Code "while armed" enhancement in § 22-4502[33] and the separate

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[30] D.C. Code § 48-904.08.

[31] Drug free zones include "[a]ll areas within 1000 feet of an appropriately identified public or private day care center, elementary school, vocational school, secondary school, junior college, college, or university, or any public swimming pool, playground, video arcade, youth center, or public library, or in and around public housing, as defined in section 3(1) of the United States Housing Act of 1937, approved August 22, 1974 (88 Stat. 654; 42 U.S.C. § 1437a(b)), the development or administration of which is assisted by Department of Housing and Urban Development, or in or around housing that is owned, operated, or financially assisted by the District of Columbia Housing Authority, or an event sponsored by any of the above entities shall be declared a drug free zone." D.C. Code § 48-904.07a.

[32] See, Judith Greene, Kevin Prains, Jason Ziedenberg, Justice Policy Institute. *Disparity by Design: How drug-free zone laws impact racial disparity – and fail to protect youth*. March, 2006. This report notes that the New Jersey Sentencing Commission concluded that under New Jersey's drug free zone laws, "urban areas where schools, parks, and public housing developments are numerous and closely spaced, overlapping zones turn entire communities into prohibited zones – erasing the very distinction between school and non-school areas that the law was intended to create." *Id*. at 4. For example, drug free zones covered 76 percent of Newark, and over half of Camden and Jersey City. *Id*. at 26. A partial map of District schools and other locations which comprise the District's gun-free zone (locations nearly identical to those listed in the drug-free zone) was compiled by the Crime Prevention Research Institute. *See* https://crimeresearch.org/2017/10/dcs-gun-free-zone-problem-regulations-effectively-ban-anyone-legally-carrying-gun/ (last visited June 25, 2019).

[33] D.C. Code § 22-4502 authorizes additional penalty for "Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or

criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[34] provide substantially increased penalties and liability for distribution, or possession with intent to distribute a controlled substance. D.C. Code § 22-4502 authorizes an enhanced penalty for distributing of or possessing with intent to distribute a controlled substance[35] "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[36] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent to distribute would be sufficient for increased liability under 22-4502 or 22-4504.[37] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[38]

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other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)[.]" The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress."

[34] D.C. Code § 22-4504 (b) states "No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence." The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress."

[35] The penalty enhancement under D.C. Code § 22-4502 applies to "crimes of violence" and "dangerous crimes." D.C. Code § 22-4501 defines "dangerous crime" as "distribution of or possession with intent to distribute a controlled substance."

[36] D.C. Code § 22-4504 could apply if a person distributes a controlled substance while constructively possessing a firearm or switchblade knife in his home located miles away, even if the weapon was inaccessible and played no role in commission of the offense

[37] *But see*, *Easley v. United States*, 482 A.2d 779 (D.C. 1984) (holding that when determining whether an actor was aware of a firearm, as required for constructive possession, a criminal venture is only relevant if there was a connection between the firearm and the criminal venture).

[38] *Hawkins v. United States*, 119 A.3d 687, 702 (D.C. 2015) (citing *Thomas v. United States,* 602 A.2d 647 (D.C.1992)). The penalty for distribution of, or possession with intent, to distribute a controlled substance that is an abusive or narcotic drug is 30 years. D.C. Code § 48-904.01. If the person commits this offense while possessing a firearm, the person may be subject to an additional 30 years, with a 5 year mandatory minimum, under the while armed enhancement in § 22-4502, and an additional 15 years, with a 5 year mandatory minimum under § 22-4504. In total, a person who distributes, or possesses with intent to distribute an abusive or narcotic drug while possessing a firearm is subject to a maximum of 75 years imprisonment, including two separate 5 year mandatory minimums. The 75 year maximum sentence

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous weapon being possessed during the controlled substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[39] Second, the revised enhancement requires that the person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change requires, as in comparable federal legislation,[40] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the controlled substance offense, which excludes coincidental possession.[41] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-4504(b).[42] These latter two changes eliminate an enhancement for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[43] These changes improve the clarity, consistency, and proportionality of the revised statute.

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exceeds the maximum sentence for first degree murder, absent aggravating circumstances. D.C. Code § 22-2104.

[39] Under D.C. Code 22-4502 a person convicted of a crime of violence or dangerous crime while armed with or having readily available a firearm or dangerous weapon may sentenced to a maximum of 30 years in addition to the penalty provided for the crime of violence or dangerous crime. D.C. Code § 22-4504 provides a separate criminal offense for possessing a firearm or imitation firearm while committing a crime of violence or dangerous crime, subject to a maximum 15-year sentence.

[40] *See generally*, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018.

[41] For example, if a person distributes a controlled substance while possessing a 7 inch chef's knife with intent to use the knife as a weapon if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply. However, a person who distributes a controlled substance in a kitchen while incidentally in close proximity to a 7 inch chef's knife would not be subject to this penalty enhancement.

[42] The scope of the revised enhancement—"readily available"—matches the breadth of current D.C. Code § 22-4502, but is narrower than D.C. Code § 22-4504(b), which applies to any constructive possession. *Compare, Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (firearm in dresser in the same room as defendant was "readily accessible"), *with Moore v. United States*, 927 A.2d 1040, 1050 (D.C. 2007) (holding that evidence of constructively possession was sufficient when firearm found in defendant's apartment, while defendant was outside the apartment sitting in a car).

[43] An actor who constructively possesses a dangerous weapon in furtherance of a drug crime may still be liable for one or more separate weapon offenses under the RCC. See RCC § 22E-XXXX [Weapon crimes] and accompanying commentary for more details.

Ninth, the trafficking of a controlled substance statute does not include a separate penalty for first time offenders who distribute or possess with intent to distribute ½ pound or less of marijuana. Under the current statute, distributing or possessing with intent to distribute marijuana is subject to a 5 year maximum sentence. However, if the offense involved ½ pound or less of marijuana, and the person had not been previously convicted of the offense, the maximum sentence is 180 days. In contrast, the revised trafficking of a controlled substance statute does not provide a separate penalty for first time offenders trafficking ½ pound or less of marijuana. Violations of this statute involving marijuana constitutes fourth degree trafficking of a controlled substance, and is subject to the penalty specified in paragraph (g)(4).[44] This change improves the consistency and proportionality of the revised statutes.

Beyond these nine substantive changes to current District law, three other aspects of the revised trafficking of controlled substances statute may constitute substantive changes to current District law.

First, the revised statute caps the increased penalties an actor may be subject to for different types of penalty enhancements. The current D.C. Code provides separate penalty enhancements in the current distribution to minors statute[45], the drug free zone statute[46], and portions of the while armed enhancement statute.[47] However, the D.C. Code is silent as to whether or how these different penalty enhancements may be stacked, and there is no relevant D.C. Court of Appeals (DCCA) case law. The revised statute resolves this ambiguity by specifying that only one of the enhancements may apply.[48] This change improves the clarity and proportionality of the revised statutes.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Third, the penalty enhancement under paragraph (h)(6)(C) requires that the actor encourages, hires, contracts, or encourages a person to sell or distribute a controlled substance, and was reckless as to the person being under the age of 18. This penalty enhancement is intended to replace current D.C. Code § 48-904.07, which criminalizes

[44] The exact effect of this change is unclear at this time, as penalties have not been determined for the trafficking offense.
[45] D.C. Code 48-904.06.
[46] D.C. Code § 48-904.07a.
[47] D.C. Code § 22-4502.
[48] For example, a person who sells a controlled substance to a minor while in a drug free zone would only be subject to an increase in penalty severity of one class.

enlistment of minors to distribute a controlled substance. Although D.C. Code § 48-904.07 does not specify a culpable mental state, the D.C. Court of Appeals (DCCA) has held that current statute does not require knowledge as to the age of the person enlisted to distribute a controlled substance.[49] However, the DCCA has not directly held that strict liability is sufficient, or if any other culpable mental state is required as to the enlisted person's age. By contrast, the revised statute's penalty enhancement requires that the actor was reckless as to the fact that the enlisted person was under the age of 18. Applying a penalty enhancement when the actor was not aware of a substantial risk that the enlisted person was under the age of 18 is disproportionately severe.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute specifies particular controlled substances rather than rely on the defined terms "abusive" or "narcotic" drugs to list those controlled substances. The current statute provides different maximum penalties based on the type of controlled substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug[.]"[50] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[51] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the person distributes, manufactures, or possesses a "measurable quantity" of a controlled substance. Although the current statute does not require any minimum quantity of controlled substance, the DCCA has clearly held that the current statute requires distribution, manufacture, or possession of a measurable quantity of a controlled substance.[52]

Third, the revised trafficking in controlled substance statute does not include exceptions for offenses committed with respect to marijuana. This is not intended to change current District law. The revised definition of the term "controlled substance" includes all of the exceptions that are recognized under current law with respect to possession, distribution, and manufacturing of marijuana.[53]

[49] *Outlaw v. United States*, 604 A.2d 873, 876 (D.C. 1992).
[50] D.C. Code § 48-904.01 (a)(2)(A).
[51] D.C. Code § 48-901.02.
[52] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994).
[53] The revised trafficking of a controlled substance statute is also consistent with the DCCA's holding in *Sims v. United States,* 17-CM-1137 (D.C. 2021).

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

Explanatory Note. *This section establishes the trafficking a counterfeit substance offense and penalty gradations for the Revised Criminal Code (RCC). The offense criminalizes knowingly distributing, creating, or possessing with intent to distribute a counterfeit substance. The offense is divided into five penalty gradations which are based on the type and quantity of counterfeit substance. The revised trafficking a counterfeit substance statute replaces portions of the District's current controlled substance prohibited acts statute,[1] the attempt and conspiracy penalty provision,[2] and the repeat offender penalty enhancement statute.[3]*

Subsection (a) specifies the elements of first degree trafficking of a counterfeit substance. Paragraph (a)(1) requires that the accused knowingly distributes, creates, or possesses with intent to distribute, a measurable quantity of a counterfeit substance. A measurable quantity means a quantity that is capable of being measured or quantified. Trace amounts of a controlled substance are insufficient to satisfy this element.[4] "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." The term "distribute" is defined in D.C. Code § 48-901.02, and means "the actual, constructive, or attempted transfer from one person to another other than by administering or dispensing of a controlled substance, whether or not there is an agency relationship." The term "creates" is intended to have the same meaning as under current law. The term "counterfeit substance" is defined under D.C. Code § 48-901.02, and means "a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance."

Paragraph (a)(1) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means that the accused was practically certain that he or she would distribute or create a counterfeit substance. It is not required that the accused knew which specific counterfeit substance he or she would distribute or create. This element may be satisfied by showing that the accused was practically certain that he or she distributed or created any counterfeit substance. Alternatively, a person commits trafficking in a counterfeit substance if he or she knowingly possesses a counterfeit substance with intent to distribute the counterfeit substance. The term "intent" is defined in RCC § 22E-206 and, applied here, requires that the accused was practically certain that he or she would distribute a counterfeit substance. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate

[1] D.C. Code § 48-904.01(d).
[2] D.C. Code § 48-904.09.
[3] D.C. Code § 48-904.08.
[4] *Thomas v. United States*, 650 A.2d 183, 196 (D.C. 1994); see also *Price v. United States*, 746 A.2d 896 (D.C. 2000) (discussing means of proving that the defendant possessed a measurable quantity of a controlled substance).

proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually distributed a counterfeit substance, only that the actor believed to a practical certainty that he or she would distribute a counterfeit substance.

Paragraph (a)(2) requires that the counterfeit substance is, in fact, one of the substances listed in subparagraphs (a)(2)(A)-(H). Subparagraphs (a)(2)(A)-(H) also require a minimum quantity for each substance. The elements in subparagraphs (a)(2)(A)-(H) can be satisfied if the offense involved the minimum quantity of a *mixture* that contains the specified substance.[5] "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to the type or quantity of substance involved in the offense.

Subsection (b) specifies the elements of second degree trafficking in a counterfeit substance. The elements of second degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that the minimum required quantity for each specified controlled substance in subparagraphs (b)(2)(A)-(H) are lower than those required for first degree trafficking.

Subsection (c) specifies the elements of third degree trafficking in a counterfeit substance. The elements of third degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that there is no minimum quantity required for each specified counterfeit substance in subparagraphs (c)(2)(A)-(H). Third degree trafficking only requires that the actor distributes, creates, or possesses with intent to distribute, a measurable quantity of a compound or mixture containing one of the substances listed in subparagraphs (c)(2)(A)-(H).

Subsection (d) specifies the elements of fourth degree trafficking in a counterfeit substance. The elements of fourth degree trafficking in a controlled substance are identical to the elements of first degree trafficking in a controlled substance, except that the offense requires that the actor distributes, creates, or possesses with intent to a distribute any counterfeit substance that is, in fact, a controlled substance under schedule I, II, or III, as defined in Subchapter II of Chapter 9 of Title 48. "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to whether the substance is included in schedules I, II, or III.

Subsection (e) specifies the elements of fifth degree trafficking in a counterfeit substance. The elements of fifth degree trafficking in a counterfeit substance are identical to the elements of first degree trafficking in a counterfeit substance, except that the offense requires that the actor distributes, creates, or possesses with intent to a distribute any counterfeit substance.

Subsection (f) allows for the aggregation of quantities for the purposes of offense grading when a single scheme or systematic course of conduct could give rise to multiple trafficking of a counterfeit substance charges. The aggregation provision only applies when the multiple charges could arise from trafficking the same type of counterfeit

[5] For example, under subparagraph (a)(2)(D), it is not required that the person distribute, manufacture, or possess X grams of pure cocaine. This element is satisfied if the defendant distributed cocaine mixed with an adulterant, if there were more than X grams of the entire mixture.

substance. The government may not aggregate quantities of two different counterfeit substances to determine the grade of the offense.

Subsection (g) specifies rules for edible products and non-consumable containers in determining the weight of compounds or mixtures containing counterfeit controlled substances. Paragraph (g)(1) specifies that when a counterfeit controlled substance is contained within an edible product, the weight of the inert edible mixture will not be included in determining the weight of the compound or mixture containing a controlled substance. Paragraph (g)(2) specifies that the weight of non-consumable containers in which a substance is stores shall not be included in the weight of the compound or mixture containing the counterfeit controlled substance.[6]

Subsection (h) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Paragraph (h)(6) codifies a penalty enhancement if the actor distributes or possesses with intent to distribute a counterfeit substance while knowingly possessing, either on the actor's person or in a location where it is readily available, a firearm, imitation firearm, or dangerous weapon. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." However, not all constructive possession suffices, as the penalty enhancement further requires that the item be "on the actor's person or in a location where it is readily available." An item is in a location where it is readily available if it is in "close proximity or easily accessible during the commission of the offense."[7] The term "firearm" is defined in RCC § 22E-701 to have the same meaning as under D.C. Code § 7-2501.01.[8] The term "imitation firearm" is defined in RCC § 22E-701, and means "any instrument that resembles an actual firearm closely enough that a person observing it might reasonably believe it to be real." The term "dangerous weapon" is defined in RCC § 22E-701, and includes an array of specified weapons, as well as "[a]ny object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person." Paragraph (h)(6) specifies that a culpable mental state of knowledge applies, a term defined in RCC § 22E-206 that, applied here, means the accused was practically certain that he or she possessed on his or her person, or in a location where it is readily available, an imitation firearm or dangerous weapon. In addition, the possession of the firearm, imitation firearm, or dangerous weapon must occur during, and be in furtherance of the offense. Incidental possession that occurs during commission of the offense is insufficient. The "in furtherance" language is adapted from 18 U.S.C. § 924, which authorizes enhanced penalties for possessing a firearm in

[6] For example, if a cigarette is dipped in liquid PCP, the weight of the tobacco containing the liquid PCP may be included in the weight of the compound or mixture. However, if some of the liquid PCP also soaks into the cigarette box, the weight of the box would *not* be included in the weight.

[7] *Clyburn v. United States*, 48 A.3d 147, 153–54 (D.C. 2012) (interpreting the meaning of the term "readily available" as used in D.C. Code § 22-4502 (a)).

[8] However, the term "firearm" as used in the RCC "shall not include a firearm frame or receiver; [s]hall not include a firearm muffler or silencer; and [s]hall include operable antique pistols."

furtherance of a drug trafficking offense.[9] It is not required that the actor actually displayed or used the firearm, imitation firearm, or dangerous weapon, but the imitation firearm or weapon must facilitate commission of the offense in some manner.[10]

Subsection (i) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (j) specifies that that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised trafficking in counterfeit substances statute changes current law in five main ways.*

First, the first three grades of the revised offense are based on the quantity of the counterfeit substance. The current statute only provides for different penalties based on the *type* of substance, but not the quantity. The current statute provides for a maximum 30 year sentence if the offense involves a schedule I or II drug that is an "abusive" or "narcotic" drug, regardless of the quantity. In contrast, under the revised statute, the first and second grades of the offense each require a minimum quantity for each specified controlled substance. In addition, when a single scheme or course of conduct could give rise to multiple trafficking of a counterfeit substance charges, bring one charge and aggregate the quantity of the counterfeit substances involved in the scheme or course of conduct. This change improves the proportionality of the revised statute.

Second, the revised statute authorizes the same penalties when the offense involves counterfeit substances under Schedules IV or V. The current statute provides for different maximum penalties based on whether the actor committed the offense with respect to substances under Schedule IV or V.[11] In contrast, under the revised statute, fifth degree trafficking of a counterfeit substance includes committing the offense with respect to substances included in Schedules IV and V. The difference in potential harmfulness between schedule IV and V drugs appears to be quite minor.[12] This change improves the proportionality of the revised statute.

Third, the RCC trafficking of a counterfeit substance offense treats attempt or conspiracy consistent with other revised offenses. Under the current D.C. Code, the elements that must be proven to establish liability for attempts or conspiracies to commit a controlled substance offense are not specified, although both are subject to the same maximum penalty as applicable to the offense which was the object of the attempt or conspiracy.[13] In contrast, under the RCC, penalties for attempt or conspiracy to commit a

[9] 18 U.S.C. § 924 (c)(1)(A).
[10] For example, if a person sells a controlled substance while armed with a firearm, with intent to use the firearm if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply even if the person never actually uses or displays the firearm.
[11] D.C. Code § 48-904.01 (a)(2)(C), (D).
[12] The current D.C. Code provides tests for determining which substances should be categorized into each schedule. The tests for schedules IV and V are require a "low potential for abuse," and "limited physical dependence or psychological dependence" if the substance is abused. D.C. Code §§ 48-902.03, 48-902.05, 48-902.07, 48-902.09, 48-902.11.
[13] D.C. Code § 48-904.09.

controlled substance offense will be determined by the general provisions relating to attempt[14] and conspiracy[15] liability which specify the relevant elements and provide a penalty of one-half the maximum punishment applicable to that offense. There is no clear rationale for why, at present, attempt or conspiracy to commit controlled substance offenses should be treated differently from other offenses. This change improves the proportionality and consistency of revised statute.

Fourth, the RCC trafficking of a controlled substance offense eliminates repeat offender penalty enhancements consistent with other nonviolent revised offenses. Under current law, a person who has been previously convicted of any controlled substance offense under Chapter 48, under any statute of the United States, or any state, upon conviction of a subsequent controlled substance offense may be imprisoned up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.[16] In contrast, the revised code omits a drug-offense specific repeat offender provision. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised statute.

Fifth, the RCC includes a penalty enhancement only if the person commits the offense while possessing on one's person or having readily available, a firearm, imitation firearm, or other dangerous weapon, and such possession is in furtherance of and while committing the offense. The current D.C. Code "while armed" enhancement in § 22-4502[17] and the separate criminal offense of "possessing a firearm during a crime of violence or dangerous crime" in § 22-4504[18] provide substantially increased penalties and liability for distribution, or possession with intent to distribute a counterfeit substance. D.C. Code § 22-4502 authorizes an enhanced penalty for distributing of or possessing with

[14] RCC § 22E-301.
[15] RCC 22E-303.
[16] D.C. Code § 48-904.08.
[17] D.C. Code § 22-4502 authorizes additional penalty for "Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, stun gun, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles)[.]" The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress." As defined in D.C. Code § 48-901.02 (5), "counterfeit substances" are controlled substances.
[18] D.C. Code § 22-4504 (b) states "No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence." The term "dangerous crime" is defined under D.C. Code § 22-4501 (2), as "distribution of or possession with intent to distribute a controlled substance. For the purposes of this definition, the term 'controlled substance' means any substance defined as such in the District of Columbia Official Code or any Act of Congress." As defined in D.C. Code § 48-901.02 (5), "counterfeit substances" are controlled substances.

intent to distribute a counterfeit substance[19] "when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous weapon[.]" D.C. Code § 22-4504 criminalizes possession of a firearm or imitation firearm while committing a dangerous crime. Under § 22-4504, there is no requirement that the firearm or imitation firearm be in proximity to the person at the time of the offense, or that the firearm or imitation firearm had any relationship to the offense.[20] However, neither D.C. Code § 22-4502 nor D.C. Code § 22-4504 has a statutory requirement that the dangerous weapon or imitation firearm had any relationship to the offense. There is no DCCA case law as to whether coincidental possession of a dangerous weapon or imitation firearm during drug distribution or possession with intent to distribute would be sufficient for increased liability under 22-4502 or 22-4504.[21] In addition, both the penalty enhancement under § 22-4502, and the separate criminal offense under § 22-4504 may apply to a single act or course of conduct.[22]

In contrast, the revised statute includes a single penalty enhancement for involvement of a firearm, imitation firearm, or dangerous weapon, clearly requires a connection between the possession of a firearm, imitation firearm, or dangerous weapon and the drug crime, and does not provide enhanced liability for an imitation firearm or dangerous weapon that is not readily available to the actor at the time of the drug crime. This penalty enhancement changes current District law in three main ways. First, the revised enhancement does not treat firearms more severely as compared to other dangerous weapons or imitation weapons, and does not provide for stacking the enhancement with a duplicative crime of possessing a weapon during commission of a drug crime. This change caps the effect of a dangerous weapon or imitation dangerous weapon being possessed during the counterfeit substance offense to an increase of one penalty class as compared with an increase of up to 45 years.[23] Second, the revised enhancement requires that the

[19] The penalty enhancement under D.C. Code § 22-4502 applies to "crimes of violence" and "dangerous crimes." D.C. Code § 22-4501 defines "dangerous crime" as "distribution of or possession with intent to distribute a controlled substance."

[20] D.C. Code § 22-4504 could apply if a person distributes a controlled substance while constructively possessing a firearm or switchblade knife in his home located miles away, even if the weapon was inaccessible and played no role in commission of the offense

[21] *But see*, Easley v. United States, 482 A.2d 779 (D.C. 1984) (holding that when determining whether an actor was aware of a firearm, as required for constructive possession, a criminal venture is only relevant if there was a connection between the firearm and the criminal venture).

[22] *Hawkins v. United States*, 119 A.3d 687, 702 (D.C. 2015) (citing *Thomas v. United States,* 602 A.2d 647 (D.C.1992)). The penalty for distribution of, or possession with intent, to distribute a counterfeit substance that is an abusive or narcotic drug is 30 years. D.C. Code § 48-904.01. If the person commits this offense while possessing a firearm, the person may be subject to an additional 30 years, with a 5 year mandatory minimum, under the while armed enhancement in § 22-4502, and an additional 15 years, with a 5 year mandatory minimum under § 22-4504. In total, a person who distributes, or possesses with intent to distribute a counterfeit substance that is an abusive or narcotic drug while possessing a firearm is subject to a maximum of 75 years imprisonment, including two separate 5 year mandatory minimums. The 75 year maximum sentence exceeds the maximum sentence for first degree murder, absent aggravating circumstances. D.C. Code § 22-2104.

[23] Under D.C. Code 22-4502 a person convicted of a crime of violence or dangerous crime while armed with or having readily available a firearm or dangerous weapon may sentenced to a maximum of 30 years in addition to the penalty provided for the crime of violence or dangerous crime. D.C. Code § 22-4504

person possessed the firearm, dangerous weapon, or imitation firearm while committing and in furtherance of the drug offense. This change requires, as in comparable federal legislation,[24] proof of some nexus between possession of a firearm, imitation firearm, or dangerous weapon and the counterfeit substance offense, which excludes coincidental possession.[25] Third, the revised statute does not provide an enhancement for constructively possessing a firearm, dangerous weapon, or imitation firearm that isn't readily available to the actor, contrary to D.C. Code § 22-4504(b).[26] These latter two changes eliminate an enhancement for trafficking a controlled substance when there is not a substantially increased risk of harm during the offense due to possession of the firearm, dangerous weapon, or imitation dangerous weapon.[27] These changes improve the clarity, consistency, and proportionality of the revised statute.

Beyond these five substantive changes to current District law, two other aspects of the revised trafficking of counterfeit substances statute may constitute substantive changes to current District law.

First, the revised statute specifies that the actor must knowingly distribute, create, or possesses a counterfeit substance. The current statute does not specify any culpable mental state, there is no relevant DCCA case law, and there is no Redbook Jury Instruction that specifically applies to the counterfeit substance offense. One means of committing the current offense is to "possess with intent to distribute a counterfeit substance,"[28] but it is not clear whether this culpable mental state applies to other elements of the offense, and the phrase "with the intent" is not defined in the statute. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[29] Specifying a culpable mental state

provides a separate criminal offense for possessing a firearm or imitation firearm while committing a crime of violence or dangerous crime, subject to a maximum 15 year sentence.

[24] See generally, Charles Doyle, Congressional Research Service, Mandatory Minimum Sentencing of Federal Drug Offenses, January 11, 2018.

[25] For example, if a person distributes a controlled substance while possessing a 7 inch chef's knife with intent to use the knife as a weapon if someone attempts to take the controlled substances from him without payment, the penalty enhancement would apply. However, a person who distributes a controlled substance in a kitchen while incidentally in close proximity to a 7 inch chef's knife would not be subject to this penalty enhancement.

[26] The scope of the revised enhancement—"readily available"—matches the breadth of current D.C. Code § 22-4502, but is narrower than D.C. Code § 22-4504(b), which applies to any constructive possession. *Compare, Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (firearm in dresser in the same room as defendant was "readily accessible"), *with Moore v. United States*, 927 A.2d 1040, 1050 (D.C. 2007) (holding that evidence of constructively possession was sufficient when firearm found in defendant's apartment, while defendant was outside the apartment sitting in a car).

[27] An actor who constructively possesses a dangerous weapon in furtherance of a drug crime may still be liable for one or more separate weapon offenses under the RCC. See RCC § 22E-XXXX [Weapon crimes] and accompanying commentary for more details.

[28] D.C. Code § 48-904.01 (b)(1).

[29] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.

First, the revised statute does not refer to the terms "abusive" or "narcotic" drugs. The current statute provides different maximum penalties based on the type of substance involved in the offense. The highest penalty is reserved for offenses committed "with respect to . . . A counterfeit substance classified in Schedule I or II that is a narcotic or abusive drug[.]"[30] The terms "abusive drug" and "narcotic drug" are defined in the current D.C. Code, and include an array of controlled substances.[31] The revised statute does not use the terms "abusive drug" or "narcotic drug," but the first three grades of the offense enumerate all of the substances that are defined as "abusive" or "narcotic" under current law.

Second, the revised statute requires that the actor distributes, creates, or possesses a "measurable quantity" of a counterfeit substance. Although the current statute does not require any minimum quantity of counterfeit substance, the DCCA has clearly held that the current statute requires distribution, creation, or possession of a measurable quantity of a controlled substance.[32]

[30] D.C. Code § 48-904.01 (a)(2)(A).
[31] D.C. Code § 48-901.02.
[32] *Thomas v. United States*, 650 A.2d 183, 184 (D.C. 1994). Although the *Thomas* case did not involve the counterfeit substance offense, the DCCA held that "in order to secure a conviction for controlled substance violations, the government need only prove there was a measurable amount of the controlled substance in question."

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

Explanatory Note. *This section establishes the possession of drug manufacturing paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly possessing an object with intent to use the object to manufacture a controlled substance. The revised possession of drug manufacturing paraphernalia offense does not cover possession of objects with intent to use them for any other purpose related to controlled substances. The revised possession of drug paraphernalia statute replaces the current possession of drug paraphernalia statute that applies specifically to hypodermic needles and syringes[1], portions of the general drug paraphernalia statute criminalizing possession of drug paraphernalia,[2] the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11[3], and the statute specifying factors to be considered in determining whether object is paraphernalia.[4]*

Subsection (a) specifies the elements of possession of drug paraphernalia. Subsection (a) specifies that the accused must knowingly possess an object. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Subsection (a) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, which here requires that the accused was practically certain that he or she possessed an object. Subsection (a) also requires that the actor had intent to use the object to manufacture a controlled substance. The term "manufacture" is defined in RCC § 22E-701, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis[.]" The term "controlled substance" is defined under D.C. Code § 48-901.02, and includes a broad array of substances organized into five different schedules. The term "intent" is defined in RCC § 22E-206 and, applied here, requires that the accused was practically certain that he or she would use the object to manufacture a controlled substance. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the person actually used the object to manufacture a controlled substance, only that the person believed to a practical certainty that he or she would use the object to manufacture a controlled substance.

Subsection (b) provides three exclusions to liability. Paragraph (b)(1) provides an exception to liability if the object is 50 year of age or older. This exclusion applies regardless of the intended use of the object. Paragraph (b)(2) provides an exclusion to liability if the actor possesses an object with intent to use the object to package or repackage

[1] D.C. Code § 48-904.10.
[2] D.C. Code § 48-1103 (a)(1).
[3] D.C. Code § 48-1101 (3).
[4] D.C. Code § 48-1102.

a controlled substance for the actor's own use. Paragraph (b)(3) provides an exclusion to liability of the actor satisfies the requirements set forth under D.C. Code § 7-403.

Subsection (c) specifies penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (e) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised possession of drug manufacturing paraphernalia statute changes current District law in three main ways.*

First, the revised statute limits liability to possession of objects related to the manufacture of a controlled substance. The current D.C. Code general paraphernalia statute requires a person to use or possess with intent to use "drug paraphernalia," a defined term,[5] to "plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance[.]"[6] In addition, current D.C. Code § 48-904.01 specifically criminalizes possession of a "hypodermic needle, hypodermic syringe . . . with intent to use it for administration of a controlled substance by subcutaneous injection"[7] In contrast, the revised statute does not use a defined term of "drug paraphernalia" and more simply requires that the person possessed an object that was actually used to manufacture a controlled substance, or with intent to use it to manufacture a controlled substance. Objects that are used or intended for use for any other purpose, most notably personal consumption, are not covered by the revised statute.[8] This change improves the clarity and proportionality of the revised criminal code.

Second, the revised statute does not provide as a basis for liability that a person possesses an object that has been "designed for use" in manufacturing a controlled substance. The current D.C. Code paraphernalia statute includes liability for "objects used, intended for use, or designed for use in manufacturing…a controlled substance." [9] In contrast, the revised statute provides liability only for possession of an object with intent to use the object to manufacture a controlled substance. Determining whether an item is specially "designed for" a particular purpose based on its objective features is a potentially difficult task, subject to arguments over whether a possessor is sufficiently on notice as to

[5] D.C. Code § 48-1101 (3). This definition of "drug paraphernalia" includes a list of items that largely, though not entirely, replicates the functions of the object described in the general paraphernalia statute, for example: "planting," "propagating," "cultivating," "growing."
[6] D.C. Code § 48-1103.
[7] This statute also requires that the needle or syringe "has on it or in it any quantity (including a trace) of a controlled substance [.]"
[8] For example, possession of an instrument with intent to use it to ingest a controlled substance is not covered by the revised statute. This decriminalizes conduct currently covered by both D.C. Code § 48-904.10, and § 48-1103.
[9] D.C. Code § 48-1101 (3)(B).

the item being contraband.[10] Moreover, in practice, the revised statute's elimination of separate liability for possession of items "designed for use in manufacturing…a controlled substance" may be quite narrow. Most objects involved in the planned[11] manufacture of a controlled substance are either general purpose items not specially designed[12] for manufacturing a controlled substance, or, if they are so specially designed,[13] would need few additional facts to allow inference of an intent to use to manufacture a controlled substance under the revised statute. This change clarifies and improves the proportionality of the revised statute.

Third, the revised statute includes an exclusion to liability if a person possesses an object with intent to use the object to package or repackage a controlled substance for the person's own use. Under current law, the term "manufacturing" includes "any packaging or repackaging of the [controlled] substance" with no exception for personal use.[14] In contrast, the revised statute provides an exclusion to liability for possessing an object with intent to use it to package or repackage a controlled substance for the actor's own use. This change improves the proportionality of the revised statute.

Beyond these three substantive changes to current District law, two other aspects of the revised possession of drug paraphernalia statute may constitute substantive changes to current District law.

First, the revised statute specifies that the actor must knowingly possess an object. The current D.C. Code statute does not specify any culpable mental state as to the possession of the object, and there is no DCCA case law on point. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[15] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability,

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[10] *See, generally, Fatumabahirtu v. United States*, 26 A.3d 322, 333 (D.C. 2011)(discussing constitutional litigation of paraphernalia statutes regarding "notice as to when otherwise innocuous household items qualified as drug paraphernalia.").

[11] The revised statute continues liability for knowing possession of an object that has been used to manufacture a controlled substance.

[12] For example, scales, packaging equipment, adulterants, and other items listed in D.C. Code § 48-1101 (3)(B).

[13] For example, a chemical preparation apparatus configured in a unique way to produce a controlled substance.

[14] The current definition of the term "manufacture" includes exceptions for "preparation or compounding of a controlled substance by an individual for his or her own use," but not for packaging or repackaging of a controlled substance for his or her own use. D.C. Code § 48-901.01 (13).

[15] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Four other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute does not include an exception to liability for possession of testing equipment for the purpose of testing personal use quantities of a controlled substance. The current statute provides that "it shall not be unlawful for a person to use, or possess with the intent to use, [paraphernalia] for the purpose of testing personal use quantities of a controlled substance."[16] However, omitting this language is not intended to change District law. Under the revised possession of drug paraphernalia statute, possession of testing equipment with intent to test personal quantities of a controlled substance is not criminalized, as the revised statute requires that the actor possesses an object that has been used, or with intent to use, it to manufacture a controlled substance.

Second, the revised statute does not include an exception for possession of objects with intent to ingest or manufacture cannabis. The current statute provides an exception for persons 21 years of age or older who use, or possess with intent to use, paraphernalia to use or possess cannabis, or to grow, possess, harvest, or process cannabis plants in a manner lawful under D.C. Code § 48-904.01(a). However, omitting this exception is not intended to change current District law. A person who possesses an object with intent to use or possess would not be liable under the revised statute, which requires intent to manufacture. The term "controlled substance" as defined excludes cannabis plants that are grown in the manner set forth in D.C. Code § 48-904.01 (a). A person who possesses an object with intent to use it to grow, possess, harvest, or process cannabis plants in the manner that is lawful under D.C. Code § 48-904.01 (a) would not have the requisite intent to manufacture a "controlled substance," and would not liable under the revised offense.

Third, the revised statute includes an exclusion to liability if the object is 50 years of age or older. The current D.C. Code paraphernalia offenses do not include this exclusion. However, in the current D.C. Code § 48-1101 definition of "drug paraphernalia" it states that "[t]he term 'drug paraphernalia' shall not include any article that is 50 years of age or older." Although the revised statute does not use a defined term of "drug paraphernalia," this exclusion is intended to maintain current law by excluding cases involving objects that are 50 years of age or older.

Fourth, the forfeiture under D.C. Code § 48-1104 includes two technical amendments. First, the statute refers to the revised paraphernalia offenses under D.C. Code § 48-904.10 and § 48-904.11, instead of current D.C. Code § 48-1103. Second, the forfeiture statute also omits the reference to use or possession of drug paraphernalia for "personal use." Under the current forfeiture statute, money or currency that has been used

[16] D.C. Code § 48-1103.

or intended for use in conjunction with the use or possession of paraphernalia, other than for personal use, is subject to forfeiture. This limitation on the forfeiture statute is unnecessary under the revised statutes, as use or possession of an object that is used for personal use of a controlled substance is not a criminal offense.

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

Explanatory Note. *This section establishes the trafficking of drug paraphernalia offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly selling or delivering, or possessing with intent to sell or deliver, an object with intent that another person will use the object for one of several specified purposes in conjunction with a controlled substance. The revised distribution of drug paraphernalia statute replaces portions of the general drug paraphernalia statute that criminalize sale, delivery, or possession with intent to sell or deliver drug paraphernalia,[1] the definition of the term "drug paraphernalia" included in the statute defining terms as used in Subchapter I of Chapter 11,[2] and the statute providing factors to be considered in determining whether an object is paraphernalia.[3]*

Subsection (a) specifies the elements of trafficking of drug paraphernalia. Paragraph (a)(1) specifies that the accused must knowingly deliver or sell, or possess with intent to deliver or sell, an object. The terms "deliver" and "sell" are intended to have the same meaning as under current District law. "Possess" is a term defined in RCC § 22E-701, to mean to "hold or carry on one's person," or to "have the ability and desire to exercise control over." Paragraph (a)(1) also specifies that a "knowingly" culpable mental state applies, a term defined in RCC § 22E-206, and applied here requires that the accused was practically certain that he or she delivered, sold, or possessed an object. The term "intent" is defined in RCC § 22E-206, and applied here requires that the accused was practically certain that he or she would deliver or sell an object. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually delivered or sold the object, only that the actor possessed the object while believing to a practical certainty that he or she would deliver or sell the object.

Paragraph (a)(2) requires that the person had intent that another person will use the object to introduce into the human body, produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a controlled substance. The term "intent" is defined in RCC § 22E-206, and applied here requires that the accused was practically certain that another person would use the object for one of the specified purposes. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that another person actually used the object, only that the person believed to a practical certainty that another person would use the object for one of the specified purposes.

Subsection (b) provides four defenses to prosecution under this section. Subsection (b) uses the term "in fact," which specifies that there is no culpable mental state required as to any of the defenses provided under this subsection. Paragraph (b)(1) specifies that it

[1] D.C. Code § 48-1103 (b), (c), and (e).
[2] D.C. Code §48-1101 (3).
[3] D.C. Code § 48-1102.

is a defense that the object sold, delivered, or possessed, is testing equipment or other objects used, planned for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance, or for ingestion or inhalation of a controlled substance, provided that the actor is a community-based organization. The term "community-based organization" is defined in D.C. Code § 7-404, and means "an organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use . . . [and] includes all organizations currently participating in the Needle Exchange Program with the Department of Human Services under § 48-1103.01."

Paragraph (b)(2) specifies that it is a defense that the object sold, delivered, or possessed is an unused hypodermic syringe or needle.

Paragraph (b)(3) specifies that it is a defense that object sold, delivered, or possessed is an item planned for use in a medical procedure or treatment permitted under District or federal civil law, to be performed by a licensed health professional or by a person acting at the direction of a licensed health professional.

Paragraph (b)(4) specifies that it is a defense that object sold, delivered, or possessed is 50 years of age or older. This defense applies regardless of the planned use of the object.

Subsection (c) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (d) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (e) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised trafficking of drug paraphernalia statute changes current law in eight main ways.*

First, the revised distribution of drug paraphernalia statute does not require that the actor distributed or possessed "drug paraphernalia," a defined term that includes objects designed in a particular way. The current D.C. Code statute requires delivery or sale, or possession with intent to deliver or sell of "drug paraphernalia," a defined term which includes a broad array of specified objects used to produce, package, test, measure, or ingest a controlled substance, as well as any object "used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing . . . [a] controlled substance into the human body[.]"[4] In contrast, the revised statute covers any object provided that the accused intended that another person would use it for one of the specified purposes.[5] This change improves the clarity of the revised criminal code.

[4] D.C. Code § 48-1101 (3).

[5] This change may have no practical effect on current District law. As currently defined, any object can constitute "drug paraphernalia" if it is used or intended to be used to manufacture or ingest a controlled substance. Any time a person satisfies the elements under the revised statute, the object in question would have constituted "drug paraphernalia" as currently defined.

Second, the revised statute requires that the actor's sale, delivery, or possession with intent to sell or deliver the object be with intent that another person would use the object for one of the specified purposes. The current D.C. Code statute requires that the defendant sells or delivers paraphernalia "knowingly, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance[.]" The D.C. Court of Appeals has applied this culpable mental state language without discussion as to the meaning of such terms or whether or how such language equates to a negligence standard under the Model Penal Code or other jurisdictions."[6] Coupled with the current D.C. Code definition of "drug paraphernalia" as including, in part, items that are "designed for" use with controlled substances, the current statute provides liability for selling or delivering an item, without any awareness of that the other person may or will use that item in relation with a controlled substance. In contrast, the revised statute requires that the person's sale, delivery, or possession be with intent to sell or deliver an object be done "with intent" that the object be used for one of the specified purposes. While it need not be proven that an actor consciously desired for the recipient of the object to use it with respect to a controlled substance, the actor must be at least practically certain that the object would be used for such purposes. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[7] while basing criminal liability on negligence[8] is generally disfavored.[9]. This change improves the clarity and proportionality of the revised criminal code.

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[6] *Fatumabahirtu v. United States*, 26 A.3d 322, 336 (D.C. 2011). This case involved a glass ink pen, which could be used to inhale or ingest a controlled substance. However, the holding in *Fatumabahirtu* may presumably be applied to all other prohibited uses of drug paraphernalia.

[7] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[8] The DCCA's opinion in *Fatumabahirtu* strongly suggests that, per the current statute's reference to "under circumstances where one reasonably should know…," something akin to mere *negligence* as to whether the buyer would use the paraphernalia to ingest a controlled substance would suffice for criminal liability. The DCCA's opinion referenced the Model Drug Paraphernalia Act, which served as a model for the District's current paraphernalia statute and stated: "The knowledge requirement of Section B is satisfied when a supplier: (i) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from *which he should reasonably conclude there is a high probability* an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care." *Fatumabahirtu*, 26 A.3d at 334 (emphasis added). To the extent that the DCCA ruling in *Fatumabahirtu* establishes or requires a lower culpable mental state as to whether the person to whom an object is delivered or sold will use the object in a proscribed manner with respect to a controlled substance, that case would no longer be valid law upon adoption of the revised statute.

[9] The Supreme Court has stated that the principle that "the understanding that an injury is criminal only if inflicted knowingly is 'as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Rehaif v.*

Third, the revised statute does not specifically criminalize sale of items currently enumerated in D.C. Code § 48-1103 (e)(1). Under the current D.C. Code statute, sale of cocaine free base kits, glass or ceramic tubes,[10] cigarette rolling papers, and cigar wrappers is criminalized for most[11] vendors, regardless of their actual or intended use. In contrast, under the revised statute sale of these objects is not criminalized, unless the person selling the objects intends that another person will use them in a manner specified in paragraph (a)(2) in relation to a controlled substance. Most of these items are objects with legitimate uses[12] and are currently available for purchase by District residents on the websites of major online retail sellers—any sale of which may constitute a crime under current law.[13] This change improves the proportionality of the revised criminal code.

Fourth, the revised statute eliminates repeat offender penalties consistent with other nonviolent revised offenses in the RCC. Under the current D.C. Code statute, a person convicted of delivering or selling drug paraphernalia who has previously been convicted in the District of Columbia of a violation under subchapter I of Chapter 11, may be sentenced up to 2 years, four times the 6 month penalty for first time offenders. In contrast, the revised code omits any special repeat offender provision for trafficking of drug paraphernalia. The RCC general recidivism enhancement (RCC § 22E-606) is limited to RCC offenses against persons and enhanced burglary, which requires the presence of a dangerous weapon or imitation firearm. This change improves the consistency and proportionality of the revised criminal code.

Fifth, the revised statute eliminates penalty enhancements for delivering or selling paraphernalia to a person under the age of 18. Under the current D.C. Code statute, any person who is 18 year of age or older who delivers or sells paraphernalia to a person who is under the age of 18 and who is at least 3 years younger may be sentenced to a term of imprisonment of up to 8 years, sixteen times the penalty for delivery or sale to an adult.[14] In contrast, the revised statute does not include an age-based penalty enhancement. Delivering or selling drug paraphernalia to a minor would likely give rise to liability for contributing to the delinquency of a minor[15] that effectively raises the penalty for such behavior in a more proportionate manner. This change improves the proportionality of the revised criminal code.

United States, No. 17-9560, 2019 WL 2552487, at *4 (U.S. June 21, 2019) (quoting *Morisette v. United States*, 342 U.S. 246, 250 (1952)).

[10] The tubes must be 6 inches in length and 1 inch in diameter.

[11] The statute excepts from this blanket prohibition on sale certain businesses. Commercial retail or wholesaler establishments may sell cigarette rolling papers if the establishment: derives at least 25% of its total annual revenue from the sale of tobacco products; and sells loose tobacco intended to be rolled into cigarettes or cigars.

[12] *See, e.g.,* Toff, Nancy, *The Flute Book: A Complete Guide for Students and Performers* (2012) at 36.

[13] *See,* D.C. Code § 45–604 ("The word "person" shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.").

[14] D.C. Code § 48-1103 (c). Notably, an 8 year maximum sentence is longer than the maximum sentence authorized for felony assault, D.C. Code § 22-404, fourth degree sexual abuse, D.C. Code §22-3005, or second degree sexual abuse of a minor, D.C. Code § 22-3009.02.

[15] D.C. Code § 22–811(a)(5)(carrying a six-month maximum penalty for a first-time offense).

Sixth, paragraph (b)(1) of the revised statute include a defense for community-based organizations selling, delivering, or possessing with intent to sell or deliver any item for ingestion or inhalation of a controlled substance. The current D.C. Code statute states that "it shall not be unlawful for a community based organization as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, the materials described in § 48-1101(3)(D)."[16] By reference to D.C. Code § 48-1101(3)(D), the current statute excludes community-based organizations selling, delivering, or possessing with intent to sell or deliver certain types of testing equipment. In contrast, the revised statute also excludes community-based organizations selling, delivering, or possessing with intent to sell any item for ingestion or inhalation of a controlled substance. Community-based organizations may address public health concerns associated with controlled substance use by distributing items for use in ingesting or inhaling controlled substance. The revised statute bars criminal liability in these cases. This change improves the proportionality of the revised criminal code.

Seventh, paragraph (b)(2) of the revised statute includes a defense for selling, delivering, or possessing with intent to sell or deliver an unused hypodermic syringe or needle. Under current D.C. Code § 48-1103.01, certain persons authorized by the Needle Exchange Program may distribute hypodermic needles and syringes. In contrast, the revised statute excludes any person selling, delivering, or possessing with intent to sell an unused hypodermic needle. Used hypodermic syringes and needles present significant health risks, and distribution of unused needles and syringes can mitigate this risk, regardless of whether the person distributing them is authorized under the Needle Exchange Program. This change improves the proportionality of the revised criminal code.

Eighth, paragraph (b)(3) of the revised statute include a defense for selling, delivering, or possessing with intent to sell or deliver an item planned for use in a medical procedure or treatment. Current District law does not provide a defense for distribution of paraphernalia for such purposes. Under current law, it appears that selling a hypodermic needle planned for use by a physician or nurse in administering a controlled substance constitutes a criminal offense. In contrast, the revised statute establishes that this conduct is not subject to criminal liability. Including this defense improves the clarity and proportionality of the revised criminal code.

Beyond these eight substantive changes to current District law, two other aspects of the revised possession of drug paraphernalia statute may constitute substantive changes to current District law.

First, the revised statute specifies that the actor must knowingly distribute or sell the object that is to be used in connection with a controlled substance. The current D.C. Code statute does not specify any culpable mental state for "deliver or sell," however the DCCA has stated that the current statute requires "specific intent" to deliver or sell the paraphernalia.[17] The revised statute specifies that a "knowingly" culpable mental state is

[16] D.C. Code § 48-1103(b)(1)(A).
[17] *Fatumabahirtu*, 26 A.3d at 325 ("We hold that D.C.Code § 48–1103(b) requires the government to prove that an owner or a clerk of a commercial retail store had (1) the specific intent to deliver or sell drug

required. Applying a knowledge requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[18] Specifying a culpable mental state for the offense improves the clarity of the RCC and is consistent with requirements for most other offenses.

Second, the revised statute specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense. The current D.C. Code generally does not codify consistent definitions, rules of liability, rules of interpretation, or general defenses. In contrast, Subtitle I of Title 22E sets forth broadly applicable rules and definitions relating to the basic requirements of criminal liability, inchoate liability, justification defenses, and penalty enhancements. Application of these general provisions to the possession of a controlled substance offense may change District law in numerous ways. For more in depth discussion of these general provisions, see commentary accompanying statutory provisions in Subtitle I of Title 22E. These changes improve the clarity, completeness, and proportionality of the revised offense.

Five other changes to the revised statute are clarificatory in nature and are not intended to change current District law.

First, the revised statute does not specifically criminalize manufacturing drug paraphernalia. The current D.C. Code statute specifically includes "manufacture with intent to deliver or sell drug paraphernalia" as a distinct form of a paraphernalia offense.[19] The revised statute, however, does not explicitly refer to manufacturing objects that are intended for use with controlled substances because such language is surplusage and potentially confusing. A person who manufactures an object would also necessarily possess the object, and fall within the scope of the revised statute.

Second, the defense under paragraph (b)(1) specifically lists testing equipment and other objects rather than rely on a cross reference. The current D.C. Code statute states that "it shall not be unlawful for a community based organization to as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, the materials described in § 48-1101(3)(D)."[20] In the revised statute the term "community based organization" is cross-referenced in the subsection (e), and retains the same meaning as under current law. However, instead of referring to D.C. Code § 48-1101(3), paragraph (b)(1) specifies the testing equipment and objects that are excluded from the offense, using language copied verbatim from current D.C. Code § 48-1103(3)(D).

Third, the revised statute includes an exclusion to liability if the object is 50 years of age or older. The current D.C. Code paraphernalia offense does not include this

paraphernalia (as defined in D.C.Code § 48–1101(3))…."). The DCCA discussion of "specific intent" in *Fatumabahirtu* does not appear to distinguish between conduct to "deliver or sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell."

[18] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[19] D.C. Code § 48-1103 (b)(1). Notably, unlike Chapter 9 of Title 48, which contains most controlled substance offenses and penalties, the term "manufacture" is not defined for Chapter 11.

[20] D.C. Code § 48-1103(b)(1)(A).

exclusion, however, current D.C. Code § 48-1101 states that "[t]he term 'drug paraphernalia' shall not include any article that is 50 years of age or older." Although the revised statute does not use the term "drug paraphernalia," this exclusion is intended to maintain current law in excluding cases involving objects that are 50 years of age or older.

Fourth, the revised statute does not include an exception for selling, delivering, or possessing with intent to sell or deliver objects with intent that another person will use the object to possess, use, grow, harvest, or process cannabis. The current statute provides an exception for selling, delivering, or possessing with intent to sell or deliver drug paraphernalia "under circumstances in which one knows or has reason to know that such drug paraphernalia will be used solely for use of marijuana that is lawful under § 48-904.01(a), or that such drug paraphernalia will be used solely for growing, possession, harvesting, or processing of cannabis plants that is lawful under § 48-904.01(a)."[21] However, omitting this exception is not intended to change current District law. A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that a person will use the object to use, possess, grow, harvest, or process cannabis plants in a manner that is lawful under § 48-901.01(a) will not be liable under the revised offense. Under both current law and the RCC, the term "controlled substance" does not include marijuana used or possessed in manner defined in §48-904.01 (a), or cannabis plants that are grown in the manner set forth in D.C. Code § 48-904.01 (a). A person who sells, delivers, or possesses with intent to sell or deliver an object with intent that another person will use the object with marijuana or cannabis plants in a manner that is lawful under D.C. Code § 48-904.01 (a) would not have the requisite intent that another person will use the object to produce, process, prepare, test, analyze, pack, store, conceal, manufacture, or measure a "controlled substance," and would not liable under the revised offense.

Fifth, the forfeiture statute under D.C. Code § 48-1104 includes two technical amendments. First, the statute refers to the revised paraphernalia offenses under D.C. Code § 48-904.10 and § 48-904.11, instead of current D.C. Code § 48-1103. Second, the forfeiture statute also omits the reference to use or possession of drug paraphernalia for "personal use." Under the current forfeiture statute, money or currency that has been used or intended for use in conjunction with the use or possession of paraphernalia, other than for personal use, is subject to forfeiture. This limitation on the forfeiture statute is unnecessary under the revised statutes, as use or possession of an object that is used for personal use of a controlled substance is not a criminal offense.

[21] D.C. Code § 48-1103 (b)(1).

RCC § 48-904.12. Maintaining Methamphetamine Production.

Explanatory Note. *This section establishes the maintaining methamphetamine production offense for the Revised Criminal Code (RCC). The offense criminalizes knowingly opening or maintaining a place with intent to manufacture methamphetamine. The offense does not include merely packaging, repackaging, labeling, or relabeling methamphetamine. The maintaining methamphetamine production offense replaces the current D.C. Code § § 48–904.03, which criminalizes opening or maintaining a place to manufacture, distribute, or store for the purposes of manufacturing or distributing a narcotic or abusive drug.*

Subsection (a) specifies the elements of maintaining methamphetamine production. Subsection (a) requires that the actor opens or maintains any location. Subsection (a) also specifies a culpable mental state of knowledge, a term defined in RCC § 22E-206 which here requires that the accused must be practically certain that he or she is opening or maintaining any location. Subsection (a) also requires that the actor with intent to manufacture methamphetamine, its salts, isomers, or salts of its isomers. Per RCC § 22E-205, the object of the phrase "with intent that" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the anyone actually manufactured methamphetamine.

Subsection (a) excludes certain types of manufacturing. The term "manufacture" is defined in D.C. Code § 48-901.02, and means "the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container." Subsection (a) specifies that maintaining a place with intent to package, repackage, label, or relabel methamphetamine is not included in the offense.

Subsection (b) specifies relevant penalties for the offense. [*See* RCC §§ 22E-603 and 22E-604 for the imprisonment terms and fines for each penalty class.]

Subsection (c) cross-references applicable definitions located elsewhere in Chapter 9 of Title 48 and in the RCC.

Subsection (d) specifies that the general provisions of Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to this offense.

Relation to Current District Law. *The revised maintaining a place for methamphetamine manufacturing statute changes current District law in two main ways.*

First, the revised requires intent to manufacture methamphetamine. The current statute includes maintaining or opening a location "for the purpose of manufacture or distribution a narcotic or abusive drug."[1] By contrast, the revised statute does not criminalize maintaining a location with intent to manufacture substances other than

[1] D.C. Code § 48-904.03a.

methamphetamine, or with intent to distribute any controlled substance. Conspiracy and accomplice liability are sufficient to deter and punish maintaining a location for manufacturing or distributing other controlled substances. However, due to the particular dangerousness associated with manufacturing methamphetamine, a separate criminal offense, with different culpability requirements than required for accomplice[2] or conspiracy[3] liability, is warranted. This change improves the proportionality of the revised criminal code.

Second, the revised excludes maintaining a location with intent to package, repackage, label, or relabel, methamphetamine. The current statute does not include any exclusions or exceptions to liability. By contrast, the revised statute excludes certain types of conduct that are included in the definition of "manufacture." Although included in the definition of "manufacture," packaging and labeling of methamphetamine does not create the same safety risks associated with the actual production of methamphetamine. This change improves the proportionality of the revised criminal code.

Beyond these two main changes to current District law, one other aspect of the revised maintaining a place for methamphetamine manufacturing statute may constitute a substantive change to current District law.

The revised statute criminalizes maintaining or opening a location with intent to manufacture methamphetamine. The current statute criminalizes knowingly opening or maintaining any location "*to* manufacture, distribute, or store *for the purpose* of manufacture or distribution a narcotic or abusive drug." The current statute is semi-inchoate in that it does not require that the location actually be used to manufacture or distribute a controlled substance. However, although the statute requires that the person must knowingly open or maintain a place, it does not specify a culpable mental state as to whether the location will be used to manufacture or store controlled substances. The revised statute resolves this ambiguity by specifying that the actor must act "with intent" that the location will be used to manufacture methamphetamine.

[2] Under RCC § 22E-210, accomplice liability requires that the actor acts with the culpability required by the offense, and either *purposely* assists another person with the planning or commission of conduct constituting that offense; or *purposely* encourages another person to engage in specific conduct constituting that offense. A person who maintains a location knowing but not *consciously desiring* that it be used to manufacture methamphetamine would not satisfy the requirements for accomplice liability.

[3] Under RCC § 22E-303, conspiracy liability requires that the actor *purposely agrees* "to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense[.]" A person who maintains a location knowing that another person will use the location to manufacture methamphetamine, without purposely forming an agreement with the other person would not be guilty of conspiracy to manufacture methamphetamine.

The CCRC repeats its prior recommendations to the Council and Mayor in Report #1: Recommendations for Enactment of D.C. Code Title 22 and Other Changes to Criminal Statutes (May 5, 2017) to repeal the following offenses:

1. D.C. Code § 3-206. Repeal of Unlawful acts.
2. D.C. Code § 4-125. Repeal of Assisting child to leave institution without authority; concealing such child; duty of police.
3. D.C. Code § 8-305. Repeal of Penalty.
4. D.C. Code § 9-433.01. Repeal of Permit required; exceptions.
5. D.C. Code § 9-433.02. Repeal of Penalty; prosecution.
6. D.C. Code § 22-1003. Repeal of Rest, water and feeding for animals transported by railroad company.
7. D.C. Code § 22-1012(a). Repeal of Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.
8. D.C. Code § 22-1308. Repeal of Playing games in streets.
9. D.C. Code § 22-1317. Flying fire balloons or parachutes.
10. D.C. Code § 22-1402. Recordation of deed, contract, or conveyance with intent to extort money.
11. D.C. Code § 22-1807. Punishment for offenses not covered by provisions of Code.
12. D.C. Code § 22-3303. Repeal of Grave robbery; burying or selling dead bodies.
13. D.C. Code § 22-3320. Repeal of Obstructing public road; removing milestones.
14. D.C. Code § 34-701. Repeal of False statements in securing approval for stock issue.
15. D.C. Code § 34-707. Repeal of Destruction of apparatus or appliance of Commission.
16. D.C. Code § 36-153. Repeal of Unauthorized use, defacing, or sale of registered vessel.
17. D.C. Code § 47-102. Repeal of Total indebtedness not to be increased.

D.C. Code § 5-115.03. Repeal of Neglect to Make Arrest for Offense Committed in Presence.

Explanatory Note and Relation to Current District Law.

Current D.C. Code § 5-115.03 provides:

> If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding $500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.[1]

The D.C. Court of Appeals (DCCA) does not appear to have published any opinions in which a criminal defendant was charged with violating this statute. However, the DCCA has referred to this statute when finding that members of the Metropolitan Police Departments are "always on duty."[2] Additionally, the U.S. District Court for the District of Columbia has referred to this statute when finding that the District does not have a policy or practice of allowing officers to break the law and shielding the government from liability under 42 U.S.C. § 1983.[3]

There is no legislative history available as to the original intent of the statute because it is among the oldest in the D.C. Code. The crime began as part of wartime (Civil War) 1861 legislation that originally created a unified "Metropolitan Police district of the District of Columbia" out of the "corporations of Washington and Georgetown, and the county of Washington." [4]

The scope of D.C. Code § 5-115.03 is ambiguous because it does not specify culpable mental states as to applicable criminal laws or the relevant conduct of persons. In

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[1] D.C. Code § 5-115.03.

[2] *See* D.C. Code § 22–405; *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010)(finding off-duty police officers are protected by the District's assault on a police officer statute); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997)(finding private business not liable for the unlawful actions of the off-duty police officers they employed as security guards).

[3] *Gregory v. District of Columbia*, 957 F. Supp. 299 (D.D.C. 1997)

[4] *See Compilation of the Laws in Force in the District of Columbia, April 1, 1868,* U.S. Government Printing Office (1868) at 400, (available online at https://books.google.com/books?id=87kWAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false) (citing Congress' August 6, 1861 Act to create a Metropolitan Police district of the District of Columbia, and to establish a police therefor, and providing in section 21 of the law: "It shall be a misdemeanor punishable by imprisonment in the county jail or penitentiary not exceeding two years, or by a fine not exceeding five hundred dollars for any person without justifiable or excusable cause to use personal violence upon any elector in said district, or upon any member of the police force thereof when in the discharge of his duty, or for any such member to neglect making any arrest for an offence against the law of the United States, committed in his presence, or for any person not a member of the police force to falsely represent himself as being such member, with a fraudulent design.").

other words, it is unclear from the statute whether police officers may be criminally liable for neglecting to arrest persons if he or she is unaware of the laws being broken or that person's conduct.[5]

However, even if limited to situations where an officer knows a person is breaking a criminal law in their presence, the statutory language makes no exception for the many circumstances in which safety concerns or District policy would require an officer to decline to arrest. In some situations, requiring an officer to make an arrest may compromise the officer's safety,[6] the arrestee's safety,[7] or the safety of a third party.[8] In some situations, Metropolitan Police Department (MPD) orders specifically direct officers to engage with people in a manner that may not result in an arrest for wrongdoing.[9] In still other situations, District law[10] conflicts with federal law[11] and requiring an arrest undermines the District's authority to make and enforce its own criminal laws.[12]

In rare circumstances,[13] requiring law enforcement officers to make arrests for criminal actions they know to be committed in their presence may be consistent with District policy. The CCRC will evaluate such situations in the context of its review of future offenses. However, the CCRC recommends the repeal of the broad failure to make arrest requirement in D.C. Code § 5-115.03. This change improves the consistency and proportionality of the revised offenses.

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[5] For example, it is unclear if an officer would be liable for failure to arrest when he or she observes a group of people playing outside without knowing that the game they are playing is shindy or that there is a law against playing shindy, D.C. Code § 22-1308.

[6] E.g., the officer is undercover, the officer is outnumbered, the officer is unarmed or physically outmatched,

[7] E.g., a person in need of immediate medical care for an injury, illness, or psychiatric condition. *See* D.C. Code § 21-521.

[8] E.g., a hostage.

[9] *See., e.g.,* Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011; Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992; Metropolitan Police Department, Special Order 96-10, July 10, 1996; Metropolitan Police Department, General Order 502.04, April 24, 2018;

[10] D.C. Code § 48-1201 (providing a civil penalty for possession of marijuana, one ounce or less).

[11] 21 U.S. Code § 844 (criminalizing possession of a controlled substance, including marijuana).

[12] Notably, the District recently adopted a policy of non-custodial arrests for public consumption of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, Washington Post, September 21, 2018, *available at* https://wapo.st/2OJBEZo?tid=ss_mail&utm_term=.9078c3261301.

[13] *See, e.g.,* D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply). Another situation where a mandatory arrest policy may be considered is when a law enforcement officer is present during a criminal act by another officer. For example, Officer A witnesses Officer B steal narcotics from the evidence control branch and, although A did not consciously desire B to steal and was not an accomplice or accessory after-the-fact, he fails to arrest B to protect B's job. In such situations, the officer's failure to arrest may be conduct sufficiently harmful to be criminalized. This situation will be reviewed when the CCRC examines the District's obstruction of justice statutory provisions.

D.C. Code §§ 7-2502.12 and 7-2502.13. Repeal of Possession of Self-Defense Sprays.

Explanatory Note and Relation to Current District Law. Current D.C. Code § 7-2502.12 provides:

> For the purposes of §§ 7-2502.12 through 7-2502.14, the term:
>
> "Self-defense spray" means a mixture of a lacrimator including chloroacetophenone, alphacloracetophenone, phenylchloromethylketone, orthochlorobenazalm-alononitrile or oleoresin capsicum.

Current D.C. Code § 7-2502.13 provides:

> (a) Notwithstanding the provisions of § 7-2501.01(7)(C), a person may possess and use a self-defense spray in the exercise of reasonable force in defense of the person or the person's property only if it is propelled from an aerosol container, labeled with or accompanied by clearly written instructions as to its use, and dated to indicate its anticipated useful life.
>
> (b) No person shall possess a self-defense spray which is of a type other than that specified in §§ 7-2502.12 to 7-2502.14.

D.C. Code § 7-2502.14 has already been repealed.

The meaning and scope of a "self-defense spray" is unclear. Specifically, it is unclear from whether § 7-2502.12 defines the permissible "self-defense spray" to include any mixture containing a lacrimator of any kind and non-lacrimators, any mixture consisting solely of lacrimators that are one of the five listed substances, or any mixture consisting solely of lacrimators of any kind.

The proportionality of criminal penalties for possession of a self-defense spray is also questionable. The District of Columbia Court of Appeals ("DCCA") has held that lacrimators are unlikely to cause great bodily injury.[1] However, simple possession of a self-defense spray is currently punishable by up to one year in jail,[2] the same maximum penalty currently available for possession of a fully automatic machine gun.[3]

Under the revised code, harmful uses of a self-defense spray would remain criminal even without a separate offense penalizing possession of such a spray. Any object, including a self-defense spray of any kind, is treated as a dangerous weapon if the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury.[4]

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[1] *See Jones v. United States*, 67 A.3d 547 (D.C. 2013).
[2] D.C. Code § 7-2507.06.
[3] D.C. Code §§ 22-4514(a) and 22-4515; *see also* D.C. Code § 7-2501.01(10) (defining "machine gun").
[4] RCC § 22E-701 (defining "dangerous weapon"). Consider, for example, an actor who uses self-defense spray against a person who is operating a motor vehicle.

Furthermore, if an actor uses a self-defense spray to assault another person, the potential punishment is determined by the degree of the injury suffered. For example, if the spray causes an injury that requires immediate medical treatment beyond what a layperson can personally administer,[5] the assault may be punished as a third or fourth degree assault, instead of as a sixth degree, simple assault.[6] Other offenses committed by use of a self-defense spray also are penalized more severely in the RCC, including robbery,[7] criminal threats,[8] sexual assault,[9] kidnapping,[10] and criminal restraint.[11]

However, the RCC differentiates self-defense sprays from firearms and other weapons. Weapons that are most likely to facilitate a mass casualty event, are prohibited and punished as contraband *per se*.[12] Weapons that are likely to cause a more serious bodily injury are punished if they are carried outside of the home,[13] possessed with intent to commit a crime,[14] or possessed during a crime.[15]

This change clarifies, logically reorganizes, and improves the consistency and proportionality of the revised offenses.

[5] *See* RCC § 22E-701 (defining "significant bodily injury").
[6] RCC § 22E-1202.
[7] RCC § 22E-1201.
[8] RCC § 22E-1204.
[9] RCC § 22E-1301.
[10] RCC § 22E-1401.
[11] RCC § 22E-1402.
[12] RCC § 22E-4101.
[13] RCC § 22E-4102.
[14] RCC § 22E-4103.
[15] RCC § 22E-4104.

D.C. Code § 22-1311. Repeal of Allowing Dogs to Go at Large.

The Commission recommends repealing in its entirety D.C. Code § 22-1311, the offense of allowing dogs to go at large. The current statute only applies to fierce or dangerous dogs, and female dogs while in heat. As it pertains to fierce or dangerous dogs, the conduct prohibited by D.C. Code § 22-1311 is duplicative of prohibited conduct found either elsewhere in the D.C. Code or in the DCMR, and is unnecessary. As it pertains to female dogs in heat, such conduct is not suitable for criminal punishment.

Explanatory Note and Relation to Current District Law.

The statutory section recommended for repeal constitute, D.C. Code § 22-1311, entitled "Allowing dogs to go at large," provides:

> (a) If any owner or possessor of a fierce or dangerous dog shall permit the same to go at large, knowing said dog to be fierce or dangerous, to the danger or annoyance of the inhabitants, he shall upon conviction thereof, be punished by a fine not exceeding $5,000; and if such animal shall attack or bite any person, the owner or possessor thereof shall, on conviction, be punished by a fine not exceeding $10,000, and in addition to such punishment the court shall adjudge and order that such animal be forthwith delivered to the poundmaster, and said poundmaster is hereby authorized and directed to kill such animal so delivered to him.
>
> (b) If any owner or possessor of a female dog shall permit her to go at large in the District of Columbia while in heat, he shall, upon conviction thereof, be punished by a fine not exceeding $20.

While D.C. Code § 22-1311(a) is constructed to apply only to dangerous or fierce dogs, the prohibited conduct is largely addressed in the D.C. Municipal Regulations (DCMR) provision regarding dogs generally. Specifically, Section 24-900 of the DCMR provides in part:

> No person owning, keeping, or having custody of a dog in the District shall permit the dog to be on any public space in the District, other than a dog park established by section 9a of the Animal Control Act of 1979, passed on 2nd reading on September 20, 2005 (Enrolled version of Bill 16-28), unless the dog is firmly secured by a substantial lease. The leash shall be held by a person capable of managing the dog.

Section 24-900 further provides that anyone who violates the subsection above, "...shall be punished by a fine of not more than three hundred dollars ($300), or by imprisonment not exceeding ten (10) days".

Much like D.C. Code § 22-1311(a), DCMR 24-900, prohibits dogs at large conduct and punishes violators with a monetary penalty. While the maximum monetary penalty allowable under D.C. Code § 22-1311(a) ($5000) is much greater than what is permissible under the DCMR ($300), the DCMR also offers a short period of imprisonment for those who violate this regulation.

The main distinction between D.C. Code § 22-1311(a) and DCMR 24-900 is that the former specifically holds owners of known dangerous or fierce dogs accountable when those dogs attack or pose a danger to others. However, the definition of a "fierce or dangerous dog" is not provided in Title 22 and has not been specified by case law.

However, Title 8, Chapter 19, the Environmental and Animal Control and Protection section of the D.C. Code does address dangerous dogs. Specifically, D.C. Code § 8-1905 provides:

> It shall be unlawful to:
>
> (1) Keep a potentially dangerous or dangerous dog without a valid certificate of registration issued under § 8-1904;
>
> (2) *Permit a potentially dangerous dog to be outside a proper enclosure unless the potentially dangerous dog is under the control of a responsible person and restrained by a chain or leash, not exceeding 4 feet in length*;
>
> (3) Fail to maintain a dangerous dog exclusively on the owner's property except for medical treatment or examination. When removed from the owner's property for medical treatment or examination, the dangerous dog shall be caged or under the control of a responsible person and muzzled and restrained with a chain or leash, not exceeding 4 feet in length. The muzzle shall be made in a manner that will not cause injury to the dangerous dog or interfere with its vision or respiration, but shall prevent it from biting any human being or animal;
>
> (4) Fail to notify the Mayor within 24 hours if a potentially dangerous or dangerous dog is on the loose, is unconfined, has attacked another domestic animal, has attacked a human being, has died, has been sold, or has been given away. If the potentially dangerous or dangerous dog has been sold or given away, the owner shall also provide the Mayor with the

> name, address, and telephone number of the new owner of the potentially dangerous or dangerous dog;
> (5) Fail to surrender a potentially dangerous or dangerous dog to the Mayor for safe confinement pending disposition of the case when there is a reason to believe that the potentially dangerous or dangerous dog poses a threat to public safety;
>
> (6) Fail to comply with any special security or care requirements for a potentially dangerous or dangerous dog the Mayor may establish pursuant to § 8-1903; or
>
> (7) Remove a dangerous dog from the District without written permission from the Mayor.

Much like the DCMR, D.C. Code Title 8 Chapter 19 provides for both a monetary penalty and a period of confinement for those who violate the above Code and gives the Office of the Attorney General jurisdiction to prosecute violators. As D.C. Code § 22-1311(a) provides a monetary penalty as high as $10,000 when a dangerous or fierce dog attacks or causes injury to another, Title 8 Chapter 19 provides the exact same monetary penalty but applies to a broader scope of conduct.

Notably, a CCRC analysis of data received from the Superior Court of the District of Columbia indicates that over the entire 10-year span of 2009-2018 there were no adult convictions for allowing dogs to go at large under D.C. Code § 22-1311(a), D.C. Code § 8-1905, or DCMR 24-900.

D.C. Codes §§ 22-1511 - 22-1513. Repeal of Fraudulent Advertising.

The Commission recommends the repeal of D.C. Code § 22-1511, which criminalizes fraudulent advertising, and D.C. Code §§ 22-1512 and 22-1513, which specify prosecutorial authority and relevant penalties for the offense.

Explanatory Note and Relation to Current District Law
Current D.C. Code § 22-1511 provides:

> It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse receipt, or any security; or with the purpose to deceive, mislead, or induce any person, firm, association, or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead, or induce any other person, firm, or corporation for a valuable consideration to employ the services of any person, firm, association, or corporation so advertising such services.

Repealing the fraudulent advertising statute in D.C. Code § 22-1511 will decriminalize little conduct because nearly all such conduct is already prohibited under the District's current fraud statute[1] and will be criminalized by the RCC fraud statute.[2] The revised fraud statute criminalizes taking, obtaining, transferring, or exercising control over property, with the consent of the owner obtained by deception.[3] However, repealing the fraudulent advertising statute does narrow current District law in one or two minor ways.

[1] D.C. Code § 22-3221. ("A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.")
[2] RCC § 22E-2201. A person commits fraud when that person "Knowingly takes, obtains, transfers, or exercises control over the property of another; (2) With the consent of an owner obtained by deception; (3) With intent to deprive that owner of the property[.]"
[3] RCC § 22E-2201.

First, the fraudulent advertising statute differs from the RCC's fraud statute in that the fraudulent advertising statute covers conduct "with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value." Consequently, the current fraudulent advertising statute does not require that the actor actually succeeded in defrauding anyone.[4] In contrast, the RCC's fraud statute requires that the actor actually takes, obtains, transfers, or exercises control over property. However, the RCC fraud statute still criminalizes conduct an actor who is unsuccessful in defrauding anyone through the use of deceptive advertising if the conduct is sufficiently close to success that it constitutes an attempt.[5]

Second, the fraudulent advertising statute differs from the RCC's fraud statute in that the fraudulent advertising statute is silent as to whether it includes advertising with immaterial misleading statements or puffery. The plain language seems to suggest even the most trivial, ineffective, or clearly outrageous claims could satisfy the elements of the offense, and there is no relevant D.C. Court of Appeals case law. However, the revised fraud offense specifically excludes liability for such minimal harms by requiring the property of another be obtained by means of "deception" and defining "deception" as "creating or reinforcing a *material* false impression," and excludes "puffing statements unlikely to deceive ordinary persons[.]"[6] Consequently, to the extent that the fraudulent advertising statute includes displaying advertising that includes immaterial misrepresentations[7] or mere puffery[8], repealing the statute would decriminalize this conduct.

Repealing the fraudulent advertising statute eliminates unnecessary overlap, and improves the proportionality and consistency of the revised criminal code.

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[4] *See, Green v. United States*, 312 A.2d 788, 791 (D.C. 1973) (evidence for fraudulent advertising sufficient even without proof that any customers actually purchased falsely advertised goods).
[5] RCC § 22E-301.
[6] RCC § 22E-701 (emphasis added).
[7] For example, if an alcohol vendor advertises liquor as being 50% alcohol by volume, but the liquor is actually only 49.9% alcohol by volume, this immaterial misrepresentation could arguably constitute fraudulent advertising.
[8] For example, if the owner of a diner displays an advertisement that says "word's best coffee," when the diner's coffee is not actually the best coffee in the entire world, these puffing statements would not constitute deception as defined in the RCC, but could arguably constitute fraudulent advertising.

D.C. Codes §§ 22-2301 – 22-2306. Repeal of Panhandling.

The Commission recommends repealing in their entirety D.C. Code §§ 22-2301 – 22-2306 concerning the offense of panhandling.[1] Most panhandling statutory provisions appear to be facially unconstitutional under recent Supreme Court case law, and the most severe forms of behavior addressed by the provisions involve conduct that is already criminalized in the RCC and current D.C. Code. For those provisions of the panhandling statute that may be constitutional and not otherwise criminalized, a criminal sanction does not appear to be proportionate. Panhandling may be regarded as a status offense that criminalizes conduct associated with poverty and homelessness. Repealing the panhandling statutes avoids constitutional challenges, eliminates unnecessary overlap, and improves the proportionality in the revised statutes.

Explanatory Note and Relation to Current District Law.

The statutory sections recommended for repeal constitute the sections in D.C. Code Title 22 Chapter 32, entitled "Panhandling." The primary statute describing the offense is D.C. Code § 22-2302, which provides:

> (a) No person may ask, beg, or solicit alms, including money and other things of value, in an aggressive manner in any place open to the general public, including sidewalks, streets, alleys, driveways, parking lots, parks, plazas, buildings, doorways and entrances to buildings, and gasoline service stations, and the grounds enclosing buildings.
> (b) No person may ask, beg, or solicit alms in any public transportation vehicle; or at any bus, train, or subway station or stop.
> (c) No person may ask, beg, or solicit alms within 10 feet of any automatic teller machine (ATM).
> (d) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle that is in traffic on a public street.
> (e) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or reserving a public parking space, or directing the operator or occupant to a public parking space.
> (f) No person may ask, beg, or solicit alms in exchange for cleaning motor vehicle windows while the vehicle is in traffic on a public street.
> (g) No person may ask, beg, or solicit alms in exchange for protecting, watching, washing, cleaning, repairing, or painting a motor vehicle or bicycle while it is parked on a public street.
> (h) No person may ask, beg, or solicit alms on private property or residential property, without permission from the owner or occupant.

[1] D.C. Code § 22-2301. Definitions; D.C. Code § 22-2303. Prohibited Acts; § 22-2303. Permitted activity; § 22-2304. Penalties; § 22-2305. Conduct of prosecutions; and § 22-2306. Disclosures.

Other statutes in Chapter 23 concern: definitions;[2] a statement that exercise of a constitutional right to "picket, protest, or speak, and acts authorized by a permit" issued by D.C. government are all lawful;[3] that punishment for the offense is up to 90 days imprisonment, a fine, or both;[4] and that panhandling is to be prosecuted by the Attorney General.[5]

The panhandling statute criminalizes two broad categories of speech that involve use of "ask[ing], beg[ging], or solicit[ing] alms," defined as the "the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value."[6] The first category involves asking for donations in any public place in conjunction with some additional conduct—e.g., making a person fear bodily harm, touching a person without consent, repeating requests after being told no, or blocking someone's passage.[7] The second category involves asking for donations in one of several narrowly-specified public locations[8] (e.g., at a bus stop) or any private location.[9]

It has long been established that under the First Amendment, laws that target speech based on its communicative content are presumptively unconstitutional and can survive legal challenge only if they are narrowly-tailored to serve compelling state interests (under a strict-scrutiny test).[10] When the District's panhandling statute was enacted in 1993, however, Supreme Court precedent suggested that the speech involved in asking for a

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[2] D.C. Code § 22-2301 ("For the purposes of this chapter, the term: (1) 'Aggressive manner' means: (A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession; (B) Touching another person without that person's consent in the course of asking for alms; (C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or (D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact. (2) 'Ask, beg, or solicit alms' includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value.").

[3] D.C. Code § 22-2303 ("Acts authorized as an exercise of a person's constitutional right to picket, protest, or speak, and acts authorized by a permit issued by the District of Columbia government shall not constitute unlawful activity under this chapter.").

[4] D.C. Code § 22-2304 ("(a) Any person convicted of violating any provision of § 22-2302 shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 90 days or both. (b) In lieu of or in addition to the penalty provided in subsection (a) of this section, a person convicted of violating any provision of § 22-2302 may be required to perform community service as provided in § 16-712.").

[5] D.C. Code § 22-2305 ("Prosecutions for violations of this chapter shall be conducted in the name of the District of Columbia by the Corporation Counsel.").

[6] D.C. Code § 22-2301(2) ("'Ask, beg, or solicit alms' includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value.").

[7] D.C. Code §22-2302(a); D.C. Code § 22-2301(1) ("'Aggressive manner' means: (A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession; (B) Touching another person without that person's consent in the course of asking for alms; (C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or (D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact.").

[8] D.C. Code §22-2302(b)-(g).

[9] D.C. Code §22-2302(h).

[10] R.A.V. v. St. Paul, 505 U.S. 377, 395, 112 S.Ct. 2538 (1992).

donation of money would not constitute a content-based law subject to strict scrutiny unless the government was signaling disagreement with the content of the speech.[11] Since adoption of the panhandling statute, in the 2015 case of *Reed v. Gilbert,* the Supreme Court clarified that "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based."[12]

The plain language of the District's panhandling statute suggests that it is, in large part, facially unconstitutional under the standard in *Reed v. Gilbert*.[13] Because §22-2302 only prohibits the solicitation of alms, versus other types of speech, it is a content-based statute subject to strict scrutiny and a claim as to this has been upheld by the United States District Court for the District of Columbia.[14] The most severe forms of the offense involve both a content-based regulation of speech and, through the panhandling definition of

[11] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[12] *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2228 (2015).
[13] The evolution of Supreme Court First Amendment case law is not the only grounds for questioning the constitutionality of the District's panhandling statute. Even at the time of enactment of the panhandling statute, there appears to have been confusion in the legal analysis. Most notably, the legislative history asserts that the initial bill for the District's statute "was modeled after the Portland, Oregon ordinance on aggressive panhandling," but also states that there was a final Amendment in the Nature of a Substitute that added other provisions. *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 3. The legal analysis and testimony regarding the initial bill by then Corporation Counsel John Payton specifically recommended alignment of the panhandling statute with the Portland, Oregon municipal ordinances which had been upheld by courts. However, the Portland, Oregon ordinances that Payton referenced and included with his testimony were 10 day, content-neutral "offensive physical contact" and pedestrian blocking statutes that do not criminalize or regulate speech at all. *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 34-35. The Portland, Oregon "offensive physical contact" statute remains in effect today. Portland, Or., Mun. Code § 14A.40.020. The legislative history for the District statute does not explain whether or how the legal analysis provided by John Payton (representing the Executive) for the original bill was updated along with the final statutory text in the Amendment in the Nature of a Substitute.
[14] *See Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019) ("As for the nature of the government's statutory prohibitions and its justifications for limiting speech in this manner, Plaintiffs allege that strict scrutiny applies, because the Panhandling Control Act is a content-based regulation insofar as it prohibits certain speech—i.e. immediate requests for money or things of value—in public areas, based on the message communicated. (See 5AC at ¶¶ 153–156.) Plaintiffs further allege that the Act cannot survive strict scrutiny, because the statutory restrictions are not narrowly tailored to promote a compelling governmental interest. (See id. at ¶¶ 158–62.) Specifically, the complaint contends that there are less restrictive alternatives available to the government, such as "enforcing existing generic criminal laws already on the books in this jurisdiction or enacting new criminal laws that directly target conduct that threatens the District's asserted interests rather than employing regulations that indirectly support those interests by directly burdening protected speech." (Id. at ¶ 161; see also id. at ¶¶ 160–62.) It is by now well established that government regulations are content-based if they "appl[y] to particular speech because of the topic discussed or the idea or message expressed[,]" Reed, 135 S. Ct. at 2227, and that content-based laws that restrict protected speech are subject to strict scrutiny, id. Furthermore, strict scrutiny " 'requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest[.]' " Id. at 2231 (quoting Ariz. Free Ent. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011)). Thus, the complaint's First Amendment claims are plainly plausible, insofar as Plaintiffs assert that the Panhandling Control Act is both subject to strict scrutiny (because it prohibits requests for immediate donations of money in various public areas and not any other speech—i.e. it is a content-based restriction), and does not satisfy strict scrutiny (because other less restrictive alternatives are available).").

"aggressive manner,"[15] an additional act that is already criminal under the D.C. Code and RCC.[16] The very fact that other criminal laws that aren't content-based regulation of speech already address the conduct described in the panhandling statute demonstrates that the statute is not "narrowly tailored." Additionally, since *Reed,* panhandling restrictions based on geographic areas that involve sidewalks, roads, parks, and other traditional or recognized public forums[17] have routinely been struck down by courts.[18] Specific evidence is needed as to the government's interest and, a general "public safety" justification does not constitute a compelling interest.[19] Such evidence is not part of the current legislative history, which is summary in its justification.[20]

Notably, two aspects of the current panhandling statute that may be facially *constitutional* are the D.C. Code § 22-2302(b) prohibition on panhandling "in any public

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[15] D.C. Code § 22-2301(1).

[16] For example, D.C. Code § 22-2301(1)(A) ("Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession") corresponds closely with disorderly conduct under D.C. Code § 22-1321(a) and RCC § 22E-4201. D.C. Code § 22-2301(1)(B) ("Touching another person without that person's consent in the course of asking for alms") arguably corresponds with assault under D.C. Code § 22-404 and offensive physical contact under RCC § 22E-1205. D.C. Code § 22-2301(1)(D) ("Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact") tracks Crowding, obstructing, or incommoding under D.C. Code § 22–1307.

[17] *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). The same standards apply in designated public forums—spaces that have 'not traditionally been regarded as a public forum' but which the government has 'intentionally opened up for that purpose.' Id., at 469–470, 129 S.Ct. 1125. In a nonpublic forum, on the other hand—a space that 'is not by tradition or designation a forum for public communication'—the government has much more flexibility to craft rules limiting speech. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The government may reserve such a forum 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'").

[18] See, e.g., *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *Cutting v. City of Portland, Maine,* 802 F.3d 79 (1st Cir. 2015); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) ("[M]unicipalities must go back to the drafting board and craft solutions which recognize an individuals… rights under the First Amendment…); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at *13 (D. Colo. Sept. 30, 2015).

[19] *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 233 (D. Mass. 2015) (striking down provisions against blocking path and following a person after they gave a negative response)

[20] *See Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 5 ("The Amendment in the Nature of a Substitute creates place restrictions on panhandling in these situations because persons engage in certain activity, whether it is parking their vehicle, sitting in traffic, waiting at a bus or subway stop, or conducting banking business at an ATM machine, that prevents them from 1eaving immediately after saying no to the panhandler's request for money. It is because of these situations that the Committee finds it necessary to establish place restrictions on the activities of panhandlers.").

transportation vehicle; or at any bus, train, or subway station or stop",[21] and the D.C. Code § 22-2302(h) prohibition "on private property or residential property, without permission from the owner or occupant." Unlike the other provisions of the panhandling statute which apply over-broadly to "any place open to the general public"[22] and involve otherwise criminal conduct (and so are not narrowly tailored), or occur in traditional public forums like public streets or sidewalks,[23] government has more leeway to regulate more in non-public forums such as these. Supreme Court precedent has upheld "reasonable" speech regulations in non-public forums where the government is not opposing the content of the speech.[24] Unfortunately, the current panhandling statute does not define language in D.C. Code § 22-2302(b)[25] and D.C. Code § 22-2302(h)[26] that may be key to determining the breadth (and facial constitutionality) of these provisions. Moreover, D.C. Code § 22-2302(b) and D.C. Code § 22-2302(h) may be susceptible to arguments that the laws are not reasonable given the government's interests at stake.[27] Consequently, while D.C. Code § 22-2302(b) and D.C. Code § 22-2302(h) may withstand a facial challenge under the First Amendment, this is not clear and does not preclude the possibility that many cases would raise as-applied challenges.

To the extent that the District wishes to regulate panhandling-type speech in public transportation, public transportation stations, or in door-to-door knocking on private residences,[28] such conduct is better addressed through civil sanctions or other regulatory

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[21] *McFarlin v. D.C.,* 681 A.2d 440, 448 (D.C. 1996) (upholding a First Amendment challenge to D.C. Code § 22-2302(b) where, under doctrine of constitutional avoidance "subway station or stop" under the statute was construed to not include traditional public fora, so strict scrutiny was not required standard of review).

[22] D.C. Code § 22-2302(a).

[23] D.C. Code § 22-2302(c)-(g).

[24] *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974).

[25] For example, the boundaries of a "subway station or stop" are undefined. The matter is the subject of litigation (see *McFarlin v. D.C.,* 681 A.2d 440, 447–48 (D.C. 1996)) and *Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019).

[26] For example, it is unclear if "residential property" is intended to include government-owned (public) housing.

[27] *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 162–63 (2002) ("Despite the emphasis on the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion, these early cases also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved. In *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Court held that an ordinance requiring Jehovah's Witnesses to obtain a license before soliciting door to door was invalid because the issuance of the license depended on the exercise of discretion by a city official. Our opinion recognized that "a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." Id., at 306, 60 S.Ct. 900. Similarly, in Martin v. City of Struthers, the Court recognized crime prevention as a legitimate interest served by these ordinances and noted that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." 319 U.S., at 144, 63 S.Ct. 862. Despite recognition of these interests as legitimate, our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. We "must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and ... appraise the substantiality of the reasons advanced in support of the regulation.' " Ibid. (quoting Schneider, 308 U.S., at 161, 60 S.Ct. 146).").

[28] Notably, a person soliciting donations who remains on another person's property without the owner's permission would likely be subject to liability under D.C. Code § 22–3302, Unlawful entry on property, and RCC § 22E-2601, trespass.

mechanisms. Soliciting a donation on public transportation or in a public transportation station appears to comparable to other undesirable conduct (e.g., spitting, smoking, playing loud music, etc.) in such locations that is currently punishable by a $50 civil fine.[29] Charitable solicitations done without meeting regulatory requirements are also subject to criminal fines and penalties under other provisions concerning charitable solicitations per Title 44, Chapter 17 of the D.C. Code.[30]

In addition, the current panhandling statute's assignment of prosecutorial authority to the Attorney General for the District of Columbia (instead of the United States Attorney for the District of Columbia) may run afoul of Home Rule Act limitations on the Council's power to assign prosecutorial authority. The panhandling offense is punishable by a fine or imprisonment or both, which under D.C. Code 23-101 (as construed by the DCCA) means that the statute cannot be prosecuted by the Attorney General for the District of Columbia unless it is deemed a "police or municipal ordinance" under subsection (a) or there is pre-Home Rule Act Congressional law specifying local prosecution per subsection (c).[31]

Case law determining prosecutorial authority in the District is complex and evolving, but the most recent DCCA opinion suggests a multi-factor analysis be used which includes consideration of: 1) the statute's nature as a "Local Regulation or General Prohibition;" 2) "History of Regulation and Enforcement;" 3) "Placement in D.C. Code;" 4) "Legislative History;" 5) "Dual Prosecution;" and 6) "Penalties."[32]

This analysis renders a mixed result for the panhandling statute. The statute is arguably a "local regulation" insofar does not absolutely bar solicitation of alms but does so in specified circumstances. Historically, the Office of the Attorney General (OAG) has prosecuted the offense since its creation in 1993.[33] Moreover, there is a link between the current panhandling statute and a prior vagrancy statute that broadly criminalized begging and was Congressionally-designated as an offense prosecuted by Corporation Counsel.[34] However, this link to the vagrancy statute is tenuous as the panhandling statute is quite different in scope. Panhandling includes conduct that would constitute "simple assault"

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[29] D.C. Code § 35–251.

[30] D.C. Code § 44-1712 ("Any person violating any provision of this chapter, or regulation made pursuant thereto, or filing, or causing to be filed, an application or report pursuant to this chapter, or regulation made pursuant thereto, containing any false or fraudulent statement, shall be punished by a fine of not more than $500, or by imprisonment of not more than 60 days, or by both such fine and imprisonment.").

[31] *See generally In re Settles,* 218 A.3d 235, 239 (D.C. 2019) ("Otherwise, § 23-101 divides criminal offenses into three general categories: violations of "police or municipal ordinances or regulations," which are prosecuted by the District of Columbia, § 23-101(a); violations of "penal statutes in the nature of police or municipal regulations," which are prosecuted by the District of Columbia as long as the "maximum punishment is a fine only, or imprisonment not exceeding one year," but not both, id.; *District of Columbia v. Moody*, 304 F.2d 943 (D.C. Cir. 1962) (per curiam); and all others, which (subject to specific statutory exceptions) are prosecuted by the United States, D.C. Code § 23-101(c).").

[32] *In re Settles,* 218 A.3d 235 (D.C. 2019).

[33] *See, e.g., McFarlin v. D.C., 681 A.2d 440, 442 (D.C. 1996); Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019).

[34] *See* D.C. Code § 22–3302 (1940). ("The following classes of persons shall be deemed vagrants in the District of Columbia: …(7) Any person wandering abroad and begging, or who goes about from door to door or places himself in or on any highway, passage, or other public place to beg or receive alms."). D.C. Code § 22–3305 (1940). ("All prosecutions under sections 22-3302 to 22-3306 shall be in the police court of the District of Columbia, in the name of the District of Columbia, by the corporation counsel or any of his assistants.").

(current D.C. Code 22-404),[35] an offense prosecuted by the United States Attorney for the District of Columbia—heightening concerns that the Council's designation of OAG as prosecutor affects prosecutorial powers that Congress intended to be exercised by the United States Attorney for the District of Columbia. The panhandling offense is codified in Title 22, with other criminal offenses that are generally not regulatory in nature. The legislative history of the panhandling statute does not include any Committee on the Judiciary statement as to the propriety of jurisdiction by the Attorney General for the District of Columbia (or the predecessor Corporation Counsel), and goes out of its way to note that the conduct covered by the panhandling statute from the vagrancy statute.[36] Moreover, it is notable that the final legislation assigning prosecutorial responsibility contradicts without explanation hearing testimony by the Corporation Counsel John Payton noting that a penalty of a fine and imprisonment under D.C. Code § 23-101 would generally entails prosecution by the United States Attorney for the District of Columbia.[37] Lastly, while the penalty for the offense is within the realm of penalties for other offenses that Congress has designated as prosecutable by OAG, it is higher than most regulatory penalties and exceeds the Congressional limitation on penalties for regulations (not otherwise subject to a Congressional grant of authority) to 10 days imprisonment.[38]

While the question is unsettled, on balance these considerations suggest that the panhandling statute is not a police regulation for purposes of D.C. Code 23-101(a), and, for purposes of D.C. Code 23-101(c), is more than a mere amendment of the vagrancy statute that was Congressionally-granted to OAG for prosecution. Were the voyeurism statute to be retained in the D.C. Code, continued prosecution by OAG would be subject to challenge.

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[35] *See* Testimony of John Payton, Corporation Counsel, July 10, 1991 in *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 30 ("Much of the conduct which would constitute "offensive physical contact" would constitute the offense of simple assault under D.C. Code section 22-504 (1989)"). Corporation Counsel Payton also recommended raising the penalty to 90 days to better align with the contemporary assault penalty. *Id. See, also,* Testimony of Jacqueline A. Baillargeon, Public Defender Service, July 24, 1991 in *Id.* at 89.

[36] *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 3 ("The current vagrancy law (D.C. Code§ 22-3302 et seq.) does not address the issue of aggressive panhandling or offensive physical contact, but it does make begging a criminal offense. Bill 10-72 repeals a provision of this law that was found to be too vague and thus unenforceable constitutionally. The bill is not intended to prevent the needy from begging peaceably, it is intended to rid the street of those who use the plight of the homeless as a means to achieve personal monetary gain through panhandling aggressively as well as those whose behavior presents a danger to citizens in public areas.").

[37] *See* Testimony of John Payton, Corporation Counsel, July 10, 1991 in *Committee on the Judiciary Report on Bill 10-72, the "Panhandling Control Act of 1993"* at 31 ("The bill should make clear who would prosecute a person for committing the offense of offensive physical contact (or the offenses of obstructing a sidewalk or an entrance). Under D.C. Code section 23-101 (1989), the general rule is that where both a fine and imprisonment may be imposed, the prosecution is conducted in the name of the United States by the United States Attorney for the District of Columbia. Therefore, if the Council intends that these offenses be prosecuted by the Corporation Counsel in the name of the district of columbia, it should expressly so state in the bill.").

[38] See D.C. Code § 1-303.05 ("The Council of the District of Columbia is hereby authorized to prescribe reasonable penalties of a fine not to exceed $300 or imprisonment not to exceed 10 days, in lieu of or in addition to any fine, or to prescribe civil fines or other civil sanctions for the violation of any building regulation promulgated under authority of § 1-303.04, and any regulation promulgated under authority of § 1-303.01, and any regulation promulgated under authority of § 1-303.03.").

The Metropolitan Police Department in 2017 reported just 19 arrests for panhandling.[39] In contrast, Metro Transit Police over the course of just January 2019 recorded 20 arrests or citations issued for "PANHANDLING/BEG/VAGRANCY" or similar offense codes that include "panhandling".[40] This suggests that a large proportion of the enforcement of the panhandling statutes in recent years is being conducted by Metro Transit Police.

However, according to a CCRC analysis of data received from the Superior Court of the District of Columbia, over the entire 10-year span of 2009-2018, there were fewer than 104 charges and fewer than 40 convictions of adults for panhandling—exact numbers cannot be provided due to limitations on the court data.[41] Panhandling is a crime eligible for post and forfeit procedures,[42] however, which may partly account for the low number of prosecutions.

In a recent CCRC survey, District voters were asked to assign a ranking to the seriousness of "begging for money at a bus stop or on public transportation" when "[t]he begging is not threatening to anyone."[43] The most frequent (modal) response, selected by 48.3% of recipients, was "0," a rating that was equivalent on the chart provided to respondents to: "Not a crime (e.g., a speeding ticket)." The median response was a "1," a low rating less serious than "non-painful physical contact (e.g., pushing someone around)." The mean response was a "2.4," a rating that is one class lower than a "4" which was equivalent on the chart provided to respondents to the harm of causing a "minor injury treatable at home (e.g., a black eye)."[44] More aggressive behavior revealed nearly identical results. Where District voters were asked to rank the seriousness of "continuing to beg for money in a public place from a person who already has said no. The begging is not threatening to anyone," the most frequent response, selected by 27.3% of recipients, was "0." The median response was a "2," and the mean response was a "2.8."

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[39] *See* MPD Adult Arrests by Year 2017 (available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Arrests%202017%20Public.csv).

[40] https://www.wmata.com/about/transit-police/upload/January-2019-Monthly-Blotter-Report.pdf

[41] See CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (October 10, 2019) and Appendix D to Advisory Group Memorandum #28 - DC Superior Court Criminal Division Adult Charges and Convictions Disposed (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[42] *See* Superior Court Bond and Collateral List: Non-Traffic Offenses – Collateral (July 5, 2019) (available at https://www.dccourts.gov/sites/default/files/Bond%20Collateral_Non-Traffic%20Offenses-Collateral)_07052019.pdf).

[43] For more information on the survey results and methodology, see CCRC Advisory Group Memo #27, Public Opinion Surveys on Ordinal Rankings of Offenses (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

[44] This conduct is roughly equivalent to simple assault under current District law, punishable by up to 180 days imprisonment. *See* D.C. Code § 22-404; RCC §§ 22E-1202 and 22E-1205.

D.C. Code § 22-3224. Repeal of Fraudulent Registration.

The Commission recommends the repeal of D.C. Code § 22-3224, which criminalizes fraudulent registration at a hotel, motel, or other lodging establishment.

Current D.C. Code § 22-3224 provides: "A person commits the offense of fraudulent registration if, with intent to defraud the proprietor or manager of a hotel, motel, or other establishment which provides lodging to transient guests, that person falsely registers under a name or address other than his or her actual name or address." This conduct may still be criminalized under the RCC's fraud[1] statute. Repealing the fraudulent registration statute may change current District law in two ways.

Repealing the fraudulent registration statute in D.C. Code § 22-3224 will decriminalize little conduct because nearly all such conduct is already prohibited under the District's current fraud statute[2] and will be criminalized by the RCC fraud[3] statutes. The revised fraud statute criminalizes taking, obtaining, transferring, or exercising control over property, with the consent of the owner obtained by deception.[4] However, repealing the fraudulent registration statute does narrow current District law in one or two minor ways.

First, the fraudulent registration statute does not require that the actor actually defrauded the proprietor or manager of the hotel. The offense only requires registering under a false name or address, with *intent* to defraud. Consequently, the current fraudulent registration statute does not require that the actor actually succeeded in defrauding anyone. A person who provides a false name or address, but does not actually use the hotel room without payment would be guilty of fraudulent registration. In contrast, the RCC's fraud statute requires that the actor actually takes, obtains, transfers, or exercises control over property. However, the RCC fraud statute still criminalizes conduct an actor who is unsuccessful in defrauding anyone through the use of deceptive registration if the conduct is sufficiently close to success that it constitutes an attempt.[5]

Second, the fraudulent registration statute does not define the term "defraud." Using a false name or address to obtain a hotel room without paying for it would constitute fraud or theft of services[6] under the RCC. However, since the term "defraud" is undefined, it is unclear if the fraudulent registration statute covers cases where a person provides a false name or address to deceive the manager or proprietor of the hotel, but still intends to

[1] RCC § 22E-2201.
[2] D.C. Code § 22-3221. ("A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.")
[3] RCC § 22E-2201. (A person commits fraud when that person "Knowingly takes, obtains, transfers, or exercises control over the property of another; (2) With the consent of an owner obtained by deception; (3) With intent to deprive that owner of the property[.]").
[4] RCC § 22E-2201.
[5] RCC § 22E-301.
[6] RCC § 22E-2101

pay for the room. If the fraudulent registration offense includes use of a false name or address, even when the actor intends to pay for the room, repealing the statute would decriminalize this conduct.

Repealing the fraudulent registration statute eliminates unnecessary overlap, and improves the proportionality and consistency of the revised criminal code.

D.C. Code § 37-131.08(b). Repeal of Penalties for Illegal Vending.

Explanatory Note and Relation to Current District Law. Title 37 of the D.C. Code and Title 24 of the D.C. Municipal Regulations ("DCMR") address a wide array of rules for vending goods from public spaces such as streets and sidewalks. A failure to comply with any of the regulations triggers both civil[1] and criminal penalties.[2] D.C. Code § 37-131.08(b) specifies a maximum penalty of 90 days in jail and a $500 fine for a violation of "any of the provisions of this chapter or any regulations issued pursuant to this chapter."[3] An arrest may also result in significant business losses to a vendor.[4]

Imprisonment does not appear to be a proportionate punishment for conduct that fails to comply with vending regulations does not otherwise involve fraudulent activity,[5] physically harm others,[6] involve the sale of spoiled, contaminated, or food unfit for consumption,[7] or block public use of locations[8]—harms separately addressed in the current and/or revised criminal code. Recent journalism has highlighted that the District imposes some of the highest fees and most stringent requirements for vending of any American city, limiting the ability of micro-businesses and entrepreneurs young and old to legally engage in sales.[9] The scope of illegal vending activity[10] and the relatively small number of prosecutions (see below) also raise concerns about selective enforcement that may disproportionately affect some members of the community.[11]

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[1] The Commission makes no recommendation at this time regarding civil remedies or penalties. Notably, however, violations involving nonpayment of fees, such as failure to maintain a business license and parking illegally, trigger steeper penalties than do violations involving risks to public safety, such as failure to comply with the District's health and fire codes. *See* 16 DCMR § 3313.

[2] D.C. Code §§ 37-131.08 and 22-3571.01; 24 DCMR § 575; 16 DCMR §§ 3201 and 3313.

[3] *See also* D.C. Code § 22-3571.01.

[4] Vendors who are arrested are subject to both lost revenue and lost product. *See* Associated Press, *LA Joins Other Big Cities in Legalizing Street Vending*, U.S. NEWS & WORLD REPORT (November 28, 2018) (explaining "If someone complains, the police, they could come in and take everything from us. Make us throw all our stuff away and we lose all our money for that day.").

[5] *See* D.C. Code § 22-3221; RCC § 22E-2201.

[6] *See* D.C. Code §§ 22-401 – 22-405; 22-406; RCC § 22E-1202.

[7] *See* D.C. Code § 48-109 (authorizing a penalty of up to 1 year of imprisonment and fines of up to $10,000 for sale or possession with intent to sell an adulterated food or other item).

[8] *See* D.C. Code §§ 22-1307; RCC § 22E-4203.

[9] *See, e.g.*, Jeff Clabaugh, *Why DC is 2nd-most challenging city for food trucks*, WTOP (March 22, 2018) (noting vendors must complete at least 23 specific interactions with regulators, pay high start-up fees, and overcome a significant number of ongoing, city-imposed hurdles in their quest to turn a profit); Robert Frommer, *Washington DC vs. Entrepreneurs: DC's Monumental Regulations Stifle Small Businesses*, Institute for Justice City Study Series (November 2010).

[10] Vending without a license is an open, longstanding, tolerated practice in many District locations. *See, e.g.*, Orion Donovan-Smith, *At Dave Thomas Circle, fixing a traffic nightmare threatens a D.C. vending empire*, WASHINGTON POST (August 14, 2019).

[11] In 2017, three black teenagers were handcuffed and detained on the National Mall by undercover U.S. Park Police officers for attempting to sell cold water without a permit. In response, Councilmember Charles Allen sent a letter to the U.S. Park Police Chief, Robert D. MacLean stating, "I can't help but think how the reaction by these same officers might have varied if different children had set up a quaint hand-painted lemonade stand on the same spot. While still the same violation of selling a beverage without proper permits and licenses, I doubt we would have seen little girls in pigtails handcuffed on the ground." *See* NBC Channel 4 Washington, *Teens Detained for Selling Water on the National Mall*, (June 23, 2017).

The Metropolitan Police Department reports hundreds of arrests for vending violations each year, including 472 in 2017 (its most recent annual report).[12] However, according to a CCRC analysis of data received from the Superior Court of the District of Columbia, over the entire 10-year span of 2009-2018, there were just 58 charges and fewer than 20 convictions of adults for vending without a license.[13] Vending without a license is a crime eligible for post and forfeit procedures,[14] however, which may partly account for the low number of prosecutions.

In a recent CCRC survey, District voters were asked to assign a ranking to the seriousness of "selling sunglasses on a public sidewalk without a business license or vending permit, as required by law."[15] The most frequent (modal) response, selected by 28.2% of recipients, was "0," a rating equivalent to "Not a crime (e.g., a speeding ticket)." The median response was a "2," a low rating equivalent to "non-painful physical contact (e.g., pushing someone around)." The mean response was a "3.1," a rating that is about one class lower than a "4" which was equivalent to the harm of causing a "minor injury

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See, also, United States v. Harrison, 2018 WL 5046496 Slip Copy (D.D.C. Aug 7, 2018) at 1 (where a parolee was arrested for vending without a license but was otherwise compliant with his conditions of release).

[12] *See* MPD Annual Report: 2017 (February 22, 2019) (available at https://mpdc.dc.gov/page/mpd-annual-reports).

[13] See CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (October 10, 2019) and Appendix D to Advisory Group Memorandum #28 - DC Superior Court Criminal Division Adult Charges and Convictions Disposed (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

Data labeled as vending without a license specifically cited to 24 DCMR 502.2 which states: "In addition to the requirements specified in § 502, no person shall vend food from public or private space in the District of Columbia without obtaining and maintaining a valid: (a) Health inspection certificate issued by the DOH Director; (b) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.1 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (c) Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; provided, that a vendor without such certification may employ a person who holds a valid: (1) Food Protection Manager Certificate issued by the Conference of Food Protection Standards for Accreditation of Food Protection Manager Certification Programs in accordance with § 203.3 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (2)Certified Food Protection Manager Identification Card issued by DOH in accordance with § 203 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; (d) Required food safety analyses and plans in accordance with § 3701 of Subtitle A (Food and Food Operations) of Title 25 of the DCMR; and (e) Permit from FEMS, if the vendor uses propane gas, open flames, or solid fuels such as wood pellets or charcoal."

[14] *See* Superior Court Bond and Collateral List: Non-Traffic Offenses – Collateral (July 5, 2019) (available at https://www.dccourts.gov/sites/default/files/Bond%20Collateral_Non-Traffic%20Offenses-Collateral)_07052019.pdf).

[15] For more information on the survey results and methodology, see CCRC Advisory Group Memo #27, Public Opinion Surveys on Ordinal Rankings of Offenses (October 10, 2019) (available at https://ccrc.dc.gov/page/ccrc-documents).

treatable at home (e.g., a black eye)."[16] Given the skewed distribution of responses,[17] the mode or median is likely the best indicator of the central tendency of responses.

In sum, the CCRC recommends the repeal of D.C. Code § 37-131.08(b). This will eliminate imprisonment penalties of up to 90 days for violations of vending regulations but leave in place civil liability under D.C. Code § 37-131.08(a) and 24 DCMR § 575 for violations.[18] This change improves the proportionality of the revised offenses.

Legislative History. The District of Columbia has regulated street vending since 1887.[19] Past regulations have been described as "vague and practically impossible to enforce."[20] After a comprehensive reform effort in 1974 proved ineffective, the District imposed a moratorium on new vending licenses in 1998.[21] Eight years later, the Department of Consumer and Regulatory Affairs ("DCRA") produced a report comparing best practices in other cities, the moratorium was temporarily lifted, and the District began passing emergency and temporary legislation to regulate vending based on the DCRA's research.[22]

The purpose of the Vending Regulation Act of 2009 was to reestablish[23] a vibrant vending program in the District that provides residents and visitors safe and varied foods, goods, and services.[24] The bill was expected to encourage entrepreneurs and bolster the District's tax rolls.[25] The Council recognized that, "historically, vending has provided a means for people to earn a living independently while gaining experience in the operation

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[16] This conduct is roughly equivalent to simple assault under current District law, punishable by up to 180 days imprisonment. *See* D.C. Code § 22-404; RCC §§ 22E-1202 and 22E-1205.
[17] Notably, 20.5% of survey respondents selected a value of "1," the lowest possible criminal conduct, rated a class less than to "non-painful physical contact (e.g., pushing someone around)."
[18] The fine amounts appear in D.C. Code § 22-3571.01 and 16 DCMR §§ 3201 and 3313.
[19] *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 3.
[20] *See Id.* at 3, 5.
[21] *Id.* at 3.
[22] *Id.* DCRA based its research on vending programs in Boston, Atlanta, New York City, Philadelphia, Chicago, Miami, and Portland.
[23] The Afro-American Vendors Association testified:

> Street vendors have been a hallmark in Washington, D.C. since the turn of the century when the first pushcart peddlers began selling their wares around the Capitol. Most vendors are people of color who earn very little money and work under harsh conditions. They perform an important service by providing convenient and affordable goods to both Washingtonians and tourists alike. Street vendors are entrepreneurs who ask for nothing more than the opportunity to earn a decent living. Yet, the city continues to treat these small businessowners as criminals.

Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009) at Page 152.
[24] *Id.* at 2.
[25] *Id.* at 11.

of a small business"[26] and explained that the legislation aimed to balance interests of "safety and economic opportunity."[27]

In contrast to the substantial public comment, discussion, and controversy preceding passage of the Vending Regulation Act of 2009,[28] there was minimal community input or discussion on the record regarding amendments in 2014[29] and 2015[30] that included the criminal penalties.[31] The criminal provisions were introduced as a technical correction of an inadvertent oversight in failing to provide criminal penalties in the Vending Regulation Act of 2009.[32]

On two occasions since the current laws were passed, the Council has recognized some instances of vending without a license[33] that should not be penalized. First, in 2015, the Council authorized the mayor to establish exemptions from the licensure requirement "when the public interest would be served by establishing such an exemption." The Council explained, "[P]unishing Girl Scouts for selling cookies outside of a grocery store without a license would not serve the public interest."[34] Second, in 2019, the Council unanimously introduced the "Lemonade Stand Amendment Act of 2019," which proposes an exemption for any minor who is operating on a small-scale[35] without a business license or vending site permit.[36]

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[26] *Id.* at 6.
[27] *Id.* at 18.
[28] The hearing record includes 26 witnesses, 30 letters, and a petition with 305 signatures, overwhelmingly advocating for deregulation and decriminalization. *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).
[29] D.C. Act 20-354 (temporarily adding a D.C. Code § 37-131.08(b) and a 24 DCMR § 575.4 ("A person convicted of violating any provision of this chapter shall be punished by a fine of not more than three hundred dollars ($300) or by imprisonment for not more than ninety (90) days, or both, for each such offense.")).
[30] D.C. Act 21-261.
[31] Only two parties testified at the public hearing on Oct 5, 2015, both of whom supported the addition of the penalties. The first was a panel of executives from the Washington Nationals Baseball Club, and the second was a Government Witness, Melinda Bolling, the Director of DCRA.
[32] *See* Report on Bill 21-113, the "Vending Regulations Amendment Act of 2015," Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015). Notably, however, the Committee Report on the Vending Regulation Act of 2009 does not indicate a clear intent to criminalize improper vending. *See* Report on Bill 18-257, the "Vending Regulation Act of 2009," Council of the District of Columbia Committee on Public Services and Consumer Affairs (June 25, 2009).
[33] The D.C. Code provides that "a person shall not vend from a sidewalk, roadway, or other space unless the person holds" the proper licensure, and unless the person is located in a specifically approved vending location that has been assigned to them by lottery. D.C. Code §§ 37-131.02 – 131.04. The DCMR provides that "[n]o person shall vend any product, service, or merchandise from public space in the District of Columbia without obtaining and maintaining a valid…business license for vending…issued by the [Department of Consumer and Regulatory Affairs] Director…" 24 DCMR § 502.1.
[34] *See* Report on Bill 21-113, the "Vending Regulations Amendment Act of 2015," Council of the District of Columbia Committee on Business, Consumer, and Regulatory Affairs (November 4, 2015) at Page 2.
[35] "Small-scale" means selling no more than 10 types of items on a sporadic basis, and in operation no more than 100 days per year.
[36] Bill 23-398; *see also* Natalie Delgadillo, *D.C. Council Stands United On…Lemonade Stands*, DCist (July 11, 2019).

However, neither the 2015 amendment nor the pending legislation exempts a child (or adult) from other requirements such as obtaining a Health Inspection Certificate, Food Protection Manager Certificate, Certified Food Protection Manager Identification Card, or food safety analyses and plans in accordance with 25 DCMR § 3701.[37] Nor do these exceptions apply to adult owners of micro-businesses. Also, neither the 2015 amendment nor the pending legislation specify what culpable mental state, if any, a person needs as to the existence of vending regulations. A person generally is not liable for reasonable mistakes of fact about the circumstances and results of one's behavior.[38] However, neither the D.C. Code nor the DCMR address these matters, and the District of Columbia Court of Appeals ("DCCA") has not yet addressed whether a person must be notified of (or otherwise familiar with) the vending rules and whether a reasonable mistake of law is an available defense.[39]

[37] *See* 24 DCMR § 502.2.

[38] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

[39] Some street vending rules are more obvious than others. For example, 24 DCMR § 503.3 categorically prohibits peddling counterfeit goods, pornography, and drug paraphernalia. However, it also prohibits selling large luggage and carpets, which may not be as intuitive. Moreover, a person who observes someone vending a particular item in a particular location may innocently assume that they, too, may vend. *See, e.g.,* Mikaela Lefrak, *What's the Story Behind Those $5 Baseball Hats at Nationals Park?*, WAMU 88.5 (Oct 5, 2017).

D.C. Code § 48-904.07. Repeal of Enlistment of Minors to Distribute.

The Commission recommends the repeal the enlistment of minors offense, under D.C. Code § 48-904.07, which criminalizes a person who is 21 years of age or older, enlisting, hiring, contracting, or encouraging any person under 18 years of age to sell or distribute any controlled substance.

Explanatory Note and Relation to Current District Law

Current D.C. Code § 48-904.07, provides:

> Any person who is 21 years of age or over and who enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance, in violation of § 48-904.01(a), for the profit or benefit of such person who enlists, hires, contracts, or encourages this criminal activity shall be punished for sale or distribution in the same manner as if that person directly sold or distributed the controlled substance.[1]

Repeal of D.C. Code § 48-904.07 may reduce the severity of penalties a person is subject to,[2] however, it would appear to have little or no effect on the existence of criminal liability because such liability already exists in overlapping statutes in the RCC and existing D.C. Code offenses. A person engaging in conduct constituting enlistment of minors may still be held criminally liable for such conduct: as an accomplice to the minor's trafficking of a controlled substance, or for causing an innocent or irresponsible person to commit the crime; for committing criminal conspiracy to traffic a controlled substance; and/or under the separate offense of contributing to the delinquency of a minor.

First, any conduct covered by the enlistment of minors offense in which the minor actually distributes, or attempts to distribute, a controlled substance would still be criminalized under the rules of accomplice liability set forth in RCC § 22E-210.[3] Accomplice liability requires that a person assists another person with the planning or commission of conduct constituting that offense, or encourages another person to engage in specific conduct constituting that offense. Enlisting, hiring, contracting, or encouraging

[1] D.C. Code §48-904.07 (b) specifies penalties for violation of this section: "Anyone found guilty of subsection (a) of this section shall be subject to the following additional penalties: (1) Upon a first conviction the party may be imprisoned for not more than 10 years, fined not more than the amount set forth in § 22-3571.01, or both; (2) Upon a second or subsequent conviction, the party may be imprisoned for not more than 20 years, fined not more than the amount set forth in § 22-3571.01, or both."

[2] The maximum penalties for accomplice liability and crime by an innocent, both under current District law and the RCC are the same as the maximum penalties for the predicate offense. Penalties for conspiracy are half the maximum penalty of the predicate offense in the RCC. The maximum penalty for Contributing to the Delinquency of a Minor under D.C. Code § 22-811 varies from 6 months to 10 years.

[3] The revised trafficking of a controlled substance offense specifies that Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to the offense.

a minor to distribute a controlled substance satisfies this *actus reus* requirement.[4] Accomplice liability also requires that the person had the *purpose* to assist or encourage another person in the planning or commission of the conduct constituting the offense. The enlistment of minors offense requires that the person enlists, hires, contracts, or encourages a minor "for the for the profit or benefit of such person[.]"[5] In virtually every case in which a person acts for his or her own profit or benefit, that person would also have purposely assisted or encouraged the minor to distribute a controlled substance.[6] In addition to accomplice liability, any effort that results in the minor distributing or attempting to distribute a controlled substance may render the principal liable for causing crime by an innocent or irresponsible person, as set forth in RCC § 22E-211.[7]

Second, short of the minor actually distributing, or attempting to distribute, a controlled substance, there may be liability for a conspiracy to commit the underlying controlled substance offense. If a person 21 years of age or older agrees with a minor to engage in or aid the planning or commission of conduct which, if carried out, will constitute distribution of a controlled substance or attempted distribution of a controlled substance, and either party engages in an overt act in furtherance, criminal conspiracy liability would apply.

Third, short of the minor actually distributing, or attempting to distribute, a controlled substance, a person who merely encourages or solicits minors to engage in such conduct appears to be liable under the separate contributing to the delinquency of minors offense.[8] D.C. Code § 22-811 makes it a crime for "an adult being 4 or more years older than a minor, to invite, solicit, recruit, assist, support, cause, encourage, enable, induce, advise, incite, facilitate, permit, or allow the minor" to possess a controlled substance[9] or to violate any criminal law of the District of Columbia.[10]

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[4] *Outlaw v. United States*, 604 A.2d 873, 875 (D.C. 1992) (holding that acting as an aider and abettor to a minor's distribution of a controlled substance is sufficient to satisfy the elements of the enlistment of minors offense).

[5] D.C. Code § 48-904.07.

[6] Under RCC § 22E-210 a person may be convicted as an accomplice even if the principal has not been prosecuted or convicted, has been convicted of a different offense or degree of an offense, or has been acquitted. Even if the minor who distributes the controlled substance is never prosecuted or convicted for a criminal offense due to being a juvenile, accomplice liability may still apply to the person who encourages the minor to distribute a controlled substance.

[7] The revised trafficking of a controlled substance offense specifies that Chapters 1 through 6 of Subtitle I of Title 22 of the D.C. Code apply to the offense.

[8] D.C. Code § 22-811.

[9] D.C. Code § 22-811 (a)(2).

[10] D.C. Code § 22-811 (a)(5), (7).